



EUROPEAN ANTI-FRAUD OFFICE

Directorate D: General Affairs
The Director

Ms Barbara PELO
Slotermeerlaan 133
1063 Amsterdam
The Netherlands

E-mail:

ask+request-8796-
f361d1c6@asktheeu.org

Via e-mail

Brussels,

Subject: **Your application for public access to documents, Ares(2020)7015271, GestDem 2020/7154**

Dear Ms Pelo,

We refer to your e-mail of 19 November 2020 addressed to the Office for the Administration and Payment of Individual Entitlements of the European Commission, re-attributed to OLAF for replying, registered on 23 November 2020 under reference Ares(2020)7015271, GestDem 2020/7154.

In your message, you first pointed to the decision of the European Ombudsman 1061/2019/FP, issued following your complaint concerning refusal of public access to documents containing mission costs of Director-General and Directors of OLAF. You invoked that the European Ombudsman suggested that OLAF takes steps to review its policy and consider implementing more transparent approach in relation to travel expenses, which are not incurred in the course of investigatory activities. In particular, consideration should be given to regular proactive disclosure of the Director-General's expenses.

You, therefore, requested under the right of access to documents in the EU Treaties, as developed in Regulation 1049/2001, access to the exhaustive lists travel expenses of OLAF Directors-General, for the period 1 January 2015 until 19 November 2020.

In particular you asked for documents that contain, for each of the trips, the following information:

- place of origin and destination, and the amount spent on travel or transportation;
- exact dates and duration of the trip;
- amount spent on accommodation;
- amount spent on subsistence;
- other information, such as possible miscellaneous costs.

If the travel was by air taxi and a team of people were travelling, you also asked for



documents with details on other travellers, at minimum their names and job titles.

You further remarked that you seek only for name and surname of the relevant persons, something that, as you say, is already in the public domain. You do not seek for bank accounts, office addresses, signatures or telephone numbers.

Taking into account the information you requested, we consider your request as an application for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents.

1. Preliminary remarks

We note that you have requested partly the same documents as in your confirmatory application of 27 April 2019, OCM(2019)13936, by which you requested public access i.a. to documents with mission costs of Director-General of OLAF within the period from 1 January 2015 to 31 December 2018. Access to those documents was refused by reply of 4 July 2019, OCM(2019)14976.

Your previous application was subject to the inquiry of the European Ombudsman 1061/2019/FP, in which the European Ombudsman decided that there was no maladministration on the part of OLAF.

The European Ombudsman suggested that OLAF takes steps to review its policy and consider implementing a more transparent approach in relation to travel expenses which are not incurred in the course of investigatory activities. In particular, consideration should be given to regular proactive disclosure of the Director-General's expenses, in line with the practice of some EU institutions and agencies.

We wish to inform you that, after having duly considered that suggestion, OLAF informed the European Ombudsman that whilst it is true that OLAF is independent insofar as its investigative function is concerned, the Office remains nevertheless one of the Commission's directorates-general from an administrative point of view. The European Commission has not adopted such a practice as regards its Director Generals and other staff members. Nonetheless, should the Commission decide in the future to adopt a more proactive approach to the disclosure of such expenses, OLAF will follow it.

It was also pointed out that, in accordance with Commission decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals², OLAF already makes information available to the public on meetings held by the Director-General with organisations or self-employed individuals on issues relating to policy-making and implementation in the Union, which are not related to investigations. This information, which is published on OLAF's website, is easily accessible to the public³.

The reply of OLAF was to the satisfaction of the European Ombudsman.

After careful examination of your application, we concluded that the legal and factual circumstances justifying the refusal of public access to documents of 4 July 2019, OCM(2019)14976 have not changed. Therefore, the earlier refusal to grant access remains justified in the light of the current legal and factual situation.

Consequently, we refer you to the decision of 4 July 2019, OCM(2019)14976. That

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, page 43.

² OJ L 343, 28.11.2014, p. 19

³ <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=e1df1b18-cb0f-47e6-bd6b-9643b9eb5c5c>

decision concluded that access to the documents you request cannot be granted, based on the exceptions of Article 4 of Regulation (EC) No 1049/2001.

With regard to documents with mission costs of Director-General of OLAF for the period 1 January 2019 until 19 November 2020, we note that your application concerns the same type of documents and that the legal or factual circumstances have not changed since the previous reply by letter of 4 July 2019, OCM(2019)14976.

2. Assessment of the documents and relevant applicable exceptions

Having considered your application, OLAF regrets to inform you that your application cannot be granted, as the disclosure of the identified documents containing the information requested is prevented by several exceptions to the right of public access to documents, laid down in Article 4 of Regulation 1049/2001⁴.

2.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that the EU institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, which provision must be implemented in accordance with the relevant EU law on the protection of personal data.⁵

According to the definition provided for in Article 3(1) of Regulation 2018/1725⁶, personal data *means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.*

The information that you have requested is included in the cost statements relating to the official assignments (business trips) of the Director-General of OLAF. It is obvious that the documents requested contain information concerning identified natural person. Consequently, the information requested, by its very nature, constitutes personal data within the meaning of the provision quoted above. The fact that data concerning the person in question are closely linked to public data on that person, *inter alia* as they are listed on the Commission's and OLAF's internet sites, and are, in particular, his name, does not mean at all that those data can no longer be characterised as 'personal data' within the meaning of the EU data protection rules.⁷

Therefore, public disclosure of the above-mentioned personal data, through the release of the documents (i.e. the cost statements) containing them, or through disclosure of a general description, would constitute processing (transfer) of personal data within the meaning of Article 3(3) of Regulation 2018/1725.

⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43–48.

⁵ Judgement of the General Court of 25 September 2018, *Psara et al. v European Parliament*, Joined Cases T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, par. 44.

⁶ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L295, 21.11.2018, page 39.

⁷ See, to that effect, judgement of the General Court of 25 September 2018, *Psara et al. v European Parliament*, cited above, par. 52; judgement of the Court of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, C-615/13 P, EU:C:2015:489, par. 31.

In its judgment in case C-28/08 P, *Bavarian Lager*⁸, the Court of Justice ruled that, when a request is made for access to documents containing personal data, Regulation 45/2001 (now replaced by Regulation 2018/1725 referred to above) becomes fully applicable.

Article 9(1)(b) of Regulation 2018/1725 provides that personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if the 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.

The processing (transfer) of personal data can occur only if the conditions set out under Article 9(1)(b) of Regulation 2018/1725 are fulfilled and if the transfer constitutes lawful processing in accordance with the requirements of Article 5 of that Regulation.

In that context, whoever requests such a transfer must first establish that it is necessary for a specific purpose in the public interest. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁹. Where there is any reason to assume that the data subject's legitimate interests might be prejudiced, the controller of personal data (i.e. the Institution concerned) then establishes whether it is proportionate to transmit the personal data for that specific purpose, after having demonstrably weighed the various competing interests.¹⁰ In the *Strack* case, the Court of Justice clarified that the Institution does not have to examine itself whether a need for the transfer of personal data exist¹¹.

In your application you have not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, OLAF does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

The EU Courts have confirmed that a mere *interest* of members of the public in obtaining certain personal data cannot be equated with a *necessity* to obtain the said data in the meaning of Regulation 45/2001¹². Furthermore, if the condition of necessity laid down in Article 8(b) of Regulation 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective¹³. The requirement for necessity requires from the applicant to show that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective and that it is proportionate to that objective, which requires the applicant to

⁸ Judgement of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, par. 59.

⁹ Ibidem.

¹⁰ In the *ClientEarth* case, the Court of Justice ruled that "whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access", judgement of the Court of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, C-615/13 P, cited above, par. 47.

¹¹ Judgement of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, par. 106.

¹² Ibidem, par. 107 and 108.

¹³ Judgement of the General Court of 15 July 2015, *Dennekamp v European Parliament*, T-115/13, EU:T:2015:497, par. 77.

provide express and legitimate reasons to that effect.¹⁴

It should also be recalled that no automatic priority can be conferred on the objective of transparency over the right to protection of personal data.¹⁵

In this respect, it is observed that the travel costs of Commission staff members, including OLAF Staff, are regulated by Articles 11 - 13 of Annex VII to the Staff Regulations¹⁶ and are subject to a detailed legal and technical framework. There is careful scrutiny of all declared mission costs for all staff of the Commission, including the staff of OLAF, at all levels. It takes place in form of checks of mission orders as well as of declarations of costs incurred. In addition to internal checks, the costs are also subject to budgetary controls, and can be subject to audits carried out by the Internal Audit Service and the European Court of Auditors.

Moreover and importantly, the person whose travel costs you are seeking access to is an agent of the Commission; he is not considered to be public office holder but exercises supportive functions allowing the Institution to perform its mission. Even if the travel costs are incurred in his professional functions, the information requested nevertheless constitutes personal data.¹⁷ This is in difference to Commissioners who are public office holders. Information pertaining to the mission costs of the Members of the Commission is proactively published on Europa website.

Nonetheless, OLAF publishes information on its activities on its website, including where appropriate about missions of its staff, including top managers. We consider that through the above-mentioned initiative, the appropriate level of public transparency with regard to the travels of top officials is ensured.

In the light of the above, we have to conclude that the transfer of personal data through the public disclosure of the personal data included in the relevant costs statements cannot be considered as fulfilling the requirements of Regulation 2018/1725. In consequence, the exception under Article 4(1)(b) of Regulation 1049/2001 applies, as no need to publicly disclose the personal data included therein is established and, in addition, it can be assumed that the legitimate rights of the data subjects concerned would be prejudiced by such disclosure.

2.2 General presumption of non-accessibility to OLAF investigation documents

As your application concerns indifferently the investigation related travels, those documents additionally fall under exception from public access to documents 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, unless there is an overriding public interest in disclosure.

The General Court recognised a general presumption of non-accessibility for documents in OLAF case files¹⁸. The Court considered that public disclosure of documents related to OLAF's investigations could fundamentally undermine the objectives of its investigative

¹⁴ Ibidem, para 54 and 59; see also judgement of the General Court of 25 September 2018, *Psara et al. v European Parliament*, cited above, par. 72.

¹⁵ Ibidem, par. 91.

¹⁶ Staff Regulations of Officials and conditions of employment for other Servants of the EU.

¹⁷ Judgement of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, cited above, par. 31.

¹⁸ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, par. 162.

activities, as well as its decision making process, both now and in the future.

That 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 gathered¹⁹. In this case, Regulation 883/2013, which governs OLAF's administrative activity, provides for the obligation of confidentiality with regard to all information gathered during investigations.

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.

Moreover, the following provisions of Regulation 883/2013 regulate and restrict the use of information in OLAF investigation files, before, during and after an OLAF investigation: Article 4 (internal investigations), 5 (opening of investigations), 6 (access to information in database prior to the opening of an investigation), 7 (investigations procedure), 8 (Duty to inform OLAF), 9 (procedural guarantees), Article 10 (confidentiality and data protection); 11 (investigation report and action to be taken following investigations), 12 (Exchange of information between OLAF and the competent authorities of Member States), 13 (cooperation between OLAF and Eurojust and Europol), 14 (cooperation with third countries and international organisations), 15 (Supervisory Committee) and 16 (exchange of views with the institutions), 17 (Director-General).

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 fulfil its mission of fight against fraud in the public interest. The disclosure of the documents concerned would seriously affect the decision-making process of OLAF, creating risks in particular by revealing travelling places, people met, etc. It would also seriously jeopardize the full independence of future OLAF investigations and their objectives by revealing OLAF's strategy and working methods.²⁰

The specific confidentiality rules regarding the documents related to OLAF investigations are 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, but also to the extent that the access to documents relating to an investigation by OLAF, even after the conclusion of the investigation in question might, as explained above, seriously hamper the work of OLAF, disclose the methodology and strategy, harm the availability of those involved in the procedure to collaborate in the future and, therefore prejudice the proper functioning of the investigations in question and the achievement of their objectives.

3. Partial Access

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

No meaningful partial access to the cost statements concerned is possible, as the entirety of the information falling under the scope of your application and included therein is

¹⁹ Judgment of the Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, par. 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, par. 55 ff.

²⁰ See judgement of the Court of Justice of 28 June 2012 *Agrofert Holding v Commission*, cited above, par. 66.

covered by the exception in Article 4(1)(b) of Regulation 1049/2001, and in part additionally fall entirely under the general presumption of applicability of Article 4(2), third indent and Article 4(3) of Regulation 1049/2001 in the context of inspections and audits.

4. Overriding public interest in disclosure

The exception laid down in Article 4(1)(b) of Regulation 1049/2001 is an absolute exception, i.e. its applicability does not need to be balanced against any possible 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 has to be, firstly, 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, an application for public access to OLAF's documents under Regulation 1049/2001 would have to contain clear elements to indicate the existence of an overriding interest to justify putting internal OLAF documents and other information related to its investigations into the public domain. In this case, OLAF considers there are no elements that would show the existence of an overriding public interest in disclosing the requested documents.

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. We also wish to inform you that with regard to the repetitive request, the review is limited only to the assessment that the legal/factual circumstances have not relevantly changed since the previous reply.

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,

Beatriz SANZ REDRADO

Privacy statement

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.