



The Director-General

Ms Aisha DOWN  
Emerika Bluma 8  
Sarajevo  
Bosnia and Herzegovina

Via e-mail and registered mail

Brussels

Subject: Your confirmatory application for public access to documents

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Case No OF/2012/0617 (Please include this number in all correspondence)

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Dear Ms DOWN,

We refer to your confirmatory application made by e-mail dated 11 November 2019 and registered in OLAF on 15 November 2019 under the reference number OCM(2019)26010, requesting the review of OLAF's position stated in its letter dated 4 November 2019, concerning your request for public access to documents under Regulation (EC) No 1049/2001<sup>1</sup>.

We have carefully considered your arguments and a detailed response follows:

#### 1. Scope of your confirmatory application

In your initial application, made by e-mail dated 7 October 2019 and registered in OLAF on 14 October 2019 under the reference number OCM(2019)22927, you have requested public 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 its reply dated 4 November 2019, registered under OCM(2019)24847, OLAF interpreted your application, in the light of Regulation No 1049/2001, 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;

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<sup>1</sup> OJ L 145, 31.05.2001, page 43.

- 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.

OLAF explained that a number of the documents you request are part of an investigation file. Therefore, those documents could not be disclosed as 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 883/2013 and Article 17 of the Staff Regulations. Furthermore, other documents directly relate to pending proceedings before the Court of Justice.

In your confirmatory application, you invite OLAF to “consider which documents are really necessary for ongoing investigations or audits” and put forward the following arguments:

First, you argue that OLAF closed the investigation in question nearly 7 years ago. Therefore, OLAF should review which of the documents are necessary for ongoing investigations or audits and consider releasing those which are not; for those which are related to ongoing investigations or audits, OLAF should specify what those documents are and “what their ongoing use will be”. Second, you suggest that “a number of investigative reports have come out [which] point at lingering questions about Dalli’s forced resignation”, mentioning interference by other parties into the OLAF investigation and “improper, rushed investigative procedures”; you also suggest that those questions “continue to cast doubt on the credibility of the European Commission’s procedures and OLAF”.

OLAF interprets your confirmatory application as inviting it to review its position on the possible disclosure of documents that it considered to be entirely covered by the exception concerning the protection of the purpose of inspections, investigations and audits under Article 4(2), third indent, of Regulation (EC) No 1049/2001.

## 2. Assessment of the documents under Regulation (EC) No 1049/2001 - relevant applicable exceptions

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.

You requested OLAF to “specify what those documents are and what their ongoing use will be”. The documents, which fall within the scope of your application, are exchanges of information or requests for assistance in accordance with Regulation (EC) No 1073/1999. They are an integral part of the OLAF's investigation file in question.

As OLAF explained in its reply to your initial application, the documents that are part of an OLAF investigation file are covered by a general presumption of non-disclosure by virtue of an applicable exception recognised by the Court. The nature of the general presumption, in principle, releases the Commission from the obligation to assess the documents individually.<sup>2</sup>

As a preliminary point, please note that the grounds of refusal to grant you access to OLAF investigation documents is not related “to possible future investigations into Mr. Dalli by OLAF”, as stated in your confirmatory application, but on the following considerations related to documents collected or produced in the course of investigations

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<sup>2</sup> See judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 54.

that OLAF has already concluded.

OLAF in this case indeed concluded the investigation in October 2012. In accordance with Article 9 of Regulation 1073/1999, OLAF transmitted its final report to the competent authorities accompanied by recommendations indicating possible further action. The competent national authorities initiated proceedings based on the final report. Those proceedings, in spite of the time which has passed since the closure of the investigation, are still pending. In addition, other legal proceedings have been initiated that directly concern the facts of the case.

Consequently, the requested documents are covered by the exceptions under Article 4(2), third indent, of Regulation (EC) 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, as well as the protection of privacy and the integrity of the individual as referred to in Article 4(1)(b) of that Regulation and the protection of the decision-making process as referred to in the second sentence of Article 4(3) of that Regulation.

The General Court has recognised in recent case-law<sup>3</sup> the existence of a general presumption under which the disclosure to the public under Regulation (EC) No 1049/2001 of documents related to OLAF internal investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision-making process, both now and in the future.

This presumption is based on the consideration that, in order to determine the scope of Regulation (EC) No 1049/2001, account must be taken of the relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were collected<sup>4</sup>. In the present instance, Regulation 883/2013, which governs OLAF's administrative activity, provides for an obligation of confidentiality with regard to all information obtained during investigations.

As indicated in the previous reply, dated 4 November 2019, 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 confidential and subject to professional secrecy.

In addition, 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 (investigation 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) and 17 (Director-General).

In view of this 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 to fight against fraud in the public interest. The disclosure of the documents concerned would seriously affect the decision-making process of OLAF, as it would seriously jeopardise the full independence of future OLAF investigations and their

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<sup>3</sup> See judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

<sup>4</sup> See judgment of the 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.

objectives by revealing OLAF's strategy and working methods and by reducing OLAF's power to make independent assessments and to consult the Commission services or other EU institutions about very sensitive issues. It could also discourage individuals to send information concerning possible fraud thus depriving OLAF of useful information to initiate investigations aiming at protecting the financial interests of the Union. They must be reassured that their statements will be kept confidential otherwise, they might be inclined to censor the information they give or to hold back sensitive information.<sup>5</sup>

The specific confidentiality rules regarding the documents relating to OLAF investigations is justified not only in so far as OLAF collects, as part of such an investigation, sensitive business secrets and highly sensitive information concerning individuals, the disclosure of which could significantly harm their reputation, but also to the extent that the access to documents relating to an internal investigation by OLAF, even after the conclusion of the investigation in question (especially those containing opinions for internal use as part of deliberations and preliminary consultations within OLAF) might, as explained above, seriously hamper the work of OLAF, reveal the methodology and objectives of OLAF strategy, impact on the availability of those involved in the procedure to collaborate in the future and, therefore, undermine the proper conduct of the investigations in question and the achievement of their objectives.

As to your argument that OLAF closed the investigation in question nearly 7 years ago, please note that the protection of confidentiality also extends to closed cases<sup>6</sup>. In addition, having regard to the nature of the information processed in the context of OLAF investigations, publication of the sensitive information contained in the OLAF investigative files is likely to breach the rules relating to 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 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.

Insofar as the personal data of persons concerned is comprised in the requested documents, public disclosure of these data in such a context would portray respective individuals in a negative light, as well as give rise to possible misapprehensions regarding their conduct, and would consequently have an adverse effect on their reputation. As a result, the protection of the privacy and integrity of the individuals concerned would be undermined.

In addition, OLAF may cooperate with national administrative or judicial authorities and vice versa in the context of its investigations,<sup>7</sup> as well as with the European Institutions such as the European Commission. Disclosing information about its members may prejudice the future cooperation of the European Commission in OLAF internal investigations.

To these arguments, it must be added that according to the case-law of the Court, the administrative activity of the Commission does not require the same extent of access to documents as required by the legislative activity of a Union institution<sup>8</sup>.

In view of the foregoing, the documents in OLAF's investigation files fall under a general presumption of non-disclosure as documents containing information collected during an OLAF investigation and subject to professional secrecy. In accordance with the case-law, this presumption applies in full regardless of whether the request for access to documents

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<sup>5</sup> See the judgment in *Agrofert Holding v Commission*, cited above EU:C:2012:394, paragraph 66.

<sup>6</sup> Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

<sup>7</sup> Judgment of the General Court of 12 May 2015, *UAHE v Commission*, T-623/13, EU:T:2015:268, paragraphs 72-79.

<sup>8</sup> Judgment of the Court of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91.

concerns an ongoing or closed investigation.<sup>9</sup>

As OLAF already explained in its reply to the your initial application, the documents requested are consequently exempt in principle and in full, from disclosure to the public, unless the applicant demonstrates that the presumption does not apply because an overriding public interest justifies the disclosure of the requested documents.<sup>10</sup> In you confirmatory application, however, you have not raised any argument that would distinguish any particular document in the investigation file from other documents and to which the presumption would thus not apply.

### 3. Partial access

The application of the general presumption means that the documents covered by that presumption are excluded from the obligation to assess whether partial access should be granted pursuant to Article 4(6) of Regulation No 1049/2001.<sup>11</sup> As explained above, you have not stated any arguments that would rebut the application of the presumption to particular documents that would require individual assessment.

### 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 document. 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.

In your confirmatory application you assert that "a number of investigative reports have come out pointing at lingering questions about Dalli's forced resignation," and that those reports "mention issues such as tobacco industry interference in the case, and improper, rushed investigative procedures." In your view, these "unanswered questions continue to cast doubt on the credibility of the European Commission's procedures, and OLAF" and they "undermine the Commission in general". You conclude that it "is unquestionably in the interest of the public that documents related to this case are released".

OLAF understands the importance of transparency of the functioning of the EU institutions and particularly of the European Commission. However, given the confidential nature of information collected by OLAF and that of the anti-fraud investigations in general, an application under Regulation (EC) No 1049/2001 would have to contain clear elements to establish the existence of an overriding public interest which justifies releasing internal OLAF documents and other information from the investigation file into the public domain. In this context, it should be borne in mind that whatever the outcome of OLAF's investigation, according to well-established case-law, the conclusions of an OLAF final report have no effects which could adversely affect the legal position of the person concerned.<sup>12</sup> OLAF has no competence to conduct or even initiate disciplinary, administrative or judicial proceedings.

In addition, the requested documents also involve the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation 1049/2001) where the overriding public interest in disclosure is inapplicable.

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<sup>9</sup> Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

<sup>10</sup> *Ibid.*, paragraph 91.

<sup>11</sup> *Ibid.*, paragraph 168.

<sup>12</sup> Order of the Court of First Instance, *Gómez-Reino v Commission*, T-215/02, EU:T:2003:352, paragraph 65; judgment of the Court of First Instance, *Nikolaou v Commission*, T-259/03, EU:T:2007:254, paragraphs 242 and 246, judgment of the Court of First Instance, *Franchet and Byk v Commission*, T-48/05, EU:T:2008:257, paragraphs 255 to 258, and judgment of the General Court, *Catinis v Commission*, T-447/11, EU:T:2014:267, paragraphs 63 and 64.

Maintaining the good reputation of OLAF, the Commission and EU institutions and bodies, as well as the trustworthiness and reliability of their actions, certainly represents an important public interest. However, your arguments seem to be based on mistaken or unfounded assertions.

The General Court in its judgment of 12 May 2015 in case T-562/12, confirmed on appeal by the Court of Justice in case C-394/15 P on 14 April 2016, unequivocally established that Mr Dalli's resignation had not been 'forced' but voluntary. It is also not clear which 'investigative reports' would indicate 'tobacco industry interference' in the investigation or 'rushed' investigative procedures. On the contrary, the General Court came to the conclusion in its judgment of 6 June 2019 in Case T-399/17 that OLAF had acted independently and in accordance with the applicable rules when opening the investigation in question and that the investigation had been carried out in a timely and proportionate manner. The conclusions of the General Court are currently under review by the Court of Justice in Case C-615/19 P, following an appeal lodged by Mr Dalli.

It therefore appears that the preservation of the public interest mentioned in your confirmatory application – namely the reputation of the Commission and OLAF – has been well ensured through the independent and impartial review of both the Commission's and OLAF's actions by the Union courts.

As such, it is not the case that this public interest outweighs the interests protected by the exceptions referred to above. Indeed, the interests of the competent national authorities to follow-up of the conclusions in OLAF's final report in an undisturbed manner as well as the interest in maintaining the confidentiality of persons involved in the investigation, such as sources of information, do prevail. In particular, with regard to the reputation of persons concerned, the Office is bound to uphold the right to the presumption of innocence, in accordance with relevant case-law and as set out in recent legislation.<sup>13</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.

## 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 notice below.

Yours sincerely,

Signed Electronically

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<sup>13</sup> Directive (EU) 2016/343 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, 11.03.2016).

## Privacy notice

Pursuant to Articles 15 and 16 of Regulation No 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 or in relation to the activities carried out in order to fulfil OLAF's tasks referred to in Article 2 of Decision 1999/352/EC, ECSC, Euratom and Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The categories of your personal data being processed are contact data, identification data, professional data, and case involvement data. Your data may originate from various sources, including publicly accessible information. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. There is no automated decision process by OLAF concerning any data subject. Your data will be stored for a maximum of 15 years.

You have the right to request access to, rectification or erasure, or restriction of processing of your personal data and to object to their processing on grounds relating to your particular situation. If you wish to request access to your personal data processed in a specific file, please provide the relevant reference or description in your request. Any such request should be addressed to the Controller ([OLAF-FMB-Data-Protection@ec.europa.eu](mailto:OLAF-FMB-Data-Protection@ec.europa.eu)).

The complete privacy statement 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). If you have questions as regards the processing of your personal data or your rights you may contact the OLAF Data Protection Officer ([OLAF-FMB-DPO@ec.europa.eu](mailto:OLAF-FMB-DPO@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](mailto:edps@edps.europa.eu)) at any time.