Subject: Your confirmatory application for public access to documents

Dear Ms Gennet,

We refer to your e-mail dated 8 April 2024, and registered in OLAF on the same day, by which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

1. Scope of your request and OLAF’s initial reply

In your initial application of 19 March 2024, you requested access to “[a]ll documents relating to OLAF investigations (concluded and non-concluded) involving the following persons: Patrick Fachin and Pascal Paridans between 2010-2024”.

In its reply to your initial application, dated 3 April 2024, OLAF informed you that “your request cannot be handled as handling your request, including the confirmation of the existence of documents falling under the scope of your request or not, and any identification of (a) document(s) covered by your request (if any), [was] prevented by the Data Protection Regulation”. In this regard, OLAF explained that “[i]nformation about the existence of documents falling under the scope of your request, formulated in relation to two identified or identifiable natural persons, and identification of those documents (if any) constitute processing of personal data and reveals information relating to two identified or identifiable natural persons (personal data).”

Moreover, OLAF also indicated that “Article 9(1)(b) of the Data Protection Regulation [Regulation (EU) 2018/1725] does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific legitimate purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subjects might be prejudiced.” In this regard, OLAF explained that, “[i]n your request, you [did] not express any particular interest to have access to these personal data not d[id] you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.”

2 Ref. Ares(2024)2446312.

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Director-General of OLAF conducts a fresh review of the reply to the initial application.

Following this review, I regret to inform you that OLAF cannot confirm nor deny the existence of any documents held by OLAF and falling within the scope of your request, as such confirmation or denial would be tantamount to a breach by OLAF of the Union legislation regarding the protection of personal data.

Indeed, as already explained by OLAF in its reply to your initial application, information about the existence of documents falling within the scope of an application for access to documents which is formulated in such a way that it relates to identified or identifiable natural persons, and the identification of those documents, if any, reveals information relating to those identified or identifiable natural persons, which constitutes processing of personal data within the meaning of the relevant provisions of Article 3 of Regulation (EU) 2018/1725.

In this respect, please note that, in its judgment in Case C-28/08 P (Bavarian Lager)\(^4\), the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable. Although as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In that respect, please note that pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if “[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.”

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, the transmission of personal data can occur.

Furthermore, in its judgment in Case C-615/13 P (ClientEarth)\(^5\), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

In your confirmatory application, you argue that your request is “specifically due to public interest, as [you are] part of the news organisation, POLITICO.” You claim that “[t]he reasons why [you are] seeking information on OLAF investigations involving Patrick Fachin and Pascal Paridans is related to misuse of EU funds and corruption within an EU institution — specifically the Parliament — funded by EU taxpayer money.” Therefore, in your view, “it is the express right of the public to know about any corrupt activities by the aforementioned individuals and OLAF investigations relating to them.” Therefore, in essence, you refer to your employment with POLITICO and you put forward general

considerations on the need to ensure transparency in the area of fraud.

In relation to your reference about your employment with POLITICO, this has to be deemed as an individual interest in obtaining the document requested. In this context, I would like to remind you that the General Court has found that “the right of access to documents does not depend on the nature of the specific interest that the applicant for access may or may not have in obtaining the information requested” and that “in so far as the applicant for access does not have to justify his request for access to the documents, the real interest that the disclosure of the documents [...] may represent for the applicant is also irrelevant for the purposes of Regulation [(EC)] No 1049/2001”.

Furthermore, please note that the General Court held that abstract and generic arguments are not sufficient to establish the necessity of the transmission of personal data. Moreover, your general reference to the right of the public to know about “corrupt activities” of named individuals, based on the assertion that it is related to “misuse of EU funds and corruption within an EU institution” is not sufficient to demonstrate the need of such transfer. In that regard, the Court of Justice held in its judgment in Case C-615/13 P (ClientEarth) that the objective of transparency of Regulation (EC) No 1049/2001 does not automatically prevail on the protection of personal data and the General Court considered in its judgment in the Joined Cases T-639/15 to T-666/15 and T-94/16 (Psara and Others v Parliament) that the applicants’ general reference to instances of fraud was not sufficient to demonstrate the need for such transfer either.

Finally, for the sake of completeness, as you seem to refer to internal investigations, please note that personal data contained in internal investigations are processed by OLAF in accordance with the record of processing DPR-OLAF-04106.4 on internal investigations. Notably, the record defines, first, the purpose of the processing of the personal data concerned, which is to evaluate the information received and assess whether wrongdoing has occurred. Secondly, it specifies the recipients of the data, which are:

- concerned EU institutions, bodies, offices or agencies, in order to gather information or allow them to take appropriate measures to protect the financial or other interests of the EU;

- competent member State national authorities, in order to gather information or allow them to take appropriate measures to protect the financial interests of the EU;

- competent third country authorities and international organisations, in order to gather information or ensure an appropriate implementation of OLAF recommendations and to maximise the protection of the financial interests of the EU.

The above-mentioned record of processing DPR-OLAF-04106.4 on internal investigations provides that the transfer of the personal data is made in accordance with the provisions of Regulation (EC) No 883/2013 and the transfer concerns data which are necessary for the performance of the investigations and other legal obligations.

Consequently, OLAF considers that a necessity to have the said personal data transmitted

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10 In fact, in your confirmatory application you affirm that your request for access to documents “is related to misuse of EU funds and corruption within an EU institution — specifically the Parliament”.

to you for a specific purpose in the public interest – within the meaning of Article 9(1)(b) of Regulation (EU) 2018/1725 – has not been established.

In this context, please note that, according to Article 9(1)(b) of Regulation (EU) 2018/1725, OLAF must assess the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that OLAF must examine if there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighted the various competing interests. As explained above, in the present case, the condition enshrined in Article 9(1)(b) of Regulation (EU) 2018/1725 is not fulfilled.

For the reasons explained above, OLAF reiterates that providing you with information about the existence, or not, of documents falling within the scope of your application, which is formulated in such a manner that it refers to two identified individuals, would constitute an unlawful transmission of the personal data concerned, which would prejudice the legitimate interests of those individuals, protected by Regulation (EU) 2018/1725.

3. 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 TFEU.

Your attention is drawn to the privacy notice below.

Yours sincerely,

Signed Electronically

Privacy notice

Pursuant to Articles 15 and 16 of Regulation (EU) 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 ensuring conformity with the requirements of Regulation 1049/2001 and Commission Decision 2001/937/EC.

The categories of your personal data being processed are identification and contact data and any other personal data provided by or to you in relation to your request. Officials within OLAF and other Commission services responsible for dealing with requests for access to documents, and third parties, within the meaning of Articles 4(4) and 3(b) of Regulation 1049/2001, and Article 5 of Commission Decision 2001/937/EC, have access to your personal data. Personal data that appear on the requested document may only be disclosed to the applicant following an assessment under Article 9(b) of Regulation (EU) 2018/1725. There is no automated decision process by OLAF concerning any data subject.

All documentation concerning OLAF investigations are stored in the relevant OLAF investigation files and are retained for a maximum of 15 years. Thus personal data contained in requests for public access to documents concerning OLAF investigations are retained for a maximum of 15 years.

You have the right to request access to your personal data, rectification or erasure of the data, or restriction of their processing. Any request to exercise one of those rights should be directed to the Controller (OLAF-FMB-DATA-PROTECTION@ec.europa.eu). You may contact the Data Protection Officer of OLAF (OLAF-FMB-
DPO@ec.europa.eu) with regard to issues related to the processing of your personal data under Regulation (EU) 2018/1725.

You have the right to have recourse to the European Data Protection Supervisor (edps@edps.europa.eu) if you consider that your rights under Regulation (EU) 2018/1725 have been infringed as a result of the processing of your personal data by OLAF.

The complete privacy statements for this and all other OLAF personal data processing operations are available at http://ec.europa.eu/anti_fraud.