



The Director General

Aisha Down

Emerika Bluma 8,
Sarajevo, Bosnia and
Herzegovina

E-mail: ask+request-7347-8e0be014@asktheeu.org

Via e-mail and registered mail

Brussels

Subject: Your confirmatory application for public access to documents

Case No OF/2011/1181 (Please include this number in all correspondence)

Dear Mrs Down,

We refer to your email dated 20 November 2019, by which you make a confirmatory application for public access to documents in relation to OLAF's reply to your initial request for public access to documents of 19 November 2019 (OCM(2019)26256).

1. Your confirmatory application

On 2 October 2019, you submitted an initial application for public access to documents under Regulation (EC) No 1049/2001¹, in which you requested public access to the following documents:

"All documents and correspondence related to OLAF's investigation of links between Japan Tobacco International (JTI), JTI's Middle Eastern distributor IBCS Trading, Syria Duty Free Shops (SDF) Ltd, and Rami Makhlouf.

Documents showing when OLAF was first aware of the link between Assad and JTI.

Documentation of the launch of OLAF's investigation of the links between Makhlouf, SDF Ltd, and JTI.

All information and documents given by Cypriot authorities to OLAF regarding JTI's links to Makhlouf, SDF Ltd, and Assad. All correspondence between Cypriot authorities and OLAF on this subject. All meetings between Cypriot authorities and OLAF on this subject.

All meetings between OLAF and JTI on the subject of the investigation of links between JTI, IBCS Trading, Syria Duty Free Shops Ltd, and Rami Makhlouf. All negotiations related to this investigation".

By letter of 19 November 2019, OLAF identified your application as a request for access to

¹Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents OJ L145, 31.05.2001, page 43.



documents of OLAF's investigation file OF/2011/1181 and refused public access to them. OLAF explained that the documents are covered by a general presumption of non-disclosure recognised by the constant case-law², according to 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, as well as the decision making process, both now and in the future.

In your confirmatory application, you reiterate your request for full/partial access to the same documents as requested in your initial application. In addition, you have suggested the following arguments of your request:

"I would like you to review this refusal, for the following reason: I believe there is an overriding public interest in disclosure. Investigations have demonstrated that tobacco majors bribe authorities and exploit war zones to sell their products.

https://urldefense.com/v3/_https://www.bbc.com/news/business-40787784_;!NW73rmyV52c!VAMCtetseTbJNdThHs4dwhaFgLZVsBcAPvkLcKRKFmACxVH53ifLTOGqSP6Oo-gthnvGsnx-\$

https://urldefense.com/v3/_https://seatca.org/revealed-how-british-american-tobacco-exploited-war-zones-to-sell-cigarettes/_;!NW73rmyV52c!VAMCtetseTbJNdThHs4dwhaFgLZVsBcAPvkLcKRKFmACxVH53ifLTOGqSP6Oo-gtho-kE6LQ\$

Such was the suspicion in Syria:

https://urldefense.com/v3/_https://www.wsj.com/articles/SB10000872396390444233104577595221203321922_;!NW73rmyV52c!VAMCtetseTbJNdThHs4dwhaFgLZVsBcAPvkLcKRKFmACxVH53ifLTOGqSP6Oo-gthnQUgpqQ\$

This behavior is deeply immoral and costs lives. The public has a right to understand what is being done about it by law enforcement authorities they trust. This investigation is over five years old. Surely, at this point, public understanding and corporate accountability are a greater concern than future audits on a closed case.

If the refusal stands, then please provide information on the future inspections or audits that necessitate this information being kept secret.

A full history of my request and all correspondence is available on the Internet at this address:

https://urldefense.com/v3/_https://www.asktheeu.org/en/request/documents_related_to_jti_and_syr_;!NW73rmyV52c!VAMCtetseTbJNdThHs4dwhaFgLZVsBcAPvkLcKRKFmACxVH53ifLTOGqSP6Oo-gthkBwMMsa\$ "

2. Preliminary remarks

OLAF has firstly to reiterate that the Office 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.

Notwithstanding the foregoing, 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 requested and subsequently disclosed under this Regulation are to be considered publicly available.

² Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 164.

3. Assessment of the documents under Regulation (EC) 1049/2001 - relevant applicable exceptions – presumption of non-accessibility

Having carefully considered your application, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by the exceptions to the right of access laid down in Article 4 of Regulation (EC) 1049/2001 based on the following considerations.

The requested documents are part of OLAF's investigation file OF/2011/1181. You were also informed that OLAF has closed the investigation in 2015 with a note to Japan Tobacco International (JTI).

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 institution³.

The requested document is 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, unless there is an overriding public interest in disclosure, as well as in Article 4(1)(b) which prescribes that access shall be refused where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data.

The General Court recognised in its case-law⁴ 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 internal investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process, 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 gathered⁵, 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.

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.

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

³ Judgement of the Court of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, paragraph 91.

⁴ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 162.

⁵ 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..

(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. The document requested is a part of the OLAF files and directly relates to the investigation activities aiming at gathering evidence and verifying allegations. The disclosure of the document concerned would seriously affect the decision-making process of OLAF, as it would seriously jeopardize the full independence of future OLAF investigations and their objectives by revealing OLAF's strategy and working methods. 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.⁶

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.

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 (e.g. persons concerned, witnesses, informants), so that the information they provide is used only for the purposes of the investigation.

The protection of confidentiality extends to closed cases⁷. 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.

The documents contain the name(s) of individual(s) and information which refers to the identification of the(se) person(s). This information cannot be released to the public at large on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001 which provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'. In its judgment in Case C-28/08 P (*Bavarian Lager*)⁸, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 (now replaced by, Regulation (EU) 2018/1725) becomes fully applicable.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he 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

⁶ See judgement in *Agrofert Holding v Commission*, cited above EU:C:2012:394, paragraph 66.

⁷ Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 164.

⁸ Judgment 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, paragraph 59.

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'.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. You rather refer to the overriding public interest in disclosure. Therefore, OLAF does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts. 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 is 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 document.⁹

4. Partial Access

As regards partial access, it should be recalled that the general presumption referred to above indicates that the documents covered by them do not fall within an obligation of disclosure, in full or in part, of their content.¹⁰ There is therefore no need for OLAF to examine the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

In any event, partial access is not possible, given that the information the document contains falls entirely under the general presumption of applicability of Article 4(2), third indent (in the context of inspections and audits) and of Article 4(3) second sentence (in the context of decision making) of Regulation 1049/2001.

5. 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. However, it is for the applicant to show that there is an overriding public interest in disclosure¹¹.

In addition, general considerations such as the principle of transparency and its importance cannot provide an appropriate basis for establishing that the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question¹². Moreover, the public interest in accessing a document based on the principle of transparency is not as relevant for an administrative document (such as documents related to a specific investigation) as for a document where the EU institution acts as legislator.

In your confirmatory application you put forward the existence of an overriding public interest in disclosure based on the considerations (two media publication referred) that

⁹ Ibid., paragraph 91.

¹⁰ Case C-404/10 P, *Commission v Odile Jacob*, EU:C:2012:393, paragraph 133.

¹¹ Judgement of the Court of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128, with further reference, and paragraphs 129 and 131; judgment of the General Court of 15 September 2016, *Herbert Smith Freehills v Council*, T-755/14, EU:T:2016:482, paragraph 74, with further references; see also the references quoted in judgment of the General Court of 13 November 2015, *ClientEarth v Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 137.

¹² *Strack v Commission*, mentioned above, paragraph 164.

there were investigations of the Serious Fraud Office (SFR) into British American Tobacco (BAT) which has promoted sales of its cigarettes in fragile and unstable countries of Africa and the Middle East. However, both publications do not relate to the matters under consideration, they rather refer to the investigation of the national authorities into another tobacco firm.

The third reference refers to the publication about the EU investigation - whether EU Syrian sanctions were violated by the sale of cigarettes by Japan Tobacco International (JTI) to Syrian companies.

Following this, you stated that such *"behaviour is deeply immoral and costs lives. The public has a right to understand what is being done about it by law enforcement authorities they trust."* In this regard, OLAF understands that you are referring to the situation in Syria (not the facts under OLAF investigation), as well as the general principle of transparency of EU institutions.

While these aspects of the situation in Syria are certainly dramatic, I would like to underline that OLAF's investigation was not focussed on them, and information touching on this matter is not (even marginally) referred to in the documents of the investigation.

As regard the business practices of the tobacco producers, OLAF fully recognises the importance of such investigations and the resulting considerable interest of the public to be informed. Nevertheless, the assessment under Regulation 1049/2001 has to be based on clear criteria for determining, first, the public interest in disclosure and second, for balancing it against other interests at stake. In this respect, OLAF reiterates that its reports are not decisions based on a full procedure but investigation reports that are aimed at assisting competent authorities in taking further action, based on their procedural framework. It is for the competent authorities to adopt decisions concluding that there was wrong-doing such as fraud, corruption or irregularities on the part of the persons involved (or not).

In that regard, OLAF wishes to reiterate that public disclosure of OLAF's investigation documents report might create serious misconceptions on the part of the public. Apart from causing harm to OLAF's investigative function; it could also undermine the protection of legitimate interests of persons concerned, witnesses and staff of the Office. Even the removal of personal data from the document could not prevent possible misrepresentations, specifically about the persons concerned, in particular when the identity of persons can be derived from the context or information that is already known.

Against this background, OLAF considers that the confidentiality of its investigations, as provided for in Regulation 883/2013, protects the fundamental rights of the persons under investigation. In other words, the public interest in disclosure must be balanced against fundamental principles of the EU legal order, such as the presumption of innocence.

On the basis of the above-mentioned arguments, while OLAF understands the importance of transparency of the functioning of the EU institutions, it considers that, given the nature of its anti-fraud investigations, and the confidential nature of information collected, that existence of an overriding public interest in disclosing the requested document has not been demonstrated. The arguments that you raise cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is of especially pressing concern and could thus prevail over the reasons justifying that the confidentiality of the documents be maintained. Nor have I, based on the information at my disposal, been able to identify any element capable of demonstrating the existence of an overriding public interest.

In addition, the requested documents to a great extent involves the protection of privacy and integrity of individuals (Article 4(1)(b) of Regulation (EC) No 1049/2001) where overriding public interest in disclosure is not applicable.

6. 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 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-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.