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EUROPEAN ANTI-FRAUD OFFICE

Directorate A: Investigations I
Director

Mr James Panichi
Politico
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Via registered mail

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Brussels
THOR/C4/CK
OLAF.C.4(S)(2016)5328

Subject: **Your application for public access to documents THOR(2016)2654**

OF No **OF/2003/0179**

Dear Mr Panichi,

We refer to your correspondence dated 25 January 2016, registered under THOR(2016)2654), in which you provided clarifications in relation to the request for access to documents which you submitted on 28 December 2015[1].

1. Scope of your application

You informed OLAF that you wish to have access to all correspondence exchanged between OLAF and the Committee of the Regions and OLAF and the European Parliament in 2003 and 2004 in relation to the case in which Mr Robert McCoy reported allegations of embezzlement and fraud at the Committee of the Regions.

2. Preliminary remarks

OLAF wishes to clarify from the outset that OLAF is legally bound to treat all information it obtains during its investigation 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 (EC) No 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 disclosed under this Regulation enter the public domain.

[1] THOR(2016)65

3. Assessment of the documents and relevant applicable exceptions

Having carefully considered your request, OLAF regrets to inform you that your application cannot be granted, as disclosure is prevented by an exception to the right of access laid down in Article 4 of this Regulation.

The documents you request access to are part of the file of OLAF investigation OF/2003/0179, which was concluded on 8 October 2003. We have not identified any other documents which are not part of that case file and which would fall into the scope of your request. The requested documents contain information about: the scheduling and carrying out of different investigative activities; the status of the OLAF investigation at the time the correspondence took place; the substance of the investigation; the findings of the OLAF investigation and the follow-up actions. The documents are therefore covered by the exception under of 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, unless there is an overriding public interest in disclosure.

3.1 General presumption of applicability of the protection of the purpose of inspections, investigations and audits as referred to in Article 4(2) third indent of the Regulation

The Court of Justice has held that to determine the scope of the Regulation (EC) No 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the documents requested under Regulation (EC) No 1049/2001 were gathered[2]. In particular, the Court stated that if specific rules do not grant the party concerned by the respective administrative procedure a right to access the requested documents (as it is the case with regard to Regulation (EU, Euratom) No 883/2013 governing OLAF's investigations[3]), there is a general presumption that Article 4(2) third indent of Regulation (EC) No 1049/2001 applies when the same documents are requested under the said Regulation[4]. Otherwise, if those interested parties – or any other person - were able to obtain access on the basis of Regulation (EC) No 1049/2001, the system of the sectoral rules would be unbalanced. Therefore, a general presumption has to be acknowledged that disclosure of the documents within the administrative file, in principle, undermines the protection of the objectives of investigation activities.

This implies that the disclosure of the requested documents can be refused without carrying out a concrete, individual examination in order to assess whether its disclosure may seriously undermine the protected interest, and that no partial access needs to be considered (see below). In addition, the general presumption applies before and also after the definitive closure of the investigation.[5]

Furthermore, with regard to recital 6 of Regulation (EU) No 1049/2001, documents relating to the institutions when acting in their legislative capacity should be made accessible to the greatest possible extent. This is in contrast to procedures relating to administrative functions specifically allocated to the institutions and governed by their own administrative rules.

The General Court referred to the general presumption as to an element under which the access to documents related to OLAF investigations is to be examined[6]. It held that the presumption of non-disclosure applies independently of the question whether the request

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[2] C-477/10 P, *Agrofert Holding v Commission*, par.50; C-139/07 P *Commission v Technische Glaswerke Ilmenau*, par.55 ff.; C-28/08 p *Commission v Bavarian Lager*, par.40 ff.

[3] See for example judgment in Case T-391/03 and T-70/04 Y *Franchet and Byk v Commission*; T-259/03 *Nicolaou v Commission*.

[4] In particular C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, but also C-477/10P, *Agrofert*.

[5] T-623/13, *UAHE vs. Commission*, par. 72-79, and T-404/10P, *Editions Odile Jacob v Commission*, par. 93 and 128.

[6] T-447/11, *Catinis v Commission*, p.43 and 44.

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for access concerns an investigation procedure that is already definitively closed or one that is pending.[7]

The documents to which you requested public access contain information concerning OLAF's investigative methods, its working relations with other EU institutions and bodies as well as information gathered using OLAF's investigative powers and the analysis and assessment of that information by OLAF.

In respect of these documents, 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 them 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 3 (external investigations), 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 (exchange of views with the institutions), 17 (Director-General).

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 individuals, so that the information they provide is used only for the purposes of the investigation.

Hence, the above case-law is applicable by analogy to the OLAF legal framework and the documents that form OLAF's investigation file come under a general presumption that disclosure would be harmful to the investigation.

In addition, having regard to the nature of the information processed in the context of OLAF investigations, that conclusion is correct irrespective of whether the request for access concerns an investigation which is already closed or an ongoing investigation.[8] The publication of the sensitive information contained in the OLAF investigation files is likely to harm the protection of personal data and/or the integrity of persons involved in the investigation (as sources of information, witnesses, private persons, officials of the competent authorities and OLAF officials), as well as the commercial interests of undertakings, regardless of whether an investigation is pending.

Furthermore, 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.

In view of the foregoing, the requested documents fall under the presumption of non-accessibility as documents containing information collected during an OLAF investigation and subject to professional secrecy. Consequently, they are exempt from disclosure to the public.

This conclusion is without prejudice to the application of other relevant exceptions referred to in Article 4 of Regulation 1049/2001 to the requested documents. However, in the

[7] T-623/13, *Union de Almacenistas de Hierros de Espana v Commission*.
[8] Case C-404/10 P, *Commission* v *Odile Jacob*, par. 124.

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present circumstances, OLAF has not considered it necessary to analyse the applicability of those exceptions.

3.2 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. Partial access is not possible, given that the information they contain falls entirely under general presumption of applicability of Article 4(2), third indent of Regulation 1049/2001 in the context of inspections and audits.

3.3 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 anti-fraud 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 document.

Please also note that the requested documents to a great extent involve 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.

4. 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 Giovanni KESSLER
Director General OLAF
European Commission
Rue Joseph II, 30
B-1000 BRUXELLES
BELGIUM.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Petra KNEUER

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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.

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