

The Director-General

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Via e-mail:

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Brussels

Subject: Your confirmatory application for public access to documents

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Case No OF/2015/1348 (Please include this number in all correspondence)

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Dear Mr Razima,

By your e-mail of 30 November 2021, registered in OLAF on the same date under the reference number OCM(2021)34902, you presented a confirmatory application for public access to documents pursuant to Regulation (EC) No 1049/2001<sup>1</sup>. By your application, you would like access to the Financial Recommendation in the investigation OF/2015/1348.

Your confirmatory application follows your request for access to the same document, of 13 August 2021, based on the national law on access to information, addressed to the Ministry of Finance of the Czech Republic. By letter registered in OLAF on 22 September 2021, under reference OCM(2021)26973, the Ministry referred your request to OLAF, via the Czech Permanent Representation in Brussels, requesting OLAF to reply to you directly. This referral was based on Article 5 second paragraph of Regulation No 1049/2001. Consequently, OLAF dealt with your request of 13 August 2021 as an initial application for access to documents under Article 7(1) of Regulation No 1049/2001 and replied to you on 15 November 2021 [OCM(2021)32042], explaining that access was not possible since the document requested was covered by certain exceptions in Article 4 of Regulation No 1049/2001.

In your confirmatory application, you disagree, first, with the procedure, which preceded OLAF's initial negative decision to grant access to the requested document, and consider it as formally incorrect. Secondly, on the substance you argue that, since the Ministry already partially disclosed the requested document, the general confidentiality requirements cannot be applied on the remaining, not disclosed, part of the document to the same extent as it would be in the case where the access to the entire document would have been refused. Thirdly, you contend that OLAF did not take into consideration the overriding public interests presented by you as an applicant in the framework of the previous national procedure before the Ministry of Finance. In this context, you put forward the right of the public to information

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<sup>1</sup> 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 L 145, p. 43).

on important issues of public interest, in particular, on the alleged unlawful use of public funds involving the highest representative of the State.

When assessing a confirmatory application for access to documents submitted pursuant to Regulation No 1049/2001, the Director-General of OLAF conducts a fresh review of the reply given at the initial stage. Following this review and taking into account the arguments presented in your confirmatory application, I would like to inform you that wide partial access can be granted to the requested document, with the exclusion of information that relates to individual persons and identifiable legal persons in accordance with the exceptions to the right of public access laid down in Article 4 of Regulation No 1049/2001.

Full disclosure of the requested document is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation No 1049/2001, because it contains personal data.

Article 4(1)(b) of Regulation No 1049/2001 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*), the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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 (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation No 1049/2001 *'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation'*.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data *'means any information relating to an identified or identifiable natural person [...]'*.

The requested document includes names of natural persons and other information which can identify them; the name and contact details of an OLAF staff member not holding senior management positions.

The names of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

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 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'.*

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

I consider that, pursuant to Article 4(1)(b) of Regulation No 1049/2001 read in conjunction with Article 9(1)b of Regulation No 2018/1725, access cannot be granted to such personal data contained in the requested document, as the need to obtain access thereto for a specific purpose in the public interest has not been established. Therefore, OLAF does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced. In any case, there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of their personal data.

In addition, Article 4(2), first indent of Regulation No 1049/2001 stipulates that '*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure.*'.

The requested document contains the name of a company which, if disclosed, would undermine the protection of commercial interests of a natural or legal person.

According to established case-law, Regulation No 1049/2001 and Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)<sup>2</sup> do not contain a provision expressly giving one regulation primacy over the other. Therefore, it is necessary to ensure that each of those regulations is applied in a manner, which is compatible with the other and enables them to be applied consistently<sup>3</sup>.

In this case, OLAF investigated mainly activities of one specific company and the Financial Recommendation contains information about this company. I consider that public access to the name of the company concerned and other information identifying it, in this very specific context, would have negative effect on its reputation and public image, in so far as the reputation of any market actor is essential for its economic operations thus it affects its commercial interests.

Indeed, the General Court confirmed on several occasions that the protection of a commercial undertaking's reputation can require the (partial) refusal of documents based on Article 4(2), first indent of Regulation No 1049/2001<sup>4</sup>.

Based on the foregoing, I consider that there is a real and non-hypothetical risk that public access to the name of the company and other information identifying it would negatively affect its commercial activities, in particular in the competitive context, and thus seriously undermine its commercial interests.

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<sup>2</sup> OJ L 248, 18.9.2013, page 1.

<sup>3</sup> Judgment in *Homoki v Commission*, paragraph 56.

<sup>4</sup> Judgments of 15 January 2013, Case T-392/07, *Strack v Commission*, EU:T:2013:8, paragraph 228 and of 26 April 2016, Case T-221/08, *Strack v Commission*, EU:T:2016:242, paragraph 210 and Judgment of the General Court of 5 December 2018 in case T-875/16 *Falcon Technologies International LLC v Commission*, ECLI:EU:T:2018:877, paragraph 51.

Therefore, I conclude that access to the relevant parts of the requested document has to be refused on the basis of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

The exceptions laid down in Article 4(2) of Regulation No 1049/2001 apply unless there is an overriding public interest in disclosing the requested document. 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.

According to case law, it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the final part of Article 4(2) of Regulation No 1049/2001<sup>5</sup>. A mere reliance on the principle of transparency, its importance and such general considerations cannot provide an appropriate basis for establishing that the principle of transparency was capable of prevailing over the reasons justifying the refusal to disclose the documents in question<sup>6</sup>.

In your confirmatory application, you considered that that there was an overriding public interest in publishing OLAF's Financial Recommendation. In that regard, you, pointed out, in particular, that *'from the point of view of the potentially conflicting right of the public to information on important issues of public interest, the entire content of the Recommendation must be regarded as a reliable source of important information on the unlawful use of public funds (...), in the context of confirming the reasonable grounds for suspicion that this has happened and that such conduct may constitute serious offences (...). This is all the more in the context of the direct participation of two major constitutional actors in the country (...).'*

However, such general considerations are not sufficient to show the existence of an overriding public interest in disclosing the redacted parts of the document under Regulation No 1049/2001. Therefore, the application of the exception laid down in Article 4(2) first indent of Regulation No 1049/2001 invoked above is justified and consequently, the redacted parts of the document cannot be made publicly available.

Finally, as regards your argument concerning the procedure, please also note that, according to Article 5 of Regulation No 1049/2001, where a Member State receives a request for a document in its possession, originating from an EU institution, the Member State may refer the request to the institution. In this case, the Ministry of Finance of the Czech Republic was therefore entitled to refer your request for access to the Financial Recommendation in the above-mentioned investigation to OLAF. In turn, OLAF was entitled to handle your request as an application for public access to documents in accordance with Regulation No 1049/2001. In that regard, I would like to underline that OLAF deals with such requests in line with the rules laid down in that Regulation, as well as the procedure established by it and therefore national legislation on access to documents does not apply to this procedure.

I would also take this opportunity to recall that any document disclosed under Regulation No 1049/2001 enters the public domain and becomes automatically available to any other member of the public in the event of a request for access.

If you disagree with our decision to grant partial access to the requested document, 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

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<sup>5</sup> Judgment of 21 September 2010, C-514/07 P, C-528/07 P and C-532/07, *Sweden v API*, EU:C:2010:541, paragraph 156.

<sup>6</sup> Judgment of 2 October 2014, C-127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraphs 129-131; see also judgment of 12 May 2015, T-480/11, *Technion v Commission*, EU:T:2015:272, paragraph 83.

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 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](mailto: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](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](mailto: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](mailto:edps@edps.europa.eu)) at any time.