

Directorate A - Expenditure - Operations and
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The Director

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By e-mail only

Brussels
olaf.d.2(2023)22242

Subject: Your application for public access to documents

Case No OC/2017/1039/A1

Dear Mr Smith-Meyer,

We refer to your e-mail dated 5 June 2023 registered in OLAF on 6 June 2023 under reference number OCM(2023)16798, by which you made a request for public access to documents based on Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

1. Scope of your application

You requested access to documents which contain the following information:

"(r)eferences to MEP Markus Ferber and his connection with an NGO called PeoplesFinancials and a Swiss company called Cfinancials, run by CEO Michael Heijmeijer between September 20, 2017 and Septem(b)er 19, 2018.

- All minutes, agendas, summary, correspondence, memos and any other reports drafted and received by OLAF between September 20, 2017 and Septem(b)er 19, 2018 related to the topic above."

After having reviewed the investigative file, we would like to inform you that OLAF does not hold "minutes", "agendas" and "memos", which would correspond to the description given in your application.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. Given that OLAF holds no such documents corresponding to the description given in your application, OLAF is not in a position to fulfil your request.

¹ OJ L 145, p. 43.

The following statements therefore only apply to the existing documents described in your application.

2. Preliminary remarks

OLAF wishes to clarify from the outset that it is legally bound to treat all information it obtains during its investigation 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 883/2013² and Article 17 of the Staff Regulations.

Please note that the purpose of Regulation (EC) No 1049/2001 is to give access to documents to the public at large. Any document disclosed to an individual under this Regulation then becomes automatically available to any other member of the public whenever there is a subsequent request. Consequently, attention is drawn to you to the fact that documents disclosed under this Regulation enter the public domain.

3. Assessment of the documents and relevant applicable exceptions

The documents which you seek to obtain are part of the investigative file of the investigation OC/2017/1039/A1, which was closed in March 2020. You did not request access to OLAF's final report and recommendations, but to previous documents from the investigative case file, from the period running from September 2017 to September 2018.

Having carefully considered your application, OLAF regrets to inform you that your application for access to the requested documents cannot be granted, as disclosure is prevented by several exceptions to the right of access laid down in Article 4 of Regulation (EC) No 1049/2001, read together with the provisions of Regulation (EU, Euratom) No 883/2013, which governs OLAF's investigative activity.

Firstly, the requested documents are covered by the exception under Article 4(2), third indent of Regulation (EC) No 1049/2001, which stipulates that the institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits.

The General Court has recognised in case law³ a general presumption of non-accessibility for documents in OLAF case files. It considers that the disclosure to the public under Regulation (EC) No 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities both now and in the future. The presumption is based on the consideration that, to determine the scope of Regulation (EC) No 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered⁴. In the case at hand, Regulation (EU, Euratom) No 883/2013, which governs OLAF's administrative activity provides for the obligation of confidentiality with regard to all information gathered during investigations.

The protection of confidentiality of information in the legal framework applicable to OLAF investigations aims, on the one hand, at safeguarding the successful conduct of an investigation in the public interest and, on the other hand, at safeguarding the legitimate interests of the individuals, so that the information they provide is used only for the purposes of the investigation.

² OJ L 248, p. 1.

³ See judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

⁴ Judgment of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraphs 50-59; judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 55 ff.; judgment of 29 June 2010, *Commission v The Bavarian Lager Co. Ltd*, C-28/08, EU:C:2010:378, paragraphs 40 ff.; judgment of 26 April 2016, *Strack v Commission*, T-221/08, cited above paragraphs 154; judgment of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paragraphs 29-34; judgment of 1 September 2021, *Homoki v Commission*, T-517/19, ECLI:EU:T:2021:529, paragraph 55.

Secondly, disclosing the requested documents would also seriously affect the decision-making process of OLAF, protected under Article 4(3) second subparagraph of Regulation (EC) No 1049/2001, as it would seriously jeopardise the full independence of future OLAF investigations and their objectives by revealing OLAF's strategy and working methods and by reducing OLAF's chances of making independent assessments and of consulting its stakeholders about very sensitive issues. The requested documents contain information gathered using OLAF's investigative powers and the assessment of that information by OLAF. They notably contain opinions for internal use as part of deliberations and preliminary consultations within OLAF. The disclosure of this information might harm the availability of those involved in the procedure to collaborate in the future and, therefore prejudice the proper functioning of the investigations and the achievement of their objectives. The protection of confidentiality of such documents extends to closed cases⁵ including such as the one at hand, where the procedures for the investigative file at issue were closed.

In view of the foregoing, the requested documents as forming part of the OLAF's investigation case file falls under the presumption of non-accessibility as documents subject to professional secrecy. Consequently, they are exempt from disclosure to the public.

Thirdly, the requested documents also contain personal data of the sources of information, a person concerned, officials of the competent authorities and OLAF officials. Disclosing the sensitive information contained in the OLAF case file might harm the protection of this personal data and the integrity of the persons mentioned in the requested documents. Therefore, the requested documents are also covered by the exception under Article 4(1)(b) of Regulation (EC) No 1049/2001 which stipulate that the institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

4. Partial Access

OLAF has examined the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

Partial access is not possible, given that the information the documents contain falls entirely under general presumption of applicability of Article 4(2), third indent in the context of inspections and audits and Article 4(3) of Regulation (EC) No 1049/2001.

5. Overriding public interest in disclosure

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. For such an interest to exist it, firstly, has to be a public interest and, secondly, it has to outweigh the interest protected by the exception to the right of access.

In your application, you did not put forward any elements which would demonstrate the existence of the overriding public interest.

In addition, the requested documents also involve the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation (EC) No 1049/2001) where overriding public interest in disclosure is not applicable.

6. Confirmatory application

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting OLAF to review this position. Pursuant to Article 4 of Commission Decision 2001/937/EC, ECSC, Euratom, such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Director-General of OLAF.

⁵ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, cited above, paragraph 162.

Any confirmatory application to OLAF should be sent to the following address:

Mr Ville ITALA
Director-General OLAF
European Commission
Rue Joseph II, 30
B-1000 BRUSSELS
BELGIUM

You may also send your confirmatory application by e-mail at: OLAF-FM-D2@ec.europa.eu.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Signed Electronically

Privacy notice

Pursuant to Articles 15 and 16 of Regulation No 2018/1725 on the protection of natural persons with regard to the processing of personal data by Union Institutions, bodies, offices and agencies and of the free movement of such data, please be informed that your personal data are stored in OLAF's electronic and paper files concerning this matter for the purposes of or in relation to the activities carried out in order to fulfil OLAF's tasks referred to in Article 2 of Decision 1999/352/EC, ECSC, Euratom and Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The categories of your personal data being processed are contact data, identification data, professional data, and case involvement data. Your data may originate from various sources, including publicly accessible information. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. There is no automated decision process by OLAF concerning any data subject. Your data will be stored for a maximum of 15 years.

You have the right to request access to, rectification or erasure, or restriction of processing of your personal data and to object to their processing on grounds relating to your particular situation. If you wish to request access to your personal data processed in a specific file, please provide the relevant reference or description in your request. Any such request should be addressed to the Controller (OLAF-FMB-Data-Protection@ec.europa.eu).

The complete privacy statement for this and all other OLAF personal data processing operations are available at http://ec.europa.eu/anti_fraud. If you have questions as regards the processing of your personal data or your rights you may contact the OLAF Data Protection Officer (OLAF-FMB-DPO@ec.europa.eu).

You may lodge a complaint concerning the processing of your personal data with the European Data Protection Supervisor (edps@edps.europa.eu) at any time.