



EUROPEAN ANTI-FRAUD OFFICE

Directorate B - Revenue and International Operations - Mr Siem EI KELENBOOM  
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Via e-mail only

Brussels  
olaf.d.2(2021)7480

Subject: Your application for public access to documents

Dear Mr Eikelenboom,

We refer to your e-mail of 22 January 2021, registered on 26 January 2021 under reference number OCM(2021)2252.

With reference to Regulation 1049/2001, you requested public access to OLAF report of mission to Malaysia dated 31/03/2015 and OLAF report of mission to Taiwan dated 21/04/2015. You put forward that in your opinion these reports can be made public because the anti-dumping rules are no longer in force and the *modus operandi* of OLAF was made public in the Dutch legal procedures.

OLAF interprets your request as an application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>.

Based on the formulation of your application, we identified the following documents as falling within the scope of your request: Mission report, registered on 31/03/2015 under THOR(2015)11569 and Mission report, registered on 21/04/2015 under THOR(2015)13770.

#### 1. Preliminary remarks

OLAF wishes to clarify that it 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.

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

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



disclosed under this Regulation enter the public domain.

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

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

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 has recognised a general presumption of non-accessibility for documents in OLAF case files<sup>2</sup>. It considers that 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.

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 gathered.<sup>3</sup> In the case at hand, Regulation 883/2013<sup>4</sup>, 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 cases<sup>5</sup>. 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 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.<sup>6</sup>

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

<sup>3</sup> See judgment 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.

<sup>4</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 248, 18.9.2013, page 1.

<sup>5</sup> Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, cited above, paragraphs 150 to 164.

<sup>6</sup> *Ibid.*, paragraph 91.

### 3. Partial Access

OLAF has 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.

### 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, OLAF considers there are no elements that would show the existence of an overriding public interest in disclosing the requested documents.

In your application you do not substantiate why, in this specific situation, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure<sup>7</sup>.

You put forward that the anti-dumping rules at stake are no longer in force and that the *modus operandi* of OLAF was made public in legal procedures in the Netherlands. In this respect, it must be stated that the role of OLAF is to conduct administrative investigations into irregularities to the detriment of the financial interests of the European Union. The investigations in these cases have been closed by OLAF. In accordance with Article 11 of Regulation 883/2013, the OLAF final reports have been transmitted to competent authorities accompanied by recommendations indicating possible further action. OLAF has not disclosed or made the requested documents accessible to the public.

Evidence gathered in the framework of OLAF investigations is transmitted on a strict "need-to-know" basis to the national customs authorities of the Member States which are concerned. According to Article 45(2) of Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters<sup>8</sup>, this information may not be sent to persons other than those whose functions require them to know or use it.

Given the preliminary nature of the anti-fraud investigations conducted by OLAF, OLAF considers that the interest in maintaining the confidential nature of its case documents prevails. Hence, the interests of the competent authorities which must be able to follow up on OLAF's conclusions in a serene manner, as well as the interests of all the persons involved in the investigation, including the sources of information, in preserving the confidentiality of OLAF's investigative documents are predominating. In particular, with regard to the reputation of persons concerned, the Office is bound to uphold the presumption of innocence, in accordance with the relevant legislation<sup>9</sup>.

In conclusion, OLAF considers that there are no sufficient elements that would show the existence of an overriding public interest in disclosing the requested document. Therefore, the application of the presumption invoked at section 2 above is justified and

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<sup>7</sup> Judgement of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 131.

<sup>8</sup> OJ L 82, 22.3.1997, p. 1.

<sup>9</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11.

consequently, the documents cannot be disclosed to you under Regulation 1049/2001.

In addition, the requested document also involves the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation 1049/2001) where overriding public interest in disclosure is not applicable.

#### 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<sup>10</sup>, 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

#### 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-PROTxxxxxx@xx.xxropa.eu](mailto:OLAF-FMB-DATA-PROTxxxxxx@xx.xxropa.eu)). You may contact the Data Protection Officer of OLAF ([OLAF-FMB-DATA-PROTxxxxxx@xx.xxropa.eu](mailto:OLAF-FMB-DATA-PROTxxxxxx@xx.xxropa.eu)).

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<sup>10</sup> OJ L 345, 29/12/2001, p. 94–98, Special edition in Polish, Chapter 1, Volume 3, p. 408.

[DPO@ec.europa.eu](mailto: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](mailto: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](http://ec.europa.eu/anti_fraud)