



EUROPEAN ANTI-FRAUD OFFICE

Directorate A - Expenditure –
Operations and Investigations
The Director

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By e-mail only

Brussels
OLAF.A.1(2022)31112

Subject: Your application for public access to documents

OC No: OC/2021/0451/A1 (Please include this number in all correspondence)

Dear Ms Strik,

We refer to your email of 26 September 2022 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 have requested access to the following document: “the OLAF final report on the European Border and Coast Guard Agency (FRONTEX), including all annexes”. We have interpreted your request as concerning the final report and annexes in OLAF’s investigation OC/2021/0451/A1 that was closed on 15 February 2022.

1. Preliminary remarks

OLAF wishes to recall, firstly, that it 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 883/2013² and Article 17 of the Staff Regulations.

Secondly, 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.

In this regard, we would like to underline that any documents provided under the public access regime can be considered as lawfully disseminated and officially made public. This

¹ OJ L 145, 31.05.2001, pages 43-48.

² OJ L 248, 18.9.2013, pages 1-22.



is quite different from the case where, for example, a third party has obtained the documents without authorisation and made them public. Documents officially made public are the only ones which may be regarded as authentic copies of the original.

2. Access to the final report

Please find enclosed the final report in investigation OC/2021/0451/A1.

Complete disclosure of the final report is prevented by a number of exceptions in Regulation 1049/2001 and partial access is given in accordance with Article 4(6) of Regulation 1049/2001. We explain below the reasons for which parts of the final report have been redacted or not disclosed.

A. Redaction of the part of the content of the final report

Having regard, firstly, to the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of the Regulation, the following personal data contained in the final report have been redacted:

- the names/initials and contact information of Commission and OLAF staff members not pertaining to the senior management;
- the names/initials, job titles and contact details of other natural persons;
- other personal information relating to an identified or identifiable natural person;
- other identifying information, such as pronouns, which could allow a natural person to be identified.

Article 9(1)(b) of Regulation 2018/1725³ does not allow the transmission of these personal data, except if you establish that it is necessary to have the data transmitted to you for a specific purpose in the public interest. As you have not put forward arguments to establish the necessity of a transmission for a specific purpose in the public interest, access to the personal data in the final report cannot be granted to you.

Secondly, Article 4(1)(a), third indent of Regulation 1049/2001 provides that access to a document shall be refused where disclosure would undermine the protection of the public interest as regards international relations. According to settled case-law, the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation 1049/2001, combined with the fact that access must be refused if disclosure would undermine those interests, the institutions have a wide discretion for the purpose of determining whether the disclosure of documents could undermine the public interest⁴.

In this case, the final report contains information on events involving one or more EU Member States and a third country which, if made public, could harm relations between the European Union and that third country. Given the sensitive nature of the information in question, the risk of the public interest being undermined is reasonably foreseeable and not purely hypothetical⁵. OLAF's final report has therefore been redacted to remove all references to information concerning relations between the European Union and third countries, on the other.

B. Non-disclosure of the annexes to the final report

³ OJ L 295, 21.11.2018, pages 39-98.

⁴ Judgment of 3 July 2014, *Council v in 't Veld*, C-350/12 P, EU:C:2014:2039, para. 63.

⁵ Judgment of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, para. 31

Although you have requested access to the annexes to the final report, OLAF regrets to inform you that disclosure of these documents is precluded by exceptions to the right of access in Regulation 1049/2001.

Indeed, the two aforementioned exceptions concerning the protection of privacy and the integrity of the individual in Article 4(1)(b), and the protection of the public interest as regards international relations in Article 4(1)(a) are equally applicable to the annexes as they contain information as described above in part (2A). In addition, the annexes are protected by the exception in Article 4(3), second subparagraph of Regulation 1049/2001, which provides that access shall be refused where disclosure would seriously undermine the institution's decision-making process.

In effect, the annexes provide an account of the information transmitted to OLAF or obtained by OLAF in the course of its investigation. They constitute the evidence underpinning the decision of the Director-General of OLAF to close an investigation, either with or without recommendations. Disclosure of the annexes would risk seriously affecting the decision-making process of OLAF, as it could jeopardise the full independence of future OLAF investigations and their objectives by revealing the Office's strategy and working methods and by reducing OLAF's chances of making independent assessments and of consulting its stakeholders about very sensitive issues.

More specifically, disclosing OLAF's working methods in a given investigation could enable potential fraudsters to anticipate investigative actions that OLAF may take in other (similar) investigations and to adapt or create new fraudulent schemes in a way that would render OLAF's investigative methods ineffective. Such disclosure would also run the risk of discouraging individuals (potential witnesses and informants) to cooperate with OLAF and to provide information concerning possible cases of fraud and thereby deprive OLAF of information that is of use for undertaking investigations for the protection of the financial interests of the European Union⁶. Such persons must be reassured that their statements and the information they provide to OLAF will be kept confidential, otherwise they might be inclined to censor the information they give or to hold back sensitive information⁷. As a result, OLAF's internal decision-making process with regard to other investigations could be seriously affected and this could seriously impinge on the effectiveness of OLAF's investigations.

The General Court has acknowledged a general presumption of non-accessibility of OLAF investigative documents and ruled that this presumption must be applied in order to prevent any risk of seriously undermining the institution's decision-making process within the meaning of Article 4(3), second subparagraph of Regulation 1049/2001⁸. This presumption extends to closed cases. The presumption is based on the consideration that, to determine the scope of Regulation (EC) No 1049/2001, account must be taken of relevant sectoral rules governing the administrative procedure under which the document requested (or concerned) under Regulation (EC) No 1049/2001 was gathered⁹. In the case at hand, this is Regulation (EU, Euratom) No 883/2013, which governs OLAF's administrative activity and provides for an obligation of confidentiality with regard to all information gathered during investigations.

In this regard, 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. These provisions regulate and restrict the use of information in OLAF's case files before, during and after an OLAF investigation. These

⁶ Judgment of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, para. 153.

⁷ *Ibid.*

⁸ *Ibid.*, para. 162.

⁹ See, notably, judgment of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paras. 29-34.

considerations also apply to the communications and case file documents based on which the final report of case OC/2021/0451 and its recommendation(s) were grounded on since they form part of the OLAF decision-making process.

Consequently, the annexes to the final report are exempt, in principle and in full, from disclosure to the public, unless it is demonstrated that the presumption is not applicable or that an overriding public interest justifies the disclosure of the document concerned¹⁰. The presumption recognised by the case-law entails that the documents covered by that presumption are not subject to the obligation to assess whether a partial access should be granted to them pursuant to Article 4(6) of Regulation (EC) No 1049/2001. In your request for access, no such overriding interest was identified.

3. Partial access

In accordance with Article 4(6) of Regulation 1049/2001, OLAF has examined the possibility of granting partial access to the annexes to the final report.

Partial access is not possible, given that the information contained in the annexes falls entirely under the general presumption of non-accessibility under Article 4(3), second subparagraph of Regulation 1049/2001 in the context of the protection of the decision-making process. In addition, the exceptions as regards the protection of personal data in Article 4(1)(b) of the Regulation and of international relations in Article 4(1)(a), third indent also apply.

4. Overriding public interest in disclosure

The exception laid down in Article 4(3), second subparagraph of Regulation 1049/2001 is applicable 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. In your application, you refer to the principle of transparency and the case-law of the Court of Justice according to which the use of presumptions of non-disclosure must be based on reasonable grounds and applied and interpreted strictly. You also mention, firstly, that there is a public interest in Frontex and, secondly, that access to the report is necessary for Members of the European Parliament in order for the Parliament to be able to carry out its functions of reviewing Frontex's activities. You indicate in this regard that the colleagues who are not members of the Parliament's CONT or LIBE committees did not have access to the final report, although they would be involved in the decisions taken in the plenary concerning Frontex.

It should be recalled that, according to the case-law, general considerations alone cannot provide an appropriate basis for establishing that the principle of transparency is of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the documents in question, and that it is the task of the party requesting information to make specific reference to circumstances showing that there is an overriding public interest to justify the disclosure of the documents concerned¹¹.

With regard to the annexes, these were not disclosed by OLAF to the Parliament and, having regard to the need to protect OLAF's decision-making process, as set out in part (2B) above, there is no overriding interest to justify the disclosure of these documents. In this regard, it should be underlined that the annexes to a final report have, as a general rule, a purely

¹⁰ *Ibid*, para. 38.

¹¹ Judgment of 5 February 2018, *MSD Animal Health Innovation and another v European Medicines Agency*, T-729/15, EU:T:2018:67, para. 121.

evidential and instrumental function¹² and do not contain assessments of the conduct of the persons concerned that goes beyond what is already indicated in the text of the final report.

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 Ville ITÄLÄ
Director General OLAF
European Commission
B-1049 BRUXELLES
BELGIUM

You may also send a confirmatory application to the email address: OLAF-FM-D2@ec.europa.eu.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Signed Electronically

Privacy notice

Pursuant to Articles 15 and 16 of Regulation No 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 or in relation to the activities carried out in order to fulfil OLAF's tasks referred to in Article 2 of Decision 1999/352/EC, ECSC, Euratom and Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). The categories of your personal data being processed are contact data, identification data, professional data, and case involvement data. Your data may originate from various sources, including publicly accessible information. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. There is no automated decision process by OLAF concerning any data subject. Your data will be stored for a maximum of 15 years.

You have the right to request access to, rectification or erasure, or restriction of processing of your personal data and to object to their processing on grounds relating to your particular situation. If you wish to request access to your personal data processed in a specific file, please provide the relevant reference or description in your request. Any such request should be addressed to the Controller (OLAF-FMB-Data-Protection@ec.europa.eu).

The complete privacy statement for this and all other OLAF personal data processing operations are available at http://ec.europa.eu/anti_fraud. If you have questions as regards the processing of your personal data or your rights you may contact the OLAF Data Protection Officer (OLAF-FMB-DPO@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.

¹² See, by analogy, judgment of 12 May 2021, *Alba Aguilera v EEAS*, T-119/17 RENV, EU:T:2021:254, para. 120.