Subject: Your request for access to information - Slovakia

Dear Mr. Turček,


1. Access to information

In your email of 23 September 2016 you request "information about the particular cases that were investigated by OLAF [in Slovakia], in very short form – name of investigated institution and object of investigation (particular tender, or use of funds,...)." We understand your email of 23 September 2016 as a request for access to information.

Having carefully reconsidered your request, OLAF regrets to inform you that the information that you seek to obtain cannot be made available.

OLAF is legally bound, pursuant to Article 339 of the Treaty on the Functioning of the European Union, Article 10 of Regulation (EU, Euratom) No 883/2013, and Article 17 of the Staff Regulations, to treat the information it obtains during an investigation as confidential and subject to professional secrecy.

The specific confidentiality rules regarding the documents related to OLAF investigations, even with regard to the persons concerned by such investigations is justified not only in so far as OLAF collects, as part of such an investigation, sensitive business secrets and highly sensitive information on individuals whose disclosure could significantly harm their reputation. The publication of the sensitive information contained in the OLAF investigative files is likely to harm the protection of personal data regardless of whether an investigation is pending or closed.

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The prospect of such publication after an investigation is closed runs the risk of adversely affecting the willingness of informants and of those who hold relevant information to cooperate with OLAF when such a procedure is pending, which could seriously compromise the effectiveness of OLAF’s investigative activities. Furthermore, OLAF may cooperate with national administrative or judicial authorities and vice versa in the context of its investigations. The effective functioning of cooperation mechanisms between OLAF and the competent authorities, which was established within the European Union in order to ensure respect of the rules on the protection of the financial interests of the European Union, implies that information exchanged between OLAF and these authorities remains confidential.

2. Access to documents

Even if your request was interpreted as a request for access to those documents held by OLAF which contain information referred to in your email of 23 September 2016, under Regulation 1049/2001 the following considerations would apply.

2.1. Applicable exceptions - presumption

First, the documents which you seek to obtain are part of numerous OLAF case files and are therefore covered by the exceptions under Article 4(2), third indent, of Regulation 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 and Article 4(3), second paragraph of Regulation 1049/2001, which provides for the protection of the decision making process, unless there is an overriding public interest in disclosure.

The Court of Justice confirmed that it is open to the institutions concerned to base their decisions on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature. The recognition of a general presumption that disclosure of documents of a certain nature would, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation 1049/2001 allows the institution concerned to treat a request in a global manner and to reply to it accordingly.

In particular, the European Courts recognised in recent case-law the existence of a general presumption under which the disclosure to the public under Regulation 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, both now and in the future.

As the Court has outlined in the Strack case, to determine the scope of the Regulation 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation 1049/2001 were gathered, in the case at hand Regulation 883/2013.
which governs OLAF’s administrative activity and provides for the obligation of confidentiality with regard to all information gathered during investigations.

In view of that regulatory context, the Court held that allowing public access to OLAF investigation documents would be particularly detrimental to OLAF’s ability to fulfill its mission of fighting against fraud in the public interest. The disclosure of the documents concerned would seriously affect the decision-making process of OLAF, as it would seriously jeopardize the full independence of future OLAF investigations and their objectives by revealing OLAF’s strategy and working methods and by reducing OLAF’s power to make independent assessments and to consult the Commission services or other EU institutions about very sensitive issues.

The disclosure of documents could also discourage individuals to send information concerning possible fraud thus depriving OLAF of useful information to initiate investigations aiming at protecting the financial interests of the Union. They must be reassured that their statements will be kept confidential, otherwise they may be inclined to censor the information they give or to hold back sensitive information.7

To these arguments, it must be added that according to the case law of the Court, the administrative activity of the Commission does not require the same extent of access to documents as required by the legislative activity of a Union institution8.

In view of the foregoing, the documents in OLAF’s case files fall under a general presumption of non-accessibility as documents containing information collected during an OLAF investigation and subject to professional secrecy. In accordance to the case-law, that presumption applies in full regardless of whether the request for access to documents concerns an ongoing or a closed investigation.9 In addition, the general presumption also entails that the documents covered by that presumption are not subject to the obligation to assess whether a partial access should be granted to them pursuant to Article 4(6) of Regulation No 1049/2001.10 Consequently, the documents requested are exempt, in principle and in full, from disclosure to the public, unless the applicant demonstrates that the presumption is not applicable because an overriding public interest justifies the disclosure of the requested documents.11

2.2. Partial Access

OLAF has also examined the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation 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 of Regulation 1049/2001 in the context of inspections and audits.

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10 Ibid., paragraph 168.
11 Ibid., paragraph 91.
2.3. Overriding public interest in disclosure

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. For such an interest to exist, firstly, has to be a public interest and, secondly, it has to outweigh the interest protected by the exception to the right of access.

OLAF understands the importance of transparency of the functioning of the EU institutions and particularly of the European Commission. However, given the nature of the anti-fraud investigations conducted by OLAF, and the confidential nature of information collected, such as sources of information, content of case files and reputation of natural persons, OLAF considers there are no elements that would show the existence of an overriding public interest in disclosing the requested documents.

2.4. Confirmatory application

In accordance with Article 7(2) of Regulation 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.

Any confirmatory application to OLAF should be sent to the following address:
Mr Giovanni KESSLER  
Director General OLAF  
European Commission  
B-1049 BRUXELLES.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Ernesto BIANCHI

Privacy statement

Pursuant to Article 11 of Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on 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.

The categories of your personal data being processed are identification and contact data (name, address, e-mail, telephone, fax) 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 have access to your personal data.

All documentation and communications 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 access those data and to correct and complete them. On request and within three months from its receipt, you may obtain information concerning your personal data which we have processed. Any such request should be addressed to the Controller (OLAF-FMB-Data-Protection@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.

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