



EUROPEAN ANTI-FRAUD OFFICE

Directorate B - Investigations II
Director

Aisha Down
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Via e-mail and registered mail

Brussels
olaf.c.4(2019)28852

Subject: Your application for public access to documents

Case No OF/2011/1181

Dear Mrs Down,

We refer to your email dated 2 October 2019, by which you submitted an application for public access to documents under Regulation (EC) No 1049/2001¹.

You requested access to the following documents:

"All documents and correspondence related to OLAF's investigation of links between Japan Tobacco International (JTI), JTI's Middle Eastern distributor IBCS Trading, Syria Duty Free Shops (SDF) Ltd, and Rami Makhlouf.

Documents showing when OLAF was first aware of the link between Assad and JTI.

Documentation of the launch of OLAF's investigation of the links between Makhlouf, SDF Ltd, and JTI.

All information and documents given by Cypriot authorities to OLAF regarding JTI's links to Makhlouf, SDF Ltd, and Assad. All correspondence between Cypriot authorities and OLAF on this subject. All meetings between Cypriot authorities and OLAF on this subject.

All meetings between OLAF and JTI on the subject of the investigation of links between JTI, IBCS Trading, Syria Duty Free Shops Ltd, and Rami Makhlouf. All negotiations related to this investigation".

1. Preliminary remarks

OLAF wishes to clarify from the outset that OLAF is legally bound to treat all information it obtains during its 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 883/2003 and Article 17 of the Staff Regulations.

¹Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents OJ L145, 31.05.2001, page 43.



However, the purpose of Regulation 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.

2. Assessment of the document under Regulation (EC) 1049/2001 - relevant applicable exceptions – presumption of non-accessibility

Having carefully considered your application, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by the exceptions to the right of access laid down in Article 4 of Regulation (EC) 1049/2001 based on the following considerations.

The documents, which you describe in your request, are part of OLAF's investigation file OF/2011/1181. OLAF has closed the investigation on 2015 with a note to Japan Tobacco International (JTI).

The requested documents are 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, as well as the protection of the decision-making process as referred to Article 4(3) second sentence of the Regulation.

The General Court recognised in recent case-law² a general presumption of non-accessibility for documents in OLAF case files. It considers that the disclosure to the public under Regulation 1049/2001 of documents related to OLAF internal investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, both now and in the future.

The presumption is based on the consideration that, to determine the scope of 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 gathered³, in the case at hand, Regulation 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.

The protection of confidentiality extends to closed cases⁴. In addition, having regard to the nature of the information processed in the context of OLAF investigations, the publication of the sensitive information contained in the OLAF case file is likely to harm the protection of personal data regardless of whether an investigation is pending or closed. 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, and that could seriously compromise the effectiveness of OLAF's investigative activities.

In view of the foregoing, the documents in OLAF's investigation files fall under the presumption of non-accessibility as documents containing information collected during an OLAF investigation and subject to confidentiality professional secrecy rules. Consequently, the document requested is exempt, in principle and in full, from disclosure to the public unless the applicant demonstrates

² Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

³ Judgment Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraphs 50-59; 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..

⁴ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 164.

that the presumption is not applicable because an overriding public interest justifies the disclosure of the requested documents.⁵

3. Partial Access

OLAF has 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 the general presumption of applicability of Article 4(2), third indent of Regulation 1049/2001 in the context of inspections and audits.

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 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.

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, an application under Regulation (EC) No 1049/2001 would have to contain clear elements to indicate the existence of an overriding interest to justify putting OLAF documents from the investigation file into the public domain. In this regard OLAF considers that there are no elements that would show the existence of an overriding public interest in disclosing the requested document that would outweigh the interest in protecting the purpose of OLAF investigations.

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 Ville ITÄLÄ
Director General OLAF
European Commission
B-1049 BRUXELLES
BELGIUM.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Signed Electronically

⁵ Ibid., paragraph 91.

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.