



EUROPEAN ANTI-FRAUD OFFICE

Directorate C: Investigation Support

Director

**Mr Akis NASTAS**

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Brussels,  
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Subject: **Your request for access to documents under Regulation  
1049/2001<sup>1</sup>**

Dear Akis Nastas,

Thank you for your email dated 29 January 2014 addressed to OLAF.

You state that the context of your application pursuant to Regulation (EC) No 1049/2001 is the Activity Report of the OLAF Supervisory Committee ('SC'), January 2012 – January 2013('Report').

You ask for the following documents:

1. The evaluation grid proposed by the Supervisory Committee (reference: paragraph 28 of the Supervisory Committee Report from January 2012 to January 2013).
2. The documents drawn up in response to the proposed evaluation grid, including those drawn up by the OLAF Data Protection Officer.
3. The document(s) advancing arguments that the Supervisory Committee lacked competency under Regulation 1073/99 to issue opinions on individual investigations (reference: paragraph 28 of the Supervisory Committee Report from January 2012 to January 2013).
4. The document(s) drawn up from 2001 to 2013 with some kind of an analysis, or guidance to OLAF staff, or equivalent, concerning the time-limits under Community law (e.g., article 3 of Regulation 2188/95 'limitation period for proceedings') barring OLAF's investigative acts seeking the collection of incriminating evidence about facts and documents predating the time-limits (reference: paragraph 37 and footnote 30 of the Supervisory Committee Report from January 2012 to January 2013).
5. The 'complaints' of natural and legal persons about OLAF's investigations that lead to an internal review of the 'complaint' (reference: paragraph 54 of the Supervisory Committee Report from January 2012 to January 2013).
6. The OLAF report with the conclusions of the internal review that was forwarded to the complainants (reference: paragraph 54 of the Supervisory Committee Report from January 2012 to January 2013).

<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, 31.05.2001, 43.



## Reply

Two preliminary remarks are in order.

The purpose of Regulation (EC) No 1049/2001 is to guarantee access to documents for everyone and as a consequence the documents disclosed under that Regulation enter the public domain. Any document disclosed to an individual pursuant to that Regulation is to be automatically disclosed to the public following a subsequent request or by the Commission under its rules implementing that Regulation. It is in this light that OLAF has examined your request.

OLAF has a duty to safeguard the protection of privacy and integrity of individuals in accordance with European Union legislation. Article 10 of Regulation 883/2013<sup>2</sup> requires OLAF to safeguard confidentiality and the protection of personal data. Prior to the adoption of this Regulation, Article 8 of Regulation 1073/99 placed similar obligations upon OLAF.

### Request no 1

I understand that the Secretariat of the OLAF Supervisory Committee has already replied to your first request and granted you access to the document you requested, i.e. the evaluation grid proposed by the Supervisory Committee (reference: paragraph 28 of the Supervisory Committee Report from January 2012 to January 2013).

Paragraph 28 of the Activity Report of the OLAF Supervisory Committee for the period January 2012 to January 2013 reads: 'The SC takes the view that the standard work form used could be further improved, in order to include other aspects (i.e. compliance with national rules, requests for access to documents or to the file, right not to incriminate oneself, the reasonable time requirement, impartiality, right to privacy). In May 2012 the SC proposed to OLAF a grid for the evaluation of the respect of fundamental rights and procedural guarantees prior to the transmission of cases to national judicial authorities.'

The disclosed grid contains no case-related information, no personal data and does not belong to a case file. Please note that this document is of historical value only, as it was created on 24 May 2012 and that it was never used by OLAF.

### Request no 2

You request 'the documents drawn up in response to the proposed evaluation grid, including those drawn up by the OLAF Data Protection Officer.'

Having carefully considered your request OLAF has identified one document which was drafted as a result of the grid, but regrets that this document cannot be disclosed, for the following reasons.

*(i) Presumption of applicability of exemption relating to the purpose of inspections, investigations and audits as referred in Art. 4(2), third indent.*

The document is an internal document, used for the purpose of investigations. According to the Courts of Justice of the European Union (CJEU), there is a general presumption that Article 4(2), third indent of Regulation (EC) No 1049/2001 applies in the context of inspections and audits. This means that Article 4 (2) third indent of Regulation (EC) No 1049/2001 applies whenever documents relating to an investigation procedure are

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<sup>2</sup> Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 OJ [2013] L 248/1.

requested under Regulation (EC) No 1049/2001.<sup>3</sup> Furthermore, investigations carried out by national authorities following information collected in an OLAF investigation are also protected by Article 4(2) third indent.<sup>4</sup>

The CJEU has also stated that, in order to determine the scope of Regulation (EC) No 1049/2001, account must be taken of relevant sectorial rules governing the relevant administrative procedure. If these rules do not grant the party concerned by the respective administrative procedure a right to access the requested documents, there is a general presumption of non-accessibility.<sup>5</sup> In this case, Regulation 1073/99 did not make provision for any specific entitlement to access to the documents you requested (nor does Regulation 883/2013).<sup>6</sup>

#### Overriding public interest

The exceptions of Article 4(2) and (3) of the Regulation apply unless they are waived by an overriding public interest in disclosure. 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. The CJEU has ruled that an overriding public interest should have an objective and common character and that it cannot be mistaken with an individual or private interest.<sup>7</sup> You have argued that this request concerns 'directly matters at the junction of the respect of fundamental rights and (in external investigations) the intrusion of OLAF in the private business affairs of natural and legal persons. They are documents that have no bearing at all with any individual OLAF investigation, and therefore they do not fall under the ambit of Article 4(2) third indent'. OLAF takes the view that a public interest in the sense of Regulation (EC) No 1049/2001 has not been demonstrated for the disclosure of a document relating to investigations and of a purely internal nature. The public interest is already served by the availability on the OLAF internet website of documents relating to its procedures and by the Supervisory Committee's reports. These documents are available on [http://ec.europa.eu/anti\\_fraud/documents/gip/gip\\_18092013\\_en.pdf#page=1](http://ec.europa.eu/anti_fraud/documents/gip/gip_18092013_en.pdf#page=1) and [http://ec.europa.eu/anti\\_fraud/about-us/reports/supervisory\\_reports/index\\_en.htm](http://ec.europa.eu/anti_fraud/about-us/reports/supervisory_reports/index_en.htm). The public interest does not therefore outweigh the interests protected by the exception mentioned above.

#### Request no 3

You request 'the document(s) advancing arguments that the Supervisory Committee lacked competency under Regulation 1073/99 to issue opinions on individual investigations'.

This relates to paragraph 32 of the Activity Report of the OLAF Supervisory Committee for the period January 2012 to January 2013, which read: 'The power of the SC to issue formal opinions on individual cases was challenged by the OLAF DG. The SC strongly disagrees with that and underlines that examination of individual cases and formulating the relevant conclusions is an indispensable element of the SC's monitoring tasks making it possible to communicate swiftly the results of its work and the potential problems discovered. It allows the OLAF DG to react promptly to risks and to take the appropriate measures to improve OLAF's investigative activity, where necessary. During the reporting period, the SC informed the OLAF DG of the results of its monitoring of another individual case and also issued recommendations to him.'

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<sup>3</sup> Cases C-139/07 P Commission v. Technische Glaswerke Ilmenau , 29.6.2010; C-477/10P Agrofert Holding v Commission, 28.6.2012

<sup>4</sup> Case T 391/03 and T-10/04 Franchet Byk v Commission, 6.7.2006

<sup>5</sup> Cases C-477/10P Agrofert Holding v Commission, 28 June 2012; C-139/07 P Commission v Technische Glaswerke Ilmenau, 29.6.2010; C- 28/08 P Commission v Bavarian Lager

<sup>6</sup> Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999

<sup>7</sup> Case T-237/05 Odile Jacob, 9 June 2010, 190-191

OLAF has identified one document corresponding to your description. Having carefully considered your request, OLAF has come to the conclusion that this document cannot be disclosed, for the following reasons.

*The privacy and integrity of individuals protected in accordance with Community legislation regarding the protection of personal data as referred in Article 4(1)(b) of the Regulation.*

The documents requested include, inter alia, the personal data of individuals, such as persons concerned. When access to documents which contain personal data is sought, Regulation N° 45/2001, which specifically applies to the processing of personal data by the Institutions, applies. Your attention is drawn to Article 8(b) of this Regulation. On the basis of the information available OLAF considers the necessity for disclosing personal data has not been established and if disclosed, it would clearly undermine the privacy and the integrity of the individuals concerned. In particular, the public disclosure of the names of the persons concerned would affect the reputation since it would relate them to OLAF investigations.

#### Overriding public interest

The exceptions of Article 4(2) and (3) of the Regulation apply unless they are waived by an overriding public interest in disclosure. 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. The CJEU has ruled that an overriding public interest should have an objective and common character and that it cannot be mistaken with an individual or private interest.<sup>8</sup> You have argued that this request concerns directly matters at the junction of the respect of fundamental rights and (in external investigations) the intrusion of OLAF in the private business affairs of natural and legal persons. They are documents that have no bearing at all with any individual OLAF investigation, and therefore they do not fall under the ambit of Article 4(2) third indent'. However, at this stage no arguments have been identified to demonstrate a public interest in the sense of Regulation (EC) No 1049/2001.

However, you may be interested to know that OLAF and the Supervisory Committee have now reached an agreement, which is available on the OLAF internet at the following addresses:

[http://ec.europa.eu/anti\\_fraud/media-corner/press-releases/press-releases/2014/20140101\\_01\\_en.htm](http://ec.europa.eu/anti_fraud/media-corner/press-releases/press-releases/2014/20140101_01_en.htm) (press release) and  
[http://ec.europa.eu/anti\\_fraud/documents/legal-framework-agreements/working\\_arrangements\\_olaf\\_supervisory\\_committee\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/legal-framework-agreements/working_arrangements_olaf_supervisory_committee_en.pdf) (agreement)

#### Request no 4

You request 'the document(s) drawn up from 2001 to 2013 with some kind of an analysis, or guidance to OLAF staff, or equivalent, concerning the time-limits under Community law (e.g., article 3 of Regulation 2188/95 'limitation period for proceedings') barring OLAF's investigative acts seeking the collection of incriminating evidence about facts and documents predating the time-limits(reference: paragraph 37 and footnote 30 of the Supervisory Committee Report from January 2012 to January 2013).'

Paragraph 37 and footnote 30 read as follows: 'Occasionally, the nine months reports did not comply with the requirements of Article 11(7) of Regulation (EC) No 1073/99. The SC noted in particular that essential information such as the time-barring consideration was often missing, also in the final reports. The SC had thus major difficulties in identifying cases which may not be taken up by national authorities due to

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<sup>8</sup> Case T-237/05 Odile Jacob, 9 June 2010, 190-191

time-barring reasons.' In addition 'there was no reference to time-barring aspects in 89 out of 188.'

Please find attached a document showing some of the time barring in the EU Member States. This list is a historical document, which was placed on the OLAF intranet. This list is now obsolete. The document is archived and has no further application.

Please also note that this document cannot be reproduced or disseminated for commercial purposes without prior consent given by OLAF.

#### Requests No 5 and No 6

You request 'the 'complaints' of natural and legal persons about OLAF's investigations that lead to an internal review of the 'complaint' (reference: paragraph 54 of the Supervisory Committee Report from January 2012 to January 2013).'

Paragraph 54 of the Activity report of the OLAF Supervisory Committee (January 2012-January 2013) reads: ' In some cases, an internal review procedure was put in place in OLAF, at the request of the persons concerned. The SC noted that the internal review lead to the conclusion that OLAF acted within its competence and respected the fundamental rights and procedural guarantees of the persons concerned.'

You also request 'the OLAF report with the conclusions of the internal review that was forwarded to the complainants (reference: paragraph 54 of the Supervisory Committee Report from January 2012 to January 2013).'

Having carefully considered your requests no 5 and no 6, OLAF has come to the conclusion that these documents cannot be disclosed, for the following reasons.

*Presumption of applicability of exemption relating to the purpose of inspections, investigations and audits as referred in Art. 4(2), third indent.*

The documents are internal documents, used in the context of investigations. According to the Courts of Justice of the European Union (CJEU), there is a general presumption that Article 4(2), third indent of Regulation 1049/2001 applies in the context of inspections and audits. This means that Article 4 (2) third indent of Regulation (EC) No 1049/2001 applies whenever documents relating to an investigation procedure are requested under Regulation (EC) No 1049/2001.<sup>9</sup> Furthermore, investigations carried out by national authorities following information collected in an OLAF investigation are also protected by Article 4(2) third indent.<sup>10</sup>

The CJEU has also stated that, in order to determine the scope of Regulation (EC) No 1049/2001, account must be taken of relevant sectorial rules governing the relevant administrative procedure. If these rules do not grant the party concerned by the respective administrative procedure a right to access the requested documents, there is a general presumption of non-accessibility.<sup>11</sup> In this case, Regulation 1073/99 did not make provision for any specific entitlement to access to the documents you requested (nor does Regulation 883/2013).<sup>12</sup>

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<sup>9</sup> Cases C-139/07 P Commission v. Technische Glaswerke Ilmenau , 29.6.2010; C-477/10P Agrofert Holding v Commission, 28.6.2012

<sup>10</sup> Case T 391/03 and T-10/04 Franchet Byk v Commission, 6.7.2006

<sup>11</sup> Cases C-477/10P Agrofert Holding v Commission, 28 June 2012; C-139/07 P Commission v Technische Glaswerke Ilmenau, 29.6.2010; C- 28/08 P Commission v Bavarian Lager

<sup>12</sup> Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999

*The privacy and integrity of individuals protected in accordance with Community legislation regarding the protection of personal data as referred in Article 4(1)(b) of the Regulation.*

The documents requested include, inter alia, the personal data of individuals, such as persons concerned. When access to documents which contain personal data is sought, Regulation N° 45/2001, which specifically applies to the processing of personal data by the Institutions, applies. Your attention is drawn to Article 8(b) of this Regulation. On the basis of the information available OLAF considers the necessity for disclosing personal data has not been established and if disclosed, it would clearly undermine the privacy and the integrity of the individuals concerned. In particular, the public disclosure of the names of the persons concerned would affect the reputation since it would relate them to OLAF investigations.

*The decision-making process of the Commission in a matter, where the decision has not been adopted as referred in Art. 4(3), first paragraph of the Regulation.*

The documents concerned were drafted for internal use and contain opinions for internal use, which form part of deliberations and preliminary consultations within OLAF. Disclosure would be detrimental to OLAF's decision-making process in anti-fraud cases, as it would seriously undermine OLAF's capacity to seek the opinions of its own staff on various issues related to its investigations. This would in turn deprive OLAF of important elements of information and consequently undermine the essential principles on which the decision-making process within OLAF is based.

*The protection of commercial interests of natural or legal persons (Art. 4(2), first indent)*

The document contains the names and/or commercially sensitive information on private entities, the disclosure of which could harm their commercial interests. In particular, the disclosure of the information in the document concerned could harm the reputation of legal entities.

#### Overriding public interest

The exceptions of Article 4(2) and (3) of the Regulation apply unless they are waived by an overriding public interest in disclosure. 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. The CJEU has ruled that an overriding public interest should have an objective and common character and that it cannot be mistaken with an individual or private interest.<sup>13</sup> You have argued that 'there is an overriding public interest to examine under close scrutiny OLAF's respect of fundamental rights and legality' and that 'the granting to the full possible and in compliance with Union law of access to those documents will serve that object'. In OLAF's view, this interest is already served by the making available on the OLAF internet website of documents relating to its procedures and by the Supervisory Committee's reports. These documents are available on [http://ec.europa.eu/anti\\_fraud/documents/gip/gip\\_18092013\\_en.pdf#page=1](http://ec.europa.eu/anti_fraud/documents/gip/gip_18092013_en.pdf#page=1) and [http://ec.europa.eu/anti\\_fraud/about-us/reports/supervisory\\_reports/index\\_en.htm](http://ec.europa.eu/anti_fraud/about-us/reports/supervisory_reports/index_en.htm). The public interest does not therefore outweigh the interests protected by the exceptions mentioned above.

#### Possibilities of review

If you wish any of the above decisions to be reviewed, the procedure for doing so involves making a written application for such a review to OLAF's Director General at the address below. Your attention is drawn the fact that the time limit for making such a request is fifteen days from receipt of this letter.

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<sup>13</sup> Case T-237/05 Odile Jacob, 9 June 2010, 190-191

The Director General of OLAF will then inform you of the result of this review within 15 working days from the registration of your request, either granting you access to the parts of the document or confirming the refusal. In the latter case, you will be informed of how you can take further action.

Your further correspondence should be sent to the following address:

Director General  
DG OLAF  
European Commission  
Rue Joseph II, 30  
B-1049 BRUSSELS

Your attention is drawn to the privacy statement below.

Yours sincerely,



Beatriz SANZ REDRADO

#### **Privacy statement**

Pursuant to Articles 11 and 12 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 carrying out OLAF's investigative activity. The categories of your personal data being processed are identification data, professional data, and case involvement data. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. Your data will be stored 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 the receipt of your request, 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](mailto: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).