



Directorate A - Investigations I  
Director

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Via e-mail and registered mail  
with AR

Brussels  
olaf.c.4(2019)27831

Subject: Your application for public access to documents

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Case No OF/2012/0617

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Dear Ms Down,

We refer to your e-mail dated 7 October 2019 and registered in OLAF on 14 October 2019 under reference number OCM(2019)22927, by which you submitted an application for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> regarding public access to European Parliament, Council and Commission documents.

You requested access to the following documents:

- all details, meetings and correspondence between OLAF officials and Jose Manuel BARROSO and his staff related to OLAF's investigation into John DALLI;
- all details, meetings and correspondence between OLAF officials and officials in Legal Services, including Catherine DAY, related to OLAF's investigation into John DALLI.

In light of Regulation No 1049/2001, we interpret your application as referring to:

- all records of meetings and correspondence and documents exchanged between OLAF and the former Commission President and his cabinet staff related to investigation OF/2012/0617;
- all records of meetings and correspondence and documents exchanged between OLAF and the Commission Legal Service related to investigation OF/2012/0617;
- all records of meetings and correspondence and documents exchanged between OLAF and the Commission Secretariat General, including Ms Catherine DAY, the former Secretary General of the Commission, related to investigation OF/2012/0617.

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<sup>1</sup> OJ L145, 31.05.2001, page 43.

## 1. 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.

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 disclosed under this Regulation enter the public domain.

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

Having carefully considered your application and taking into account the opinion of the Commission services concerned, 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.

### (a) *Presumption of inaccessibility for documents in an investigation file – Article 4(2) third indent*

Part of the requested documents, in particular the correspondence with the former President and his staff, as well as with the former Secretary-General and the Secretariat-General are part of OLAF's investigation file. The investigation in that case has been closed and OLAF's final report has been transmitted to competent authorities accompanied by recommendations indicating possible further action in accordance with Article 9 of Regulation 1073/2001.

The requested documents are covered by the exception 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.

The General Court recognised in recent case-law<sup>2</sup> the existence of a general presumption of non-accessibility under which the disclosure to the public under Regulation 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities 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, 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

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<sup>2</sup> Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, paragraphs 28-50.

<sup>3</sup> Judgment Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, paragraphs 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, paragraph 55 ff.; judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, paragraphs 29-34.

purposes of the investigation.

The protection of confidentiality extends to closed cases. In particular, it is constant that the protection of OLAF's investigations extends to their follow-up, to the extent that that follow-up takes place within a reasonable period<sup>4</sup>.

According to the case-law, to grant access to OLAF's investigation file, even partially, could compromise the effective use of those elements by the national authorities, given that the persons suspected of irregularities could act in such a way as to prevent the proper conduct of the various procedures or investigations which those authorities might decide to initiate.

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 might harm the protection of personal data and/or the integrity of persons involved in the investigation, as sources of information, witnesses, persons concerned, officials of the competent authorities and OLAF officials.

In view of the foregoing, the documents in OLAF's investigation files fall under the presumption of non-accessibility as documents containing information which are collected during an OLAF investigation and are subject to professional secrecy.

In accordance to the case-law, that presumption applies in full regardless of whether the request for access to documents concerns an on-going or a closed investigation.<sup>5</sup>

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>

*(b) Exception related to court proceedings and legal advice – Article 4(2) second indent*

Part of the requested documents, in particular exchanges between OLAF and the Commission Legal Service, relate to preparation of the Commission's legal defence in proceedings before the Court of Justice of the European Union, in particular in cases T-562/12, C-394/15 P, T-399/17 and C-615/19 P. Case C-615/19 P is currently pending before the Court of Justice.

The documents therefore fall in the scope of the exception provided for in Article 4(2) second indent of Regulation 1049/2001 as documents related to court proceedings and legal advice.

*(c) Exception related to the protection of privacy and personal data – Article 4(1)(b)*

In addition to the exceptions under (a) and (b), most of the documents contain personal data, in particular those of persons concerned, witnesses and informants who enjoy particular protection under Union law. Disclosure of those documents would constitute interference with privacy of those persons within the meaning of Regulation No 2018/1725.

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<sup>4</sup> Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, paragraphs 33, 35; judgment of 6 July 2006 in *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 108 to 113; judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

<sup>5</sup> *Ibid.*;

<sup>6</sup> Judgment of the General Court of 26 May 2016, *IMG v Commission*, T-110/15, ECLI:EU:T:2016:322, paragraph 38.

### 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 the general presumption of applicability of Article 4(2), third indent of Regulation 1049/2001 in the context of inspections and audits, and under the exception related to court proceedings and legal advice – Article 4(2) second indent of Regulation 1049/2001.

### 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 that you have not put forward elements that would show the existence of an overriding public interest in disclosing the requested documents.

In addition, the requested documents also involve 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, 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 notice 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-PROTxxxxx@xx.xxropa.eu](mailto:OLAF-FMB-DATA-PROTxxxxx@xx.xxropa.eu)). You may contact the Data Protection Officer of OLAF ([OLAF-FMB-DPO@ec.europa.eu](mailto: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](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).