



EUROPEAN ANTI-FRAUD OFFICE

Directorate A – Investigations I  
The Director

**Mr Peter Teffer**  
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Subject: Your application for public access to documents

OF No **OF/2015/1139/SIT**

Dear Mr Teffer,

We refer to your request for public access to documents under Regulation (EC) 1049/2001 which you sent to OLAF on 29 August 2017.

## 1. Your application

You have made a request for the following document:

the administrative recommendation OLAF sent to the European Investment Bank regarding a loan to Volkswagen Group.

Based on the information provided, we identified the following document as falling within the scope of your request: Recommendation for action to be taken following an OLAF investigation (OCM(2017)14162).

## 2. Access cannot be given to documents in OLAF case files

Having carefully considered your request under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, OLAF regrets to inform you that it cannot provide you with access to the document that you have requested on the basis of the following considerations.

### 2.1. Preliminary remarks

OLAF wishes to clarify from the outset that 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.

However, 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, your attention is drawn to the fact that documents disclosed under this Regulation enter the public domain.

## **2.2. Assessment under Regulation 1049/2001 - applicable exceptions - presumption**

In the present case, the document which you seek to obtain is part of an OLAF case file and is 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 stipulates the protection of the decision making process, unless there is an overriding public interest in disclosure.

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.<sup>1</sup>

The General Court has confirmed that there is a general presumption that the disclosure of documents from OLAF files may undermine the protection of OLAF's investigation activities independently of whether an investigation is still open or closed. As the Court has outlined in the *Strack*<sup>2</sup> case, in order 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<sup>3</sup>, 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 fraud in the public interest. The disclosure of the document concerned would seriously affect the decision-making process of OLAF, as it would 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.

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<sup>1</sup> Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, p.36.

<sup>2</sup> See judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

<sup>3</sup> See judgment of the Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraph 50; judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 55 ff.; judgment of the Court of Justice of 29 June 2010, *Commission v Bavarian Lager*, C-28/08, EU:C:2010:378, paragraph 40 ff.



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 institution<sup>4</sup>.

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.<sup>5</sup>

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 with relevant case-law, that presumption applies in full regardless of whether the request for access to documents concerns an ongoing or a closed investigation.<sup>6</sup>

Consequently, the document requested is 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 document.<sup>7</sup>

### **3. Partial Access**

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

Partial access is not possible, given that the information the document contains falls entirely under general presumption of applicability of Article 4(2), third indent of Regulation 1049/2001 in the context of inspections and audits. 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.<sup>8</sup>

### **4. 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 document. 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.

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 document.

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<sup>4</sup> Judgment of the Court of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91.

<sup>5</sup> See judgment in *Commission v EnBW* above, EU:C:2014:112, paragraphs 65 and 68.

<sup>6</sup> Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, p.33 Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

<sup>7</sup> Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 91.

<sup>8</sup> *Ibid.*, paragraph 168.

## 5. 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  
Rue Joseph II, 30  
B-1049 BRUXELLES.

Your attention is drawn to the privacy statement below.

Yours sincerely,

  
Dominik SCHNICHEL

## 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](http://ec.europa.eu/anti_fraud).