



EUROPEAN ANTI-FRAUD OFFICE

Directorate A : Investigations I  
Director

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Via registered mail

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Brussels,  
ARES/C.4/LL/cg(2016)656879

Subject: **Your application for public access to documents  
THOR(2016)1931**

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Dear Mr Harris,

We refer to your request for public access to documents, under Regulation (EC) 1049/2001, made in the e-mail dated 19 January 2016 and registered in OLAF on 20 January 2016 under reference numbers THOR(2016)1931.

### **1. Scope of the application**

You have requested public access to documents containing the following information:

*'Please provide case files for all investigations carried out by OLAF in 2015, where the institution equals European Parliament'.*

We understand your request as a request for access to documents from the case files of all investigations on-going or closed in 2015 by OLAF on facts and allegations concerning the European Parliament.

### **2. 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.

Notwithstanding the foregoing, 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, attention is drawn to you to the fact that documents disclosed under this Regulation enter the public domain.

### **3. Assessment of the documents and relevant applicable exceptions**

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 this Regulation.

The documents which you seek to obtain are part of OLAF investigations files and therefore covered by the exception under of 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, unless there is an overriding public interest in disclosure.

### **4. General presumption of applicability of the protection of the purpose of inspections, investigations and audits as referred to in Article 4(2) third indent of the Regulation**

#### *4.1. The nature of requested documents*

The requested documents form OLAF's case files of investigations carried out in 2015. This means on-going investigations and/or investigations carried out and concluded by OLAF in 2015, for which final reports have been transmitted to competent authorities accompanied by recommendations indicating possible further action in accordance with Article 11 of Regulation 883/2013.

#### *4.2. The general presumption of applicability of Article 4(2) third indent of Regulation 1049/2001*

The Court of Justice has held that to determine the scope of the Regulation (EC) No 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered <sup>1</sup>.

In particular, the Court stated that if specific rules do not grant the party concerned by the respective administrative procedure a right to access the requested documents (as it is the case with regard to Regulation (EU, Euratom) No 883/2013 governing OLAF's investigations<sup>2</sup>), there is a general presumption that Article 4(2) third indent of Regulation (EC) No 1049/2001 applies when the same documents are requested under the said Regulation<sup>3</sup>. Otherwise, if those interested parties – or any other person - were able to obtain access on the basis of Regulation (EC) No 1049/2001, the system of the sectoral rules would be unbalanced. Therefore, a general presumption has to be acknowledged that disclosure of the documents within the administrative file, in principle, undermines the protection of the objectives of investigation activities.

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<sup>1</sup> C-477/10 P, *Agrofert Holding v Commission*, par.50; C-139/07 P *Commission v Technische Glaswerke Ilmenau*, par.55 ff.; C-28/08 p *Commission v Bavarian Lager*, par.40 ff.

<sup>2</sup> See for example judgment in Case T-391/03 and T-70/04 *Y Franchet and Byk v Commission*; T-259/03 *Nicolaou v Commission*.

<sup>3</sup> In particular C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, but also C-477/10P, *Agrofert*.

This implies that the disclosure of the requested documents can be refused without carrying out a concrete, individual examination in order to assess whether their disclosure may seriously undermine the protected interest, and that no partial access needs to be considered (see below). In addition, the general presumption applies during the investigation and also after the definitive closure of the investigation.<sup>4</sup>

Furthermore, the Court has also noted that according to recital 6 of Regulation (EU) No 1049/2001, documents relating to the institutions when acting in their legislative capacity should be made accessible to the greatest possible extent. This is in contrast to procedures relating to administrative functions specifically allocated to the institutions and governed by their own administrative rules.

The documents to which you requested public access contain information gathered using OLAF's investigative powers and the analysis and assessment of that information by OLAF.

With respect to these documents, 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 them 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 3 (external investigations), 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).

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 individuals, so that the information they provide is used only for the purposes of the investigation.

OLAF's investigations, as well as possible subsequent EU or national procedures, depend upon the willingness of informants and witnesses to provide such information. Therefore, these persons must be reassured that their statements will be kept confidential. With the prospect of finding that their information, explanations or assumptions are disclosed to the public, they might be inclined to censor the information they give or to hold back sensitive information and that could seriously compromise the effectiveness of OLAF's investigative activities.<sup>5</sup>

For these reasons, the cooperation of those who hold relevant information requires the increased protection of the information obtained, according to the conditions established by the Court and by virtue of the protection of the purpose of the investigation (Article 4 (2) third indent of Regulation (EC) No 1049/2001). Furthermore, OLAF may communicate

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<sup>4</sup> T-623/13, *UAHE vs. Commission*, par. 72-79, and T-404/10P, *Editions Odile Jacob v Commission*, par. 93 and 128.

<sup>5</sup> C-477/10P, *Agrofert*, 28 June 2012, par. 66

<sup>6</sup> T-623/13, *UAHC*, par. 72-79.

<sup>7</sup> Case C-404/10 P, *Commission v Odile Jacob* (EU:C:2012:393), paragraph 124, Joined Cases T-391/03 and T-70/04, *Franchet and Byk v Commission* (EU:T:2006:190), paragraphs 108 to 113.

<sup>8</sup> Case C-404/10 P, *Commission v Odile Jacob* (EU:C:2012:393), paragraph 133.

with other EU or national authorities in the context of its investigations and also relies on their cooperation.<sup>6</sup>

Hence, the above case-law is applicable by analogy to the OLAF legal framework and the documents that form OLAF's investigation file come under a general presumption that disclosure would be harmful to the investigation.

In addition, having regard to the nature of the information processed in the context of OLAF investigations, that conclusion is correct irrespective of whether the request for access concerns an investigation which is already closed or an ongoing investigation.<sup>7</sup> The publication of the sensitive information contained in the OLAF investigative files might harm the protection of personal data and/or the integrity of persons involved in the investigation, as sources of information, witnesses, private persons, officials of the competent authorities and OLAF officials.

In view of the foregoing, the documents in OLAF's case files fall under the presumption of non-accessibility as documents containing information collected during OLAF investigations and subject to professional secrecy. Consequently, they are exempt from disclosure to the public.

This conclusion is without prejudice to the application of other relevant exceptions referred to in Article 4 of Regulation 1049/2001 to the requested documents. However, in the present circumstances, OLAF has not considered it necessary to analyse the applicability of those exceptions.

## **5. Partial Access**

As regards partial access, it should be recalled that the general presumption referred to above indicate that the documents covered by them do not fall within an obligation of disclosure, in full or in part, of their content.<sup>8</sup> There is therefore no need for OLAF to examine the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

In any event, 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.

## **6. 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.

Please also note that the requested documents to a great extent involve the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation (EC) No 1049/2001)

where overriding public interest in disclosure is not applicable.

## **7. 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-1000 BRUXELLES  
BELGIUM.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Petra KNEUER

### **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).