



Directorate A Investigations I
Director

Ms Margarida da SILVA
CEO
Rue d'Edimbourg 26,
Ixelles 1050

Via e-mail

[ask+request-5256-
2ec89dc3@asktheeu.org](mailto:ask+request-5256-2ec89dc3@asktheeu.org)

Brussels
olaf.c.4(2018)9770

Subject: Your application for public access to documents

Case No OC/2016/0055/A1

Dear Ms Silva,

We refer to your request of 16 March 2018, registered in OLAF on 19 March 2018, under reference OCM(2018)6520, by which you submitted an application for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents.

You requested access to the "*documents which relate to any investigation into former President Jose Manuel Barroso's and Goldman Sachs International*".

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, your attention is drawn 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 – presumption of non-accessibility

Having carefully considered all circumstances, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of public access laid down in Article 4 of Regulation (EC) No 1049/2001 based on the following considerations.

OLAF's position is based on the most recent evolution of the case-law in the field of access to documents and as such is applicable without any discrimination to all applicants (journalists, members of the general public etc).

1 OJ L145, 31.05.2001, page 43.

The documents which you seek to obtain are part of an OLAF investigation file and therefore covered by the exceptions 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, as well as the protection of the decision-making process as referred to Article 4(3) second sentence of the Regulation.

The General Court recognised in recent case-law² a general presumption of non-accessibility for documents in OLAF case files. It considers that the disclosure to the public under Regulation 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, both now and in the future. This implies that the disclosure of the requested documents can be refused without carrying out a concrete, individual examination of those documents in order to assess whether their disclosure may seriously undermine the protected interest, and that no partial access needs to be considered (see below).

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 gathered³, 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 purposes of the investigation.

The protection of confidentiality extends to closed cases⁴. 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 is likely to harm 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 of 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. 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, public disclosure of selection/investigation documents could negatively affect OLAF's future cooperation with national administrative or judicial authorities and vice versa in the context of its investigations.⁵

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

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

3 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..

4 Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 164.

5 Judgment of the General Court of 12 May 2015, *UAHE v Commission*, T-623/13, (EU:T:2015:268), paragraphs 72-79.

documents.⁶

OLAF notes that the general presumption that the documents cannot be disclosed pursuant to Article 4(2) third indent and 4(3) of Regulation (EC) No 1049/2001 is without prejudice to the application of other relevant exceptions referred to in Article 4 of that Regulation to certain parts of the requested documents. However, in the present circumstances OLAF has not considered it necessary to analyse the applicability of those exceptions.

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.

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 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.

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 N. J. ILETT
Director General (acting)
European Anti-Fraud Office (OLAF)
European Commission
B-1049 BRUXELLES
BELGIUM

Your attention is drawn to the statement concerning the transfer of personal data below.

Signed Electronically

6 Ibid., paragraph 91.

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.