European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 943/2007/PB against the European Anti-Fraud Office

Decision
Case 943/2007/PB - **Opened on** 06/06/2007 - **Decision on** 05/08/2011

The background to the complaint

1. On 8 January 2007, the complainant submitted an application for public access to documents to the European Anti-Fraud Office (OLAF). The application was made under 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 ('Regulation 1049/2001') [1] . On 21 February 2007, OLAF sent the complainant a confirmation of receipt of application. The complainant did not, however, receive a reply to his application within the relevant deadline. He therefore submitted a confirmatory application on 14 February 2007. By the date of the present complaint, OLAF had not replied to either application.

2. The complainant's application for access to documents, confirmed by the confirmatory application of 14 February 2007, raised the following points.

3. The complainant referred to the judgment of the Court of First Instance of 4 October 2006 in Case T-193/04 *Tillack v Commission* [2] , and to an article entitled "Brüsseler Nachwehen", which was published in a German newspaper, the *Frankfurter Allgemeine Zeitung* ('the FAZ') of 29 November 2006. The article reported that the Public Prosecutor of Hamburg had closed an investigation, which had been opened on the basis of an OLAF notification, involving an unnamed individual at Gruner und Jahr (a publisher).

4. The complainant thereafter applied for access to the following documents:

1) A communication of 11 February 2004, mentioned in paragraph 27 of the above-mentioned decision of the Court of First Instance [3] . The complainant also asked to be informed of who had signed the said communication (the complainant's request for information).

2) The written instructions/mandate given to the relevant OLAF staff in relation to a meeting referred to in paragraph 78 of the above-mentioned judgment of the Court of First Instance [4] .

3) The document in which the possible financial damage to the financial interests of the Community was discussed, whether produced when OLAF opened its internal investigation, or at some later time.

5. The complainant did not receive a reply to his confirmatory application within the deadline foreseen in Regulation 1049/2001. He therefore submitted the present complaint to the Ombudsman. On 24 May 2007, the Ombudsman asked the complainant whether OLAF had contacted him concerning his application. On 28 May 2007, the complainant sent the Ombudsman a copy of the reply dated 19 March 2007, which he had received from OLAF in response to his confirmatory application. The complainant also submitted his additional comments ('Ergänzende Stellungnahme') to the present complaint.

6. In its reply of 19 March 2007, OLAF refused access to all of the documents concerned.

The subject matter of the inquiry

7. The Ombudsman opened the present inquiry into the complainant's following allegations and claims:

Allegations:

OLAF failed to respect the provisions of Regulation 1049/2001 in its handling of the complainant's confirmatory application.

OLAF failed (a) to reply to, and (b) to grant the complainant's request to be informed of who signed the communication referred to in paragraph 27 of the decision of the Court of First Instance in Case T-193/04, which was sent to the German justice authorities on 11 February 2004.

Claims:

OLAF should grant the complainant full or partial access to the documents requested under Regulation 1049/2001.

OLAF should inform the complainant of who signed the communication referred to in paragraph 27 of the decision of the Court of First Instance in Case T-193/04, which was sent to the German justice authorities on 11 February 2004.

The inquiry

8. The Ombudsman sent the complaint to OLAF with a request for an opinion. OLAF's opinion was forwarded to the complainant, who submitted his observations.

9. On 24 September 2008, the Ombudsman made a proposal for a friendly solution. On 15 January 2009, OLAF sent its reply to the Ombudsman, who forwarded it to the complainant with an invitation to submit observations. The complainant did not provide any observations.

10. Due to a misunderstanding regarding follow-up action which OLAF was to take in response to the Ombudsman's friendly solution proposal, but which OLAF failed to do, the Ombudsman did not immediately assess the case. OLAF was subsequently contacted regarding the follow-up action. OLAF responded by submitting a new letter to the complainant and the Ombudsman. In its letter to the complainant, OLAF granted extensive partial access to the documents in question.

The Ombudsman's analysis and conclusions

A. Allegation that OLAF failed to respect the provisions of Regulation 1049/2001 in its handling of the complainant's confirmatory application

Arguments presented to the Ombudsman

Procedural issues

11. In its opinion on the present complaint, OLAF acknowledged that there had been a delay in replying to the complainant's confirmatory application, and apologised to the complainant. The complainant did not insist on pursuing this matter in the present complaint.

12. In his proposal for a friendly solution, the Ombudsman welcomed the fact that OLAF offered the complainant a clear and unequivocal apology for its failure to respect the relevant deadline. The Ombudsman therefore considered that no further inquiry or assessment was needed as regards this aspect of the complaint.

Substantive issues

13. OLAF essentially maintained the views and arguments it set out in its reply the complainant's confirmatory application, as did the complainant with respect to his complaint to the Ombudsman. An account thereof, in the order in which they occurred, is set out below.

14. The Ombudsman recalls that the complainant asked for access to the following documents:

1. A communication of 11 February 2004, mentioned in paragraph 27 of the above-mentioned decision of the Court of First Instance [5] . In addition , the complainant asked to be informed of who had signed that communication.

2. The written instructions/mandate given to OLAF staff in relation to a meeting which was referred to in paragraph 78 of the above-mentioned judgment of the Court of First Instance [6] .

3. The document in which the possible financial damage to the financial interests of the Community was examined, irrespective of whether it was produced when OLAF's internal investigation was opened, or whether it was drawn up subsequently.

Arguments presented by OLAF for its refusal to grant disclosure of the above three documents

15. OLAF argued that Article 4(2), third indent, of Regulation 1049/2001, which relates to investigations [7] , applied to the documents because they formed part of an on-going OLAF investigation. It considered that disclosing the documents could lead to the available evidence, and its sources, becoming public. If that were to happen, it was feared that the individuals under investigation could gain an overall picture of the evidence already collected, before the evidence was complete. OLAF took the view that disclosing the documents could seriously undermine the purpose of the investigation, which was to find out whether there have been irregularities in the handling of finances. The decision of the Court of First Instance in Case T-391/03 *Franchet and Byk v Commission* [8] supported this view.

16. OLAF further argued that Article 4(1)(b) of Regulation 1049/2001 [9] was also applicable, since disclosure would put at risk the privacy and the integrity of those individuals whose names were mentioned in what was referred to as the final report. The same applied with regard to the case-handler responsible for that report.

Regarding documents 1 and 2 specifically:

17. OLAF argued that Article 4(2), first indent, of Regulation 1049/2001 [10] applied to documents 1 and 2, since it relates to the commercial interests of individuals (private or natural). OLAF was of the opinion that such interests could also be harmed if the above documents were disclosed. It explained that, until a final decision is reached on the measures which need to be taken, the mere fact that individuals are involved in the investigation can be damaging to their reputation.

18. OLAF furthermore concluded that there was no overriding public interest in disclosure [11] , and that there was no possibility of granting partial access [12] , since the stated exceptions applied to the documents in their entirety.

Arguments presented by the complainant

19. The complainant criticised OLAF's reliance on the court judgment in Case T-391/03, stating that paragraph 113 of the judgment had not been adequately considered. He pointed out that the said paragraph provides as follows: " *It is therefore appropriate to ascertain whether, at the time of the adoption of the contested decisions, inspections and investigations were still in progress which could have been jeopardised by the disclosure of the requested documents, and whether these activities were carried out within a reasonable period.* "

20. The documents to which the complainant requested access were produced in 2002 and 2004. They were, therefore, produced approximately between three and five years before his application for access. In the complainant's view, the on-going investigation to which OLAF referred did not fall within the " *reasonable period* " alluded to by the Court of First Instance, especially in light of the nine-month period generally foreseen for OLAF investigations in the above-mentioned OLAF Regulation [13] .

21. The complainant further argued that the persons who were being investigated by OLAF now all appeared to be in possession of, or have had access to, the evidence.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

22. The Ombudsman made the following proposal for a friendly solution:

23. Taking into account the Ombudsman's above findings, OLAF could reconsider its decision not to grant the complainant access to the documents requested.

24. The Ombudsman's proposal was based on an analysis of how OLAF applied (i) Article 4(2), third indent, of Regulation 1049/2001; (ii) Article 4(1)(b), third indent of Regulation 1049/2001, and (iii) Article 4(2), first indent, of Regulation 1049/2001.

25. OLAF invoked the exception under Article 4(2), third indent, of Regulation 1049/2001, explaining that disclosure could enable individuals who are under investigation to gain an overall impression of the evidence that had been collected, before the submission of evidence was completed. OLAF considered that this could seriously undermine the purpose of the investigation, which was to find out whether there were irregularities in the handling of finances.

26. The concern referred to by OLAF was, in principle, a valid one. However, in light of the specific, apparent facts of the case, the Ombudsman was not convinced that OLAF validly and adequately explained why it relied on the above exception. In its judgment in Case T-391/03 *Franchet and Byk v Commission* , the Court of First Instance held as follows (emphasis added):

" *105 The fact that a document concerns an inspection or investigation cannot in itself justify*

application of the exception invoked. According to established case-law, any exception to the right of access to Commission documents must be interpreted and applied strictly (Case T-20/99 Denkavit Nederland v Commission [2000] ECR II-3011, paragraph 45).

106 In that respect, it should be recalled that, as regards the documents referred to in Case T-391/03, OLAF's investigations were already finished at the time of the adoption of the first contested decision, 1 October 2003. The final investigation report *concerning Eurogramme was drawn up in July 2002. On 25 September 2003, OLAF drew up final investigation reports in accordance with Article 9 of Regulation No 1073/1999 concerning Eurocost and Datashop – Planistat. The applicants received, as persons implicated in these reports, copies of them by letter of 10 October 2003.*

107 Moreover, concerning Case T-70/04, the IAS investigation ended with the final report *of 22 October 2003.*

108 Therefore, in the present case, it is appropriate to determine whether documents relating to inspections, investigations or audits were covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, where the specific inspections, investigations or audits were finished and had led to the drawing-up of final reports, but the action to be taken to follow up those reports had not yet been decided.

109 The Court of First Instance has held that the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect 'the purpose of inspections, investigations and audits', applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits.

110 Certainly, it is apparent from the case-law that various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed (see, to that effect, Denkavit Nederland v Commission, paragraph 48).

111 Nevertheless, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would make access to the IAS documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities.

112 Such a solution would be contrary to the objective of guaranteeing public access to documents relating to any irregularities in the management of financial interests, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers *(see, to that effect, Case T-123/99 JT's Corporation v Commission [2000] ECR II-3269, paragraph 50).*

113 It is therefore appropriate to ascertain whether *, at the time of the adoption of the contested*

decisions, inspections and investigations were still in progress *which could have been jeopardised by the disclosure of the requested documents, and whether these activities were carried out within a reasonable period.* "

27. In light of the Court's findings, the exception here concerned could not, in principle, be validly invoked when (i) the investigation has essentially ended (evidenced, for instance, by the existence of a 'final report'), and (ii) the various authorities (Community and/or national ones) were merely in the process of deciding on follow-up action (paragraphs 111-112 of the judgment quoted above).

28. By invoking the exception in Article 4(2), third indent, of Regulation 1049/2001, OLAF merely stated that the documents " *concern an on-going investigation* ". It did not, with respect to this exception, supply any more information on the status of the investigation. However, by invoking the exception in Article 4 (1)(b) of Regulation 1049/2001 (privacy and the integrity of the individual), OLAF twice referred to " *the final report* " (" *names are mentioned in* the final report ", " *the case-handler responsible for that* final report " (emphasis added)).

29. In light of the above, it would appear that OLAF invoked the exception relating to 'investigations' in respect to an investigation which, as evidenced by the existence of a " *final report* ", had essentially already ended (see paragraphs 106-108 of the judgment quoted above). Additionally, the Ombudsman noted that, when invoking the exception relating to 'commercial interests', OLAF referred to " *the adoption of the final decision regarding the measures to be taken* ".

30. In order for OLAF to be able to rely on the exception here concerned, it would appear that it would have depended on whether other, or additional investigations were being carried out, the completion of which would have been endangered through disclosure of the documents requested by the complainant in the present case (see paragraphs 109 and 113 of the judgment quoted above). Any attempted justification in this direction would, moreover, have had further to take into account " *whether these activities were carried out within a reasonable period* ". These elements were not, however, present in the grounds which OLAF gave for its decision on the complainant's confirmatory application.

31. Considering the above, the Ombudsman made the preliminary finding that OLAF's invocation of Article 4(2), third indent, of Regulation 1049/2001 was invalid, and hence amounted to an instance of maladministration.

32. As regards OLAF's reliance on Article 4(1)(b), third indent, of Regulation 1049/2001, the Ombudsman considered it appropriate to recall first that, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be *specific* in nature. The risk of a protected interest being undermined must be *reasonably foreseeable* and *not purely hypothetical* . Consequently, the examination, which the institution must undertake in order to apply an exception, must be carried out in a *concrete manner* and *must be apparent from the reasons* given for the decision [14] .

33. By invoking Article 4(1)(b) of Regulation 1049/2001 [15] , OLAF merely stated its presumption that disclosure would put at risk the privacy and the integrity of those individuals whose names are mentioned in the final report, and that the same applied with regard to the case-handler responsible for that final report.

34. OLAF's decision contained no reasons or explanations for the above presumption which, therefore, appeared purely hypothetical. Consequently, OLAF's invocation of the above exception did not comply with the requirements to give reasons, laid down in the case-law of the Community Courts.

35. As regards OLAF's application of Article 4(2), first indent, of Regulation 1049/2001 [16] to the requested documents 1 and 2, OLAF argued that the aforementioned Article was applicable because commercial interests were at stake. In its view, the commercial interests of individuals could be harmed if disclosure were granted, in particular through damage being done to their reputation by the mere fact of being associated with the investigation before the adoption of the final decision regarding the measures to be taken.

36. The Ombudsman considered that OLAF's explanation in this regard was not, in itself, unconvincing. Indeed, OLAF referred to a specific consideration, namely, the possible harm which might be done to the reputation of the individuals involved. In the context of investigations concerning financial irregularities, this consideration appeared, in principle, to be valid.

37. However, OLAF did not appear to have considered consulting the individuals concerned. Although Regulation 1049/2001 only expressly provides for consultation where third-party " *documents* " are concerned (as opposed to the 'names' of third parties), the institutions appear to have a margin of manoeuvre within which to decide whether to consult the persons concerned [17] . In the present case, it might have been appropriate to do so, since (a) the facts relating to the events dated back several years, and (b) OLAF had apparently already finished its investigation and drawn up a final report.

38. Hence, it would have been consistent with principles of good administration to consult the third parties whose commercial interests OLAF intended to protect. OLAF refrained from doing so in this case.

B. Allegation that OLAF failed (a) to reply to, and (b) grant the complainant's request for information on who signed the communication mentioned in paragraph 27 of the decision of the Court of First Instance in Case T-193/04, which was sent to the German justice authorities on 11 February 2004.

39. The complainant asked OLAF to inform him of who signed the communication which was sent to the German justice authorities on 11 February 2004. In its decision on the complainant's confirmatory application, OLAF did not reply to this request.

40. In its opinion on the present complaint, OLAF recognised that, in accordance with the provisions of the European Commission's Code of Good Administrative Behaviour [18] , it should have treated the complainant's question as a request for information. It stated that, in view of the fact that the national judicial authority concerned had decided to close the matter, OLAF could inform the complainant that the letter was signed by its Director responsible for investigations.

41. In his observations on OLAF's opinion, the complainant appeared to be satisfied that he had now received the information he requested.

42. In light of the above, it appeared that the above matter was settled, and the Ombudsman therefore refrained from further examining this part of the case.

The arguments presented to the Ombudsman after his friendly solution proposal

43. In its reply to the Ombudsman's proposal for a friendly solution, OLAF stated that it could not, at that point in time, give a positive response. It provided, in summary, the following information and comments.

44. With regard to OLAF's application of Article 4(2), third indent of Regulation 1049/2001, OLAF pointed out that, as a matter of fact, the investigation had not ended in March 2007, when its reply was sent to the complainant. It is important to clarify this point again. OLAF noted that the Ombudsman's proposal was based on the assumption that a final case report existed. The reference to such a "final" case report was, however, a mistake. The investigation was still ongoing at the relevant point in time.

45. With regard to whether OLAF acted within a reasonable period of time, OLAF pointed out that, according to Article 6(5) of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [19] , the time spent on investigations must be proportionate to the circumstances and complexity of the case. OLAF considered that it had acted in accordance this provision, bearing in mind that more than one national judicial authority was involved in what proved to be a complex case. Insofar as the time taken by a national judicial authority is concerned, the length of the procedure is mainly a matter covered by national law. Although OLAF cannot intervene with regard to the speed or diligence of such independent authorities, in 2008 it wrote to the Belgian judicial authorities, specifically inviting them to "communicate the future developments of their procedure."

46. With regard to OLAF's reliance on Article 4(l)(b) of Regulation 1049/2001, OLAF considered that it "clearly indicated that it had carried out a concrete examination. In particular, mentioning that investigations were ongoing should not be described per se as purely hypothetical, even if OLAF had not provided detailed to the complainant."

47. With regard to OLAF's invocation of Article 4(2), first indent of Regulation 1049/2001, and the Ombudsman's finding that OLAF should have consulted the third parties involved, OLAF recalled that there was no third party *document* involved in this specific case. Therefore, there were no grounds for a consultation pursuant to Article 4(4) of Regulation 1049/2001.

48. With regard to the related argument that " *the events lay back several years* " OLAF drew attention to Article 4(7) of Regulation 1049/2001 which states that the " *exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exception may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy of commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period* ".

49. OLAF also pointed out that consulting third parties might not be consistent with the confidentiality requirements for protecting the purpose of the investigations concerned.

50. OLAF also pointed out that it was still in close contact with the Belgian judicial authorities. On 23 December 2008, it wrote to the Belgian Judicial Authorities, asking whether they had any objection to the disclosure of the requested documents, in particular the communication dated 11 February 2004. OLAF stated that it had not yet received an answer from the Belgian Judicial Authorities.

OLAF's Conclusion

51. OLAF stated that it was not in a position to accept the proposal for a friendly solution. It explained that it was waiting for a reply to the letter it sent to the Belgian Judicial Authorities on 23 December 2008. Once it had received the reply from the Belgian Judicial Authorities, it would reconsider whether to grant the complainant public access to the requested documents.

Follow-up to OLAF's response to the proposal for a friendly solution

52. On 2 May 2011, OLAF informed the Ombudsman that, on 11 April 2011, it sent a letter to the complainant, granting the latter extensive, albeit partial, access to the documents concerned. Its letter to the complainant contained the following comments:

"We have concluded that at this point in time we are in a position to disclose the requested documents and enclose the copies of documents 1-4, which we hope will meet your needs. Pursuant to Article 16 of Regulation 1049/2001, the documents cannot be reproduced or disseminated for commercial purposes unless the Commission has first been consulted.

However, OLAF regrets to inform you that parts of the documents are covered by three of the exceptions provided for by Article 4 of Regulation 1049/2001 and therefore cannot be disclosed. The exceptions which apply are that divulgation of information would undermine the protection

of the interest referred to below.

Firstly, the protection of privacy and integrity of individuals protected in accordance with Community legislation regarding the protection of personal data as referred in Article 4(1)(b) of the Regulation.

This includes, inter alia, the personal data of individuals, such as persons concerned, witnesses, employees of legal entities, etc., which if disclosed, would clearly undermine the privacy and the integrity of the individuals concerned in accordance with Regulation 45/2001 which specifically applies to the processing of personal data by the Institutions. The disclosure of that personal data would clearly expose the concerned persons to risks for their privacy and integrity.

As regards … names of persons concerned, witnesses and employees of private companies, the non-disclosed parts of documents 1 and 4 contain the names of individuals and information which refers to the reputation of these persons. Such information qualifies as personal data since it identifies the individuals. The documents in which personal data is not being disclosed refer to investigations of OLAF, allegations of corruption and possible criminal offences. Public disclosure of the names of individuals and other personal information in such context would show these persons in a negative light and would give rise to possible misrepresentations about their performance. Consequently, such disclosure would have an adverse effect on their reputation and, therefore, undermine the protection of privacy and the integrity of the individuals concerned.

The protection of commercial interests of natural or legal persons (Art. 4(2), first indent), as some parts of document 1 contain the names on private entities, the disclosure of which could harm their commercial interests.

In particular, the disclosure of the information in document 1 would harm the reputation of legal entities. This information refers to OLAF investigations, allegations of corruption and possible criminal offences. Public disclosure of the names of legal entities involved in investigation in such context would show them in a negative light, would give rise to possible misrepresentations about their performance and consequently would harm their reputation and other legitimate business interests.

Thirdly, the decision-making process of the Commission in a matter where the decision has been adopted as referred to in Art. 4(3), second sub-paragraph, of the Regulation.

The document 1 is the OLAF letter to the judicial authorities in Germany. It is prepared by the investigators responsible for investigation. This document contains the thought processes and analysis of the investigator and other responsible officials concerning the development and direction of the investigation, regarding both substantive and administrative aspects.

As you are aware, the OLAF investigative operational activities in the respective case have ceased. However, the refused parts of document were drafted only for internal use of OLAF and national judicial authorities and contain opinions for internal use and form part of deliberations

and preliminary consultations within OLAF and between OLAF and the judicial authorities in Germany. They contain possible positions to be followed or to be rejected by the OLAF investigators and their counterparts in Germany with regard to the possible investigation strategies, operational activities and decisions to be taken. They do not express the final position neither of OLAF nor of the Commission, but contain reasoning, analysis of the facts of the case, intended actions and reflect the process of the decision making process.

Disclosure of these parts of document would be highly detrimental to OLAF's capacity to perform their tasks, in particular but not limited to, the fight against fraud, in the public interest. Indeed, in order to preserve the collective nature of the institutions' decision-making process, OLAF officials should be free to submit uncensored advice and exchange ideas and practice in order to ensure that all aspects of the issues at stake so that an appropriate final decision can be taken. Such result would not be achieved if the officials involved have to take into account that their views and assessments will be subsequently disclosed to the public, even after the particular decision has been taken. In OLAF's view, the disclosure of some parts of document 1 would also seriously undermine the independence of future OLAF investigations and its objectives and ultimately interfere with OLAF's capacity to adopt final positions free from external influences, in the general interest. Consequently, Article 4(3), second subparagraph of the Regulation applies.

In documents 1-4 which are partially disclosed, names of OLAF investigators have been removed since these officials are involved in a number of investigations and other operational activities conducted by OLAF will have to share expertise and give opinions in other, future internal cases. Given the sensitivity of OLAF investigations, due to the required expertise, OLAF must take all measures in order to avoid exposing them to undue external pressure which would result in a serious undermining of possible future investigations and of its decision-making process. Indeed, disclosure of the identity of these investigators would, inter alia, impair on their capacity to conduct the other investigations independently. The public disclosure of the concerned officials' names would facilitate and encourage criticism directed against them, which, either by express design or inevitable effect, would interfere with their ability to conduct this kind of investigations and take decisions within OLAF independently. Ultimately this would also interfere with OLAF's capacity to adopt final positions free from external influences in the general interest. Consequently, Article 4(3), second subparagraph of the Regulation applies.

Overriding public disclosure

The exceptions of Article 4(2) and (3) of Regulation 1049/2001 apply unless they are waived by an overriding public interest in disclosure. 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 is not aware of any element that would cause it to conclude that there is an overriding public interest in disclosure of the removed parts of documents concerned. Rather, in this case the public interest lies on the protection of the OLAF and the Commission’s decision-making process and the commercial interests of the persons concerned."

The Ombudsman's assessment after his friendly solution proposal

53. The Ombudsman welcomes OLAF's decision to grant access to the documents requested by the complainant. The Ombudsman notes that the access granted was extensive, albeit partial. OLAF appears to have very carefully and meticulously selected those specific parts of the texts it considers to be covered by the exceptions to which it referred in its last communications with the Ombudsman and the complainant. The remaining text in all the documents therefore provides a considerable amount of information.

54. To avoid prolonging the present inquiry, and in light of how facts and circumstances have changed since the inquiry was opened, the Ombudsman considers it appropriate to invite the complainant to submit a new complaint if he wishes to complain about OLAF's blanking-out of sections of the documents to which he requested access.

55. The remainder of the Ombudsman's assessment concerns the evaluation of OLAF's response to the Ombudsman's findings in his proposal for a friendly solution.

56. The Ombudsman was not convinced by OLAF's argument that it was entitled to rely on the exception intended to protect investigations. The Ombudsman based his finding on the fact that the investigation in question was closed. In its response to the proposal for a friendly solution, OLAF clarified that, at the relevant point in time, the investigation was not closed. It acknowledged that the words 'final report' were used in relevant documents, but pointed out that this was a mistake. The Ombudsman therefore now concludes that, contrary to the findings set out in the proposal for a friendly solution, there was no instance of maladministration.

57. The Ombudsman also found that OLAF failed to provide sufficiently specific reasons to justify its reliance on the exception intended to protect the privacy and integrity of individuals. OLAF challenged this finding in its response to the proposal for a friendly solution. However, the only reason it gave was that it "clearly indicated that it had carried out a concrete examination.

58. The Ombudsman would first like to correct a possible misunderstanding. The requirement that the reasons for non-disclosure must be concrete and specific does not imply that the institution must merely make a clear statement to the effect that it carried out a concrete and specific examination. Rather, it is the statement of reasons given to the person applying for access which must be concrete and specific to the applicability of the exceptions to the actual documents in question. Without such information, the applicant cannot decide whether an institution has provided valid reasons for its decision. Furthermore, the review bodies, namely, the courts and the Ombudsman, cannot investigate disputes without asking the institution to provide more detailed explanations.

59. The Ombudsman remains unconvinced that OLAF's statement of reasons meets the standards established by the relevant case-law. However, given that OLAF granted extensive access to the documents in question, and recalling his decision in paragraph 54 above, he considers it appropriate to close his inquiry into this part of the case without further action.

60. The Ombudsman also found it problematic that OLAF did not consider consulting the individuals it intended to protect by not disclosing the documents. His finding was, in part, based on the fact that, as pointed out above, the investigation in question was closed.

61. OLAF disagreed with the Ombudsman's findings. One of the issues with which it disagreed was the consultation the Ombudsman had suggested, since no such provision is foreseen in Regulation 1049/2001.

62. The Ombudsman would first like to point out that the duty to consult, which he identified in his proposal for a friendly solution, was based on the general principle of good administration (see paragraphs 37 - 38 above). Although his finding was inspired by the reference to 'consultation' in Regulation 1049/2001, it was not, therefore, a finding of a breach of a specific provision in that legislation. The Ombudsman would like to add that the margin of manoeuvre that he found OLAF to have, for the purpose of consultation on issues of public access (see paragraph 37), may not merely benefit the person who requests access to the document. It may also benefit both OLAF and the third parties in question. The Ombudsman therefore encourages OLAF not to limit its possibility to consult to the specific situations foreseen in Regulation 1049/2001.

63. With regard to the Ombudsman's understanding that the investigation here in question was closed at the relevant time, the Ombudsman recalls that, in its reply to the proposal for a friendly solution, OLAF clarified that this was not the case. In light of this, and the fact that OLAF recently granted extensive partial access to the documents in question, the Ombudsman considers it appropriate to close the examination of this part of the case without further action.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

The Ombudsman welcomes the fact that OLAF granted extensive, albeit partial, access to the documents in question in its follow-up to the Ombudsman's proposal for a friendly solution. If the complainant is unhappy with the partial access granted by OLAF, the Ombudsman considers that the appropriate action for the complainant to take would be for him to submit a new complaint.

With regard to OLAF's invocation of the exception intended to protect investigations, OLAF clarified that, at the relevant point in time, it had not yet closed its investigation. It acknowledged that the words 'final report' were used in relevant documents, but pointed out that this was a mistake. The Ombudsman therefore now concludes that, contrary to the findings set out in the proposal for a friendly solution, there was no instance of maladministration regarding this aspect of the case.

As for the remainder of the Ombudsman's findings in his proposal for a friendly solution, the Ombudsman concludes that no further inquiries are necessary.

The complainant and OLAF will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 5 August 2011

[1] OJ 2001 L 145, p. 43.

[2] Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.

[3] The text of this provision reads as follows: "[o] *n 11 February 2004, OLAF forwarded information concerning suspicions of breach of professional secrecy and bribery to the judicial authorities in Brussels (Belgium) and Hamburg (Germany), referring to Article 10(2) of Regulation No 1073/1999.* "

[4] Paragraph 78 of the Judgment reads as follows: "[a] *s regards, second, the interim report appended to the letter sent to the Belgian judicial authorities, points 2.2 and 2.3 thereof are respectively worded as follows:*

'As already discussed with the public prosecution service in Hamburg ... on 13 January 2004 and with the public prosecution service in Brussels ... on 16 January 2004, the transmission of information to the two judicial authorities proves necessary in order to start proceedings which are independent but coordinated;... ".

[5] The text of this provision reads as follows: "[o] *n 11 February 2004, OLAF forwarded information concerning suspicions of breach of professional secrecy and bribery to the judicial authorities in Brussels (Belgium) and Hamburg (Germany), referring to Article 10(2) of Regulation No 1073/1999.* "

[6] Paragraph 78 of the Judgment reads as follows: " *[a]s regards, second, the interim report appended to the letter sent to the Belgian judicial authorities, points 2.2 and 2.3 thereof are respectively worded as follows:*

'As already discussed with the public prosecution service in Hamburg ... on 13 January 2004 and with the public prosecution service in Brussels ... on 16 January 2004, the transmission of information to the two judicial authorities proves necessary in order to start proceedings which are independent but coordinated; ".

[7] The relevant part of this provision provides as follows: " *2. The institutions shall refuse access to a document where disclosure would undermine the protection of:*

...

- the purpose of inspections, investigations and audits; ... ".

[8] Case T-391/03 *Franchet and Byk v Commission* [In Joined Cases] T-391/03 and T-70/04: Paragraph 110: " *Certainly, it is apparent from the case-law that various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed (see, to that effect, Denkavit Nederland v Commission, paragraph 48).* "

[9] The relevant part of this provision provides as follows: " *1. The institutions shall refuse access to a document where disclosure would undermine the protection of:*

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. "

[10] The relevant part of this provision provides as follows: " *2. The 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,... ".

[11] Article 4(2) and (3) of Regulation 1049/2001 provide that access shall be granted in the case of an " *overriding public interest* " in disclosure, even when the relevant exceptions apply.

[12] Article 4(6) of Regulation 1049/2001 obliges the institutions to grant partial access if possible.

[13] Regulation 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), 1999 OJ L 136, p. 1.

Article 11(7) of this Regulation provides as follows:

" *The Director shall forward to the Supervisory Committee each year the Office's programme of activities referred to in Article 1 of this Regulation. The Director shall keep the committee regularly informed of the Office's activities, its investigations, the results thereof and the action taken on them. Where an investigation has been in progress for more than nine months, the Director shall inform the Supervisory Committee of the reasons for which it has not yet been possible to wind up the investigation, and of the expected time for completion.* "

[14] See Case T-36/04, *API v Commission* judgment of 12 September 2007 [not yet published

in the ECR], paragraph 54 (citing cases). " *The general nature of the statement of reasons on which a refusal of access is based, as well as its brevity or its formulaic character, can be indicative of failure to carry out a concrete examination only where it is objectively possible to give the reasons justifying the refusal of access to each document, without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose. See Case T-36/04, cited above, paragraph 67.* "

[15] The relevant part of this provision provides as follows " *1. The institutions shall refuse access to a document where disclosure would undermine the protection of:*

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. "

[16] The relevant part of this provision provides as follows " *2. The 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, "

[17] Cf. Case T-391/03 *Franchet and Byk v Commission* , referred to above, paragraph 98 (consultation of national courts).

[18] OJ 2000 L 267, p. 63.

[19] OJ 1999 L 136, p. 1.