



The Director General

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Via e-mail and registered mail
with AR

Brussels

Subject: Your confirmatory application for public access to documents

Dear Ms Pelo,

We refer to your two e-mails dated 27 April 2019, submitted via AsktheEU website and registered under reference numbers OCM(2019)13936 and OCM(2019)13940.

1. Scope of your requests and supporting arguments

By the above-mentioned e-mails you make confirmatory applications and request a review of the position taken by OLAF with regard to your request for public access to "the travel expenses of Mr G. Kessler (DG BUDG advisor, former Director General of OLAF), E. Bianchi (OLAF Director B), Francesco Albore (OLAF staff member) for the period 1 January 2015 to 31 December 2018 inclusive" and to your request for public access to "the exhaustive lists travel expenses of OLAF Directors, Mr D. Schnichels, Mr E. Bianchi, Ms B. Sanz Redrado and Ms M. Hofmann, for the period 1 January 2015 to 2019 inclusive".

In particular, you asked access to 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 access to

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

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

In your confirmatory applications you put forward that it is not justified to invoke the exception of privacy and the integrity of the individual (Article 4(1)(b), (2) and (3) of Regulation 1049/2001 and Articles 3(1), (3) and 9(1)(b) of Regulation 2018/1725). You also pointed out that the European Commission has the good practice of making such kind of data available to the public and publish them "*at the present website*", which, we understand, is the AsktheEU website. In your view, there is an overriding interest in disclosing these documents, as it is important for the general public to be able to hold the EU accountable for its use of EU budget. You also underlined that you did not ask for any sensitive personal information, such as telephone numbers or individual data. You further considered that "*specific purpose in the public interest is demonstrated*" and that the access to these data is necessary and proportionate according to the established practice of EU Institutions. EU Institutions have to ensure an appropriate level of public transparency with regard to the travels of their top officials and staff members. Moreover, there is no reason, in your view, to assume that the data subjects' legitimate interests might be prejudiced. You also pointed out that the information requested is included in the cost statements relating to the official assignments (business trips) of the former Director-General of OLAF, Directors and some other staff members mentioned. Therefore, the presumption of non-accessibility to OLAF investigation documents is not justified in this case, since your request concerns business trips and is not related to any OLAF "*secret*" file.

2. Assessment of the documents and relevant applicable exceptions

Having very carefully considered your confirmatory applications, OLAF regrets to inform you that your applications 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 1049/2001¹.

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.²

According to the definition provided for in Article 3(1) of Regulation 2018/1725³, 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 former Director-General of OLAF, Directors and one other staff member of OLAF mentioned in your applications. It is obvious that the documents requested contain information concerning identified natural persons.

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 L 145, 31.5.2001, p. 43–48.

² 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.

³ 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.

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 persons in question are closely linked to public data on those persons, *inter alia* as they are listed on the Commission's and OLAF's internet sites, and are, in particular, their names, 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.⁴

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.

In its judgment in case C-28/08 P, *Bavarian Lager*⁵, 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 subject⁶. 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.⁷ 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 exist⁸.

OLAF has carefully examined the reasons you put forward in your confirmatory applications to explain why, in your view, it is necessary to disclose the requested documents.

In that regard, you mentioned that there is a practice of making such kind of data available to the public and that it is important for the general public to be able to hold the EU accountable for its use of the EU budget. You also stressed that you do not ask for any

⁴ 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.

⁵ 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.

⁶ *Ibidem*.

⁷ 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.

⁸ Judgement of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, par.

sensitive personal information. You further added that EU Institutions have to ensure appropriate level of public transparency with regard to travels of top officials and staff members and that your requests concern official assignments (business trips).

However, 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 45/2001⁹. 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 objective¹⁰. 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 provide express and legitimate reasons to that effect.¹¹

You put forward the objective in broad and general wording: to enable the general public to hold the European Union accountable for its use of the EU budget, so in essence in this case to enable the public to verify the appropriateness of the expenses incurred by the named officials. In that regard, it must first be held that, because of its excessively broad and general wording, this objective cannot, in itself, establish the need for the transfer of the personal data in question.¹² 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.¹³

You have also not submitted any express and legitimate reasons proving that the transfer of personal data at issue is the most appropriate of the possible measures in order to achieve the objective you pursue and that it is proportionate to that objective.¹⁴

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 Regulations¹⁵ 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 persons whose travel costs you are seeking access to are officials; they are not considered to be public office holders but exercise supportive functions allowing the Institutions to perform their mission. Even if the travel costs are incurred in their professional functions, the information requested nevertheless constitutes personal data.¹⁶

OLAF is also not aware of a generalised practice to publish travel costs of officials, including high ranking officials of the European Commission.

For these reasons, OLAF considers that the necessity to make the travel costs of OLAF staff public in order to subject them to a public scrutiny has not been established. In any

⁹ Ibidem, par. 107 and 108.

¹⁰ Judgement of the General Court of 15 July 2015, *Dennekamp v European Parliament*, T-115/13, EU:T:2015:497, par. 77.

¹¹ 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.

¹² See, in that regard, judgement of the General Court of 25 September 2018, *Psara et al. v European Parliament*, cited above, par. 73 – 76.

¹³ Ibidem, par. 91.

¹⁴ Ibidem, par. 93.

¹⁵ Staff Regulations of Officials and conditions of employment for other Servants of the EU.

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

event the disclosure of the documents requested is not the most appropriate means for attaining the stated objective as extensive controls already apply. The disclosure of personal data is also not proportionate to that objective. Moreover, the data subjects' legitimate interests might be prejudiced.

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

You mentioned that your requests concerned "*business trips*" and are "*unrelated with any OLAF secret file*". However, some of the information contained in the requested documents concern investigation-related travels. OLAF staff carries out inspections and on-the-spot checks of economic operators in the EU and in third countries, in accordance with the applicable legal framework. In addition, OLAF staff meets with competent authorities of the Member States and third countries for operational purposes, e.g. to coordinate investigations. Travelling for these purposes is an inherent part of OLAF's investigations. Therefore, any information concerning details of such travels is to be considered as information related to the investigations carried out by OLAF staff, and any document containing such information is to be considered as an investigation-related document.

For this reason, the documents concerning missions carried out by OLAF staff in the context of investigations additionally fall under the exceptions from public access to documents set out in Article 4(2) third indent and Article 4(3) second sentence of Regulation 1049/2001. These provisions stipulate that the institutions shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits, as well as the protection of the decision-making process, unless there is an overriding public interest in disclosure.

The General Court recognised a general presumption of non-accessibility for documents in OLAF case files¹⁷. The Court considered that public disclosure of documents related to OLAF's investigations could fundamentally undermine the objectives of its investigative 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 gathered¹⁸. 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

¹⁷ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, par. 162.

¹⁸ 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.

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.

In this case, some of the documents requested relate to investigation activities aiming at gathering evidence and verifying allegations. 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.¹⁹

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.

However, it is clear that the disclosure of a version of the documents requested expunged of all personal data, i.e. all data linked to the expenditure for travel costs of the three identified OLAF officials, would deprive the access to these documents of any useful effect in the light of this objective. Therefore, no meaningful partial access is possible without undermining the above-referred interests. Consequently, the requested documents are covered in their entirety by the exceptions to the right of public access laid down in Article 4(1)(b), Article 4(2), third indent and Article 4(3) of Regulation 1049/2001.

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

¹⁹ See judgement of the Court of Justice of 28 June 2012 *Agrofert Holding v Commission*, cited above, par. 66.

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. Means of redress

I draw your attention to the possible means of redress available against this decision. You may either bring proceedings before the Court of Justice of the European Union or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Signed Electronically

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-PROTxxxxxx@xx.xxropa.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.