



EUROPEAN ANTI-FRAUD OFFICE

Directorate C: Investigation Support
Director

Ms Martina TOMBINI
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Via e-mail and registered mail with
AR

Brussels

Subject: **Your application for public access to documents**

Dear Ms Tombini,

We refer to your message of 7 October 2019 addressed to OLAF via AsktheEU website and registered on 11 October 2019 under Ares(2019)6313307, by which you requested public access to documents that provide details on expenditure incurred by OLAF Director-General Mr Ville Itälä during his trip to Bucharest on 14 December 2018 to participate in the conference "Impact of the EPPO Regulation at the level of the national authorities of the participating EU Member States".

We consider your request as an application for access to documents under Regulation (EC) No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents and can inform you that we have identified the document as falling under the scope of your request: Settlement of mission expenses – (reference number) concerning participation of Mr Ville Itälä in the EU Conference on the impact of the EPPO Regulation at the level of the national authorities. The mission took place from 12 to 13 December 2018.

1. Assessment of the documents under Regulation (EC) 1049/2001 - relevant applicable exception - protection of the privacy and integrity of the individual

Having carefully considered your application, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by the exception to the right of access laid down in Article 4(1)(b) of Regulation (EC) 1049/2001 based on the following considerations.

This provision provides that the 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.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, page 43.

According to the definition provided for in Article 3(1) of Regulation 2018/1725², personal data means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Moreover, Article 4(1)(b) of Regulation 1049/2001 also protects the integrity of the individual, which is a broader concept than privacy.

Your request concerns a concrete and clearly identified natural person. The information requested is included in the cost statement relating to the official assignment (mission) of the Director-General of OLAF. This cost statement contains information directly related to the concrete individual and even if the travel costs are incurred in his professional functions, the information requested nevertheless constitutes personal data.³ As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life.⁴

In the recent *Psara* ruling, which concerned the expenditure incurred by Members of the European Parliament, in particular disclosure of documents showing details regarding how and when [...] MEPs' from each Member State spent, during various periods, the General Court concluded that it is apparent [...] [that] all the requested documents contain personal data, so that the provisions of Regulation No 45/2001 are applicable in their entirety to the present case.⁵ The General Court did not only conclude that the requested documents obviously contained personal data, but also confirmed the decision of the European Parliament to refuse access to these documents. In this same judgment, the General Court stated that 'the fact that data concerning the [MEPs] in question are closely linked to public data on those persons, inter alia as they are listed on the Parliament's internet site, and are, in particular, MEPs' names does not mean at all that those data can no longer be characterised as personal data, within the meaning of Article 2(a) of Regulation No 45/2001.'⁶

Public disclosure of the above-mentioned personal data, through the release of the document (i.e. the cost statement) containing it would constitute processing (transfer) of personal data within the meaning of Article 3(3) of Regulation 2018/1725. In its judgement in Case C-28/08 P (*Bavarian Lager*)⁷, 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 the 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 the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to

² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L295, 21.11.2018, page 39.

³ See to that effect, judgment of the General Court of 25 September 2018, *Psara et al. v European Parliament*, cited above, par. 52; judgment of the Court of Justice of 16 July 2015, *ClientEarth and PAN Europe v EFSA*, C-615/13 P, EU:C:2015:489, par. 31.

⁴ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁵ Judgment of the General Court of 25 September 2018, *Maria Psara and Others v European Parliament* (hereafter referred to as '*Psara v European Parliament* judgment'), Joined Cases T-639/15 to T-666/15 and T-94/16, EU:T:2018:602, paragraph 52.

⁶ *Ibidem*.

⁷ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 59.

transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

Only if the conditions set out under Article 9(1)(b) of Regulation (EU) 2018/1725 are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the processing (transfer) of personal data occur.

In that context whoever requests such a transfer must first establish that it is necessary for a specific purpose in the public interest. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject.⁸ Where there is any reason to assume that the data subject's legitimate interests might be prejudiced, the controller of personal data then establishes whether it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.⁹ We refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹⁰.

The Court has also confirmed that a mere *interest* of members of the public in obtaining certain personal data cannot be equated with a *necessity* to obtain the said data in the meaning of Regulation 45/2001¹¹. Furthermore, according to the *Dennekamp* judgement, if the condition of necessity laid down by Article 8(b) of Regulation No 45/2001, which is to be interpreted strictly, is to be fulfilled, it must be established that the transfer of personal data is the most appropriate means for attaining the applicant's objective, and that it is proportionate to that objective¹².

You have not established that it is necessary to have the data transmitted to you for a specific purpose in the public interest. Neither did you demonstrate the existence of such a *specific* purpose.

In this respect, it is observed that the travel cost of Commission staff members, including OLAF staff, are regulated by Articles 11 - 13 of Annex VII to the Staff Regulations¹³ and are subject to a detailed legal and technical framework. Detailed rules are contained in Commission Decision of 27.9.2017 on the general provisions for implementing Articles 11, 12 and 13 of Annex VII to the Staff Regulations of Officials (mission expenses) and on authorised travel.¹⁴

There is careful scrutiny of all declared mission costs for all staff of the Commission, including the staff of OLAF, at all levels. It takes place in form of checks of mission orders as well as of declarations of costs incurred. In addition to internal checks, the costs are also subject to budgetary controls, and can be subject to audits carried out by the Internal Audit Service and the European Court of Auditors. As a result, public scrutiny of details of individual missions is not of necessity to ensure that public money is spent in accordance with applicable rules.

Moreover and importantly, while the Director-General of OLAF occupies a senior post within the European public administration, his status is not the same as the status of

⁸ Ibidem.

⁹ Judgment of the Court of Justice of 16 July 2015 in case C-615/13 P, *ClientEarth v EFSA*, EU:C:2015:219, paragraph 47.

¹⁰ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 106.

¹¹ Ibidem, paragraphs 107 and 108.

¹² Judgment of the General Court of 15 July 2015 in case T-115/13, *Dennekamp v European Parliament*, EU:T:2015:497, paragraph 77.

¹³ Staff Regulations of Officials and conditions of employment for other Servants of the EU.

¹⁴ <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-5323-F1-EN-MAIN-PART-1.PDF>, <https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-5323-F1-EN-ANNEX-1-PART-1.PDF>

Commissioners and their cabinet members. In particular, he is not subject to the same obligations as Members of the College and their cabinet members, for whom the Code of Conduct for the Members of the European Commission¹⁵ applies, which requires under Article 6(2) the Commission to publish an overview of mission expenses per Member every two months covering all missions undertaken unless publication of this information would undermine the protection of the public interest as regards public security, defence and military matters, international relations or the financial, monetary or economic policy of the Union or a Member State.

In the light of the above, we have to conclude that the transfer of personal data through the public disclosure of the personal data included in the relevant costs statement cannot be considered as fulfilling the requirements of Regulation 2018/1725. In consequence, the exception under Article 4(1)(b) of Regulation 1049/2001 applies, as no need to publicly disclose the personal data included therein is established and, in addition, it can be assumed that the legitimate rights of the data subjects concerned would be prejudiced by such disclosure. Please note also that Article 4(1)(b) of Regulation 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

2. Partial Access

OLAF has also examined the possibility of granting partial access to the requested documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

No meaningful partial access to the cost statements concerned is possible, as the entirety of the information falling under the scope of your application and included therein is covered by the exception in Article 4(1)(b) of Regulation 1049/2001.

3. 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:

Director-General OLAF
European Commission
B-1049 BRUXELLES
BELGIUM

Your attention is drawn to the privacy notice below.

Yours sincerely,

Beatriz SANZ REDRADO

¹⁵ OJ C 65, 21.2.2018, p. 7-20.

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-PROTECTION@ec.europa.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.