



EUROPEAN COMMISSION
SECRETARIAT GENERAL

Director SG B

Brussels, **15 SEP. 2014**
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Mr Guido STRACK
Allerseelenstrasse 1n
D-51105 Cologne,
Germany

By e-mail:
ask+request-1442-5852a170@asktheeu.org

Ref: Your request for access to documents GESTDEM 2014/3717

Dear Mr Strack,

By e-mail of 12.08.2014 registered on 14 August 2014 under the reference GestDem 2014/3717, you applied for access to documents in accordance with Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents.

I also refer to the holding reply sent by DG HR on 4 September by which we extended the time-limit for replying to your request by 15 working days until 26 September 2014, in accordance with Regulation (EC) 1049/2001.

In your request for access to documents you have asked for "*... any documents in relation to officials or non-officials-staff of the EU-institutions contacting the President of the Commission or his predecessors as "external addressee" for whistleblowers under art. 22b of the staff regulations (incl. the previous internal norms of the Commission) including but not limited to: any correspondence from and to the whistleblower(s) including all its annexes and also any follow-up communication or notifications from and to other services also with all its annexes as well as all internal drafts and other documents related to these issues.*"

Six documents have been identified as falling within the scope of your request. Please note that the Commission's document registration systems and databases do not contain the specific category of whistleblower or external whistleblower mentioned in your request.

The requested documents are:

¹ OJ L 345, 29.12.2001, p. 94.

(1) Correspondence addressed to the Commission or sent by the Commission in relation to "officials or non-official-staff" of the EU-institutions contacting the President of the Commission or his predecessors as "*external addressee*" for whistleblowers under Art. 22b of the Staff Regulations, including but not limited to any correspondence from and to the whistleblower(s), including all its annexes.

(2) Correspondence, notes and e-mails including follow-up communications or notifications from and to other institutions or bodies, also with all its annexes related to the above mentioned correspondence.

Under (1), the Commission has identified 5 documents. Document **1.1** is a request addressed to the President of the Commission on 24 June 2010 by an MEP asking for information on any communications received by the Commission concerning serious wrongdoings disclosed by members of staff of other institutions on the basis of Article 22 b of the Staff Regulations. Document **1.2** is the reply addressed to this MEP by the Secretary General on behalf of the President on 31 August 2010. Document **1.3** is a complementary letter addressed by the Secretary General to the MEP informing of the existence of a communication under Art.22 b of the Staff Regulations which had arrived in the meanwhile.

Document **1.4** is the confidential communication, originally including several annexes, of an external whistleblower to the Commission's President under Art 22 b of the Staff Regulations. Please note that the annexes are no longer in the Commission's possession as they were forwarded to OLAF. Document **1.5** is the acknowledgement of the Commission to the external whistleblower.

Under (2) the Commission has identified 1 document, namely document **2.1** which is the transmission note of the Commission's Secretariat General to OLAF forwarding the above-mentioned communication and its annexes, on the basis of Article 22 b of the Staff Regulations.

Please note that documents **1.4**, **1.5** and document **2.1** falling within the scope of your request are protected by encryption when transmitted within and outside the Commission. They are subject to a marking namely "*Enquêtes et affaires disciplinaires*" approved under Commission Decision 2001/844/EC, which restricts access to them on a strict need-to-know basis. The information contained in the identified documents is by definition sensitive and confidential. The documents are communicated only on a strict need-to-know basis to the staff dealing with whistleblowing issues. As regards document **1.4**, this was transmitted on a confidential basis by the external whistleblower.

1. ASSESSMENT UNDER REGULATION 1049/2001

I inform you that further to an examination of your request and of the above-mentioned documents under points (1) and (2), full access can be granted to documents **1.1** to **1.3**. You will find copies enclosed.

However, I must refuse access to the remaining documents, namely documents **1.4**, **1.5** and document **2.1**. These documents are covered by two of the exceptions provided for in the above-mentioned Regulation.

The exception listed in Article 4 (2) third indent (protection of the purpose of inspections, investigations and audits) of Regulation No 1049/2001, applies to the entirety of documents **1.4**, **1.5** and **2.1**. In addition, the exception foreseen in Article 4(1) letter b) (protection of privacy and personal data) of Regulation No 1049/2001, applies to extensive parts of those documents.

The reasons for this decision are set out below.

1.1. Protection of the purpose of investigations

Access to documents **1.4**, **1.5** and document **2.1** has to be refused on the basis of the exception provided for in Article 4(2), third indent, of Regulation No 1049/2001, which provides that: *"The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."*

These documents have been addressed and forwarded by the Commission to OLAF on the basis of Article 22b of the Staff Regulations. This provision states that:

"... 1. An official who further discloses information as defined in Article 22a ² to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

² Article 22a

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.

Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed."

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed."

Document **1.4** contains information provided by an external whistleblower, on a confidential basis, under Article 22 b of the Staff Regulations, on possible irregularities which may have taken place in another institution. This information was considered confidential by the author and was transmitted to the Commission under the explicit request to keep it confidential in order to avoid any adverse effects for the external whistleblower.

This document and its annexes were transmitted by an internal note to OLAF, and the external whistleblower was duly informed by the Commission of this follow-up. The above-mentioned confidential communication (**1.4**) was the subject of OLAF investigations, as were the related documents (**1.5** and **2.1**).

It is the competence of OLAF to ensure the follow-up of the alleged irregularities.

I would like to draw your attention to the fact that OLAF, as an independent investigative body, should be able to conduct its inspections, investigations, and related activities, in an independent manner and without being subject to external pressures.

Disclosure of the requested documents by the Commission could have a negative impact on those activities and their follow-up. I would also like to underline that the Commission and OLAF are obliged to protect the whistleblower from adverse consequences. This covers not only the obligation not to disclose the identity of the external whistleblower, but also not to disclose related information that could allow identifying him/her directly or indirectly. The effectiveness of the procedure foreseen in Article 22 b and the trust of external whistleblowers in the Commission would be undermined if the institution could disclosed the documents transmitted to non-authorised third persons or to the public. Disclosure would severely put into question the philosophy underpinning the above-mentioned provisions, negatively affecting the institution's policy in this area.

Even if internal investigations launched on the basis of the confidential communication have been already closed, the ability of OLAF to conduct similar investigations would be severely undermined if it could not guarantee the confidential treatment of such data and information, nor the respect of the fundamental rights of other external whistleblowers and third parties, including the presumption of innocence of persons concerned.

Finally, I would like to recall the fact that the documents concerned by your request are subject to a marking, which limits access to them on a strict "need-to-know basis", and that they are encrypted when drafted, underlining the need to protect the information they contain and the negative impact that it would have if such information were to be disclosed even within the institution, and *a fortiori* to the public.

As a consequence documents **1.4**, **1.5** and **2.1** are covered by the exception set out in Article 4(2), third indent, of Regulation (EC) No. 1049/2001.

1.2. Protection of privacy and the integrity of the individual

Extensive parts of the requested documents under **1.4, 1.5** and **2.1** are covered by Article 4 (1) (b) of Regulation No 1049/2001 which provides that...*"The institutions shall refuse access to a document where disclosure would undermine the protection (...) of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. "*

These documents contain allegations regarding staff of the institutions, some of whom are specifically identified and others easily identifiable. It is especially important to guarantee the confidentiality of the information concerning them, which may only be disclosed on the basis of a strict "need to know" in the context of open and closed investigations.

Please bear in mind that it is not possible to guarantee the anonymity of these people by expunging their names, gender, or position. Indeed, in the event that the abovementioned documents were to be disclosed, third parties with some knowledge of the facts and events could identify not only the external whistleblower but also the people who are the subject of the allegations. The disclosure of this information could therefore damage the private and professional reputations of these people, whatever the outcome of the investigation.

In addition and as already mentioned under point 1.1 above, the protection of the effectiveness of the policy on whistleblowing and of the fundamental rights and the presumption of innocence of the persons concerned will be undermined in the event of the disclosure of the documents in question.

Moreover, the above mentioned information qualifies as personal data since it concerns one or several identifiable persons. According to the Court of Justice in its judgement in case C 28/08 P, *Commission v. Bavarian Lager*, such public access could only be granted if this complies with the applicable provisions of Regulation No 45/2001. According to Article 8(b) of Regulation 45/2001, recipients of personal data have to establish the necessity of having personal data transferred to them, and the Commission has to be satisfied that there is no reason to assume that the data subject's legitimate interests might be prejudiced. I consider in the present case that the necessity of disclosing the aforementioned personal data to you has not been established in your request and that, in addition, such disclosure would prejudice the legitimate rights of the persons concerned.

I would also like to recall that the European Data Protection Supervisor, in its Opinion of 27 October 2006³, underlined the need to respect the confidentiality of the identity of whistleblowers during OLAF investigations and in the later stages (paragraph 42).

Consequently, access to personal data contained in relevant parts of the above-mentioned documents has to be refused on the basis of the exception provided for in Article 4 (1) (b) of Regulation 1049/2001.

³ OJ C 91 of 26th April 2007, p 1.

2. PARTIAL ACCESS

The requested documents under points **1.4**, **1.5** and **2.1** have been examined in order to assess the possibility to grant you partial access on the basis of Article 4(6) of Regulation (EC) n° 1049/2001. However, a partial access would not possible without affecting the interests protected by the applicable exceptions, raised under points 1.1 and 1.2 above.

Indeed, no element can be released without undermining at least one of the interests protected by one of the exceptions invoked.

3. OVERRIDING PUBLIC INTEREST

Finally, the exception laid down in 4(2), third indent, must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. I consider that in this case the public interest is better served by protecting the external whistleblower and the fundamental rights and the presumption of innocence of the persons concerned as well as the interests protected by the exception given in Article 4(2) third indent.

If you wish to appeal against this decision, you should write to the Commission Secretary-General at: sg-acc-doc@ec.europa.eu. You have fifteen working days from receipt of this letter in which to appeal.

The Secretary-General will inform you of the outcome of this re-examination of your request within fifteen working days of receipt of your request, either by granting you access to the document(s) or by confirming the refusal.



Marianne Klingbeil
Director SG B f.f.