DEPARTMENT OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/1123

Dear Mr Dohle,

I am writing in reference to your confirmatory application registered on 28 April 2023, submitted in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in replying to your request.

1. **Scope of Your Request**

In your initial application of 20 February 2023, registered under the above-quoted number, and handled by the Legal Service of the European Commission, you requested access to “All documents related the ECJ case started in 2017: Stichting Against Child Trafficking v European Commission”.

The Legal Service identified the following documents as falling within the scope of your request:

1. Exchange of emails from 2 to 8 February 2018 between the Legal Service and OLAF, Ares(2018)833874
   1.1. Annex to the exchange of emails, Ares(2018)833874;
2. Applicant’s request for annulment, Ares(2018)589517;
3. Question from the Court to the Applicant, Ares(2018)589517;

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4. Applicant’s reply to the question of the Court, Ares(2018)589517;

In its initial reply of 14 April 2023, the Legal Service granted full access to document 3. Wide partial access was provided to documents 4 and 6, with the exception of parts containing personal data in accordance with Article 4(1)(b) Regulation (EC) No 1049/2001. In addition, access to document 1 and parts of documents 2 and 5 was refused on the basis of the third indent of Article 4(2) (protection of purpose of inspections, investigations and audits) and the second subparagraph of Article 4(3) Regulation (EC) No 1049/2001 (protection of the decision-making process). Furthermore, parts of documents 2 and 5 contained commercial information which was withheld on the basis of Article 4(2), first indent of Regulation (EC) No 1049/2001. Access to document 1 was refused in full on the basis of Article 4(2), second indent, Regulation (EC) No 1049/2001 (protection of court proceedings and legal advice).

In your confirmatory application, you request a review of the Legal Service position regarding the refusal of documents 1 and 1.1 as well as the partial disclosure of document 2. Consequently, the scope of the confirmatory review is circumscribed to these documents.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that the Secretariat-General has to confirm the initial position of the Legal Service to refuse access to documents 1 and 1.1 and give partial access to document 2 on the basis of the exceptions provided for in Article 4(2) second indent (protection of court proceedings and legal advice), Article 4(2) third indent (protection of the purpose of inspections, investigations and audits) and Article 4(3) second subparagraph (protection of the decision-making process).

The detailed reasons underpinning this assessment are set out in the sections below.

2.1. Protection of legal advice

The second indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: […] court proceedings and legal advice […] unless there is an overriding public interest in disclosure’.
Pursuant to settled case-law the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice. In the present case, this exception applies to the protection of the legal advice.

As far as the interest for the protection of legal advice is concerned, the examination to be undertaken by the institution concerned must necessarily be carried out in three stages, corresponding to the three criteria in that provision. Apart from the criterion of the lack of an overriding public interest (which will be assessed in the corresponding section of the present decision below), the case-law identified indeed two cumulative criteria that must be fulfilled for the exception under second indent of Article 4(2) of Regulation (EC) No 1049/2001 to apply.

In accordance with settled case-law, in order to invoke this exception, first, the institution must 'satisfy itself that the document which it is asked to disclose does indeed relate to legal advice'. The concept of legal advice refers to the content of a document and to the nature of the information concerned and not to its author or the manner in which a document is described. The decisive criterion in this respect is whether the advice in question relates to a legal issue, regardless of its form, including whether it is reflected in 'track changes.'

Secondly, the institution must examine whether [its] disclosure [in full or in parts] [...] would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution’s interest in seeking legal advice and receiving frank, objective and comprehensive advice.

The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.
Moreover, the preliminary nature of legal advice, the limited number of its recipients and the short notice by which it was given increase the risk of undermining the capacity of the institution of receiving frank, objective, and comprehensive advice in the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/200110.

Disclosure would make sensitive internal opinions known to the public. Such opinion was drafted under the responsibility of the Legal Service and intended for the European Anti-Fraud Office (OLAF) and describes the approach to be taken by the Commission in Case T-658/17, *Stichting Against Child Trafficking v European Commission*, before the General Court of the European Union, whereby OLAF’s decision not to open an investigation in case OC/2017/0451 was challenged.

Indeed, document 1 reveals discussions between the Legal Service and OLAF on the preparation of case T-658/17 and in particular on the preliminary approach advised to be taken in that case by the Legal Service. This applies both to the parts of the e-mail exchange originating from the Legal Service and to the parts of that e-mail exchange originating from OLAF, which, if disclosed, would also reveal the contents of the Legal Service’s advice. Therefore, the entirety of the document qualifies as ‘legal advice’ within the meaning of the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

Document 1 must therefore remain confidential in its entirety. Disclosing the internal legal assessment contained in document 1 would clearly have, in a foreseeable manner, a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services, in this case OLAF, in the assessment of legal strategy.

Furthermore, the legal advice contained in both documents is of a particularly sensitive nature in the sense of the Court of Justice’s case-law11. The legal advice at issues contains particularly sensitive information, covering complex and delicate legal issues which arose in relation to the complainant’s action for annulment of OLAF’s decision. The advice also concerns the legal interpretation of sensitive factual elements.

In view of the above, the Secretariat-General confirms the assessment at initial level that disclosure of document 1 would undermine the protection of legal advice, which, as recognised by the Court of Justice, represents an exception that must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice12. This should furthermore be recognised as imperative in the context of the request at hand which concerns the litigation strategy of the Commission, which cannot be said to be limited to the action in case T-658/17, but indeed extends to all similar cases.

Consequently, access to document 1 has to be refused on the basis of Article 4(2) second indent (protection of legal advice) of Regulation (EC) No 1049/2001.

2.2. Protection of the decision-making process and the purpose of inspections, investigations and audits.

Article 4(3) second subparagraph of Regulation (EC) No 1049/2001 provides that ‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.’ This is particularly so when disclosure of documents held by the Commission may also affect the effectiveness of future OLAF investigations, protected under Article 4(2) third indent of Regulation (EC) No 1049/2001, which provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits, […] unless there is an overriding public interest in disclosure’.

In accordance with the case-law of the Court of Justice, ‘a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it’ and two different exceptions can, as in the present case, be ‘closely connected’.

The Court of Justice ruled in case France v Schlyter that ‘[w]ithout there being any need to identify an exhaustive definition of ‘investigation’, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation’.

Furthermore, the Court stressed that ‘[t]hose procedures do not necessarily have to have the purpose of detecting or pursuing an offence or irregularity. The concept of ‘investigation’ could also cover a Commission activity intended to establish facts in order to assess a given situation’. It is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs.

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13 Judgment of 13 September 2013, Netherlands v Commission, T-380/08, EU:T:2013:480, paragraphs 26 and 34.
15 Ibid, paragraph 47.
16 Ibid, paragraph 45.
In addition, OLAF is legally bound to treat all information it obtains during investigations as confidential and subject to professional secrecy, in particular pursuant to Article 339 of the Treaty on the Functioning of the European Union, Article 10 of Regulation (EU, Euratom) No 883/2013\(^{17}\).

Document 1.1 describes, in detail, information collected by OLAF during the so-called ‘selection phase’ of the investigation. Furthermore, it provides an in-depth summary of the procedure undertaken during the selection phase. The redacted sections of document 2 constitute exchanges between the source of the information and OLAF and are thus part of the casefile of the selection phase.

The selection phase is an intrinsic part of the investigation process. In this important procedural step, provided for by Article 5 of Regulation (EU, Euratom) No 883/2013, OLAF gathers and verifies factual information for the decision of its Director-General on the opening of the investigation on the matter. These activities clearly meet the criteria defined by the Court of Justice in the Schlyter judgment, so as to constitute an investigation within the meaning of Regulation (EC) No 1049/2001.

Therefore, by analogy to the OLAF investigation, the protection of confidentiality extends to these documents of the selection phase casefile, in the same way it applies to the OLAF investigation strictly speaking and their follow-up phase. Disclosure of these documents would also be a clear violation of Article 10 of Regulation (EU, Euratom) No 883/2013.

The General Court recognises that the disclosure to the public under Regulation (EC) No 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of investigative activities, as well as the decision-making process, both now and in the future. In that sense, documents in OLAF's case files are subject to professional secrecy, regardless of whether the request for access to documents concerns an ongoing or a closed investigation\(^{18}\). By analogy, and as explained above, document 1.1. describes the selection phase casefile in detail and parts of document 2 are form part of this case-file, which should be held to the same standard of confidentiality.

In addition, as held by the General Court in its judgment in case T-18/15, the disclosure of that kind of information, as contained in the documents at issue, would seriously undermine Commission’s decision-making process as a whole, since it would prevent making remarks independently and without being unduly influenced by the prospect of wide disclosure.


The disclosure of the documents requested could expose the relevant departments to the foreseeable risk of coming under outside pressure, which would be detrimental to the proper conduct of future investigations and undermine their effectiveness. Unquestionably, the purpose of such investigations is best achieved free from external pressure.

Moreover, disclosure of these documents would reveal OLAF’s strategy and the means by which OLAF collects additional information to support the selection process in a specific case. This would concretely and effectively undermine OLAF’s interests in ensuring a protected selection phase and avoiding any prejudice to the proper and confidential operation of the selection phase. Disclosing these documents would also run the risk of discouraging potential witnesses and informants from cooperating with OLAF, thus depriving OLAF of useful information to initiate investigations aiming at protecting the financial interests of the Union. Such persons must be reassured that their statements and the information they provide to OLAF will be kept confidential, otherwise they might be inclined to censor the information they give or to hold back sensitive information.

Further, it would reduce OLAF’s chances of receiving independent assessments from its collaborators and of consulting the Commission’s services or other EU bodies on very sensitive subjects.

Therefore, the disclosure of document 1.1 and parts of document 2 would seriously affect OLAF’s internal decision-making process with regard to other investigations and OLAF’s overall effectiveness could be seriously undermined. In these circumstances, there is a real and non-hypothetical risk that disclosure of the documents at issue would adversely affect the ongoing above-mentioned assessment and future investigations of a similar nature.

Having regard to the above, the application of the exceptions provided in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) and the second subparagraph of Article 4(3) (protection of decision-making process) of Regulation (EC) No 1049/2001 is justified. Therefore, access to document 1.1 and full access to document 2 must be refused on the basis of these exceptions.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) and the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

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According to the case-law, the burden falls on the applicant\textsuperscript{21}, on the one hand, to demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal\textsuperscript{22}.

In the API judgment, the Court of Justice ruled that it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents\textsuperscript{23}.

In your confirmatory application you argue that ‘The issue of child trafficking for intercountry adoption in Congo is a heinous crime against children and their families that needs full transparency.’

In its Turco v Council judgment, the Court held explicitly that the overriding public interest capable of justifying the disclosure of a document must, as a rule, be distinct from the principles of transparency, openness, and democracy or of participation in the decision-making process\textsuperscript{24}. The reason is that those principles are effectively implemented by the provisions of Regulation (EC) No 1049/2001 as a whole. In its judgment in the Strack case\textsuperscript{25}, the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure\textsuperscript{26}.

The general considerations put forward in your confirmatory application do not demonstrate a pressing need for the disclosure of the documents.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) of Regulation (EC) No 1049/2001.

\textsuperscript{23} Judgment of the Court of Justice of 21 September 2010, Kingdom of Sweden v Association de la presse international ASBL (API) and European Commission, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 156-159.
To the contrary, the Secretariat-General considers the overriding public interest to be better served by ensuring the protection of its legal advice in sensitive cases, the purpose of investigations and of the Commission’s decision-making process.

The Secretariat-General concludes therefore that an overriding public interest has not been demonstrated.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting (further) partial access to the documents. Indeed, document 2 provides wide partial access, with the redacted parts being limited to the application of the above-mentioned exceptions.

However, for the reasons explained above, no meaningful partial access of documents 1 and 1.1. is possible without undermining the interests described above.

Consequently, the Secretariat-General has come to the conclusion that those documents are covered in their entirety by the invoked exceptions to the right of public access.

5. **MEANS OF REDRESS**

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General