

Decision in case 1061/2019/FP on the Refusal by the European Anti-Fraud Office to give public access to documents concerning travel expenses of identified staff members

Decision

Case 1061/2019/FP - Opened on 14/06/2019 - Decision on 26/09/2019 - Institution concerned European Anti-Fraud Office (No maladministration found) |

The case concerned the refusal by the European Anti-Fraud Office (OLAF) to grant public access to documents concerning travel expenses of senior OLAF staff members.

The Ombudsman found that OLAF was justified in refusing to disclose the requested documents on the grounds that disclosure would undermine the protection of privacy and the integrity of the individual and the purpose of inspections, investigations and audits.

However, the Ombudsman recognises that greater transparency concerning expenses incurred by EU officials enhances citizens' trust in the EU institutions. For this reason, the Ombudsman, on closing the case, suggested that OLAF takes steps to review its policy and consider whether a more transparent approach would be in the public interest. In particular, she suggests regular proactive disclosure of the expenses incurred by the Director-General that are not directly related to a specific OLAF investigation.

Background to the complaint

1. On 2 March 2019, the complainant asked the European Anti-Fraud Office (OLAF) to grant her public access to documents [1] containing the travel expenses, for the period of 1 January 2015 to 31 December 2018, of three OLAF staff members, including of the former Director-General of OLAF and a Director.
2. On 9 March 2019, the complainant made a second request to OLAF for public access to documents containing the travel expenses, for the period of 1 January 2015 to 2019, of another three OLAF Directors.
3. In particular, the complainant requested access to documents that contain, for each work trip, information concerning: a) where the work trip began and ended, and the costs incurred for



travel; b) the dates and the duration of each work trip; c) the amounts spent on accommodation; d) miscellaneous costs. If the travel was by air taxi, and a team of people were travelling, she also requested documents providing the details of the other travellers, including names and job titles.

4. On 10 and on 26 of April 2019 respectively, OLAF replied to the two requests, informing the complainant that it would not grant access to the documents.

5. On 26 April 2019, the complainant requested that OLAF review its two decisions, a so-called confirmatory application.

6. In the absence of a response from OLAF, the complainant turned to the Ombudsman on 10 June 2019.

The inquiry

7. The Ombudsman opened an inquiry into OLAF's refusal to grant public access to the requested documents.

8. The Ombudsman asked OLAF to provide samples of the relevant documents. OLAF provided a sample of 12 documents.

9. On 5 July 2019, after the commencement of the Ombudsman's inquiry, OLAF adopted a decision on the complainant's request for review (a so-called 'confirmatory decision') again refusing public access to all the requested documents.

Arguments presented to the Ombudsman

Supporting arguments by the complainant

10. The complainant argues that there is an overriding public interest in disclosing these documents. EU institutions, she stated, have to ensure appropriate levels of public transparency regarding the travel expenses of senior officials and of staff members in general. She said that the public has to be able to hold the EU accountable for its use of the EU budget. The complainant claims that there is no reason to assume that the staff members' legitimate interests might be prejudiced, as the request does not relate to sensitive personal data. She also argues that the presumption of confidentiality that applies to documents related to OLAF investigations would not be applicable to documents that concern business trips.

11. She concludes that access to these data would be in line with the European Commission's practice of publishing on its website the travel expenses of commissioners.

Supporting arguments by the institution

12. OLAF argues that the information requested constitutes 'personal data' of its staff and that the disclosure of the requested documents would undermine the privacy and integrity of the individuals concerned. [2] It claims that the applicant failed to establish the necessity to have



the personal data transmitted to her. OLAF noted that this test is a legal requirement and the necessity has to be for a specific purpose in the public interest. [3]

13. OLAF states that the appropriate level of public transparency, with regard to the travel expenses of top officials, is already ensured by the fact that the travel costs of its staff members are regulated by the Staff Regulations [4] (a public document) and are regularly subject to audits and control procedures. OLAF added that it publishes, on its website, information on its activities including, where appropriate, business trips of its staff.

14. It also stated that the persons whose travel costs are sought are not public office holders, but are rather officials “ *with supportive functions allowing the institutions to perform their mission* ”. It added that there is no established practice of publishing travel expenses and as such, the disclosure of these data would not be proportionate.

15. OLAF also argued that the release of the documents concerning business trips carried out by OLAF staff in the context of investigations, would undermine the protection of the purpose of inspections, investigations and audits [5] as well as the protection of the decision-making process. [6] OLAF said that, in this respect, the EU courts have recognised a general presumption of non-accessibility to OLAF case files. OLAF stated that the Court considered that public disclosure of documents related to OLAF's investigations could fundamentally undermine the objectives of its investigative activities, as well as its decision making process, both now and in the future. OLAF added that the complainant did not demonstrate the existence of an overriding public interest in disclosure and therefore this exception justified the refusal, in addition to the personal data arguments.

The Ombudsman's assessment

16. The concept of ‘personal data’ is very broad. It covers any information linked to an identified or identifiable person. The information need not be linked to the person’s private life in order to be ‘personal data’. Information linked to the work of a person in a public body can also be their ‘personal data’. The Ombudsman thus accepts OLAF’s assessment that the details of expenses incurred by identified staff members are personal data. As such, any disclosure of the document must fulfil the conditions for transfer of personal data set out in EU data protection law.

17. Under EU data protection law, OLAF must follow a three-stage analysis in considering whether it can grant public access to personal data. First, the recipient needs to demonstrate the need for the transfer of the personal data for a specific purpose in the public interest. Second, there must be no reason to believe that such transfer might undermine the legitimate interests of the data subject. Third, the controller (OLAF) needs to establish that it is proportionate to transmit the personal data for that specific purpose, weighing up the various competing interests.

18. As regards the first stage of the analysis, the Ombudsman notes that the complainant has stated that access to the travel expenses of OLAF’s staff members is necessary to enable the



public to hold the EU accountable for its use of the EU budget. The Ombudsman recognises the force of this argument. However, she accepts that, according to EU case law, such a general justification based on the interest of transparency cannot alone justify the disclosure of personal data. [7] According to EU data protection law, in order to justify the transfer of personal data, the requester must demonstrate that such transfer **is necessary for the performance of a task carried out in the public interest** .

19. As regards the second and third stages of the analysis, OLAF took the view that disclosure of the data would not be proportionate to the objective pursued by the complainant. The Ombudsman notes that when assessing the proportionality of the transfer and the risk of the legitimate interests of data subject being prejudiced, the institution needs to take the identity of the data subject(s) into account. [8]

20. The Ombudsman considers that, in this case, the complainant failed to demonstrate the necessity for the transfer of this personal data, as required by EU data protection law. Therefore OLAF was not legally obliged to go on to assess the proportionality of such a transfer.

21. However, as a general principle, the Ombudsman considers that it is not unreasonable for citizens to expect a higher degree of transparency regarding expenses incurred by top management, such as OLAF's Director-General, in their official role. The Ombudsman notes that some agencies have voluntarily implemented a more transparent approach, disclosing details of travel and accommodation expenses incurred by their top managers for business purposes. The Ombudsman welcomes such initiatives.

22. The Ombudsman also notes that, in this case, some of the sample documents provided by OLAF relate to travel expenses incurred in the course of "sensitive missions" linked to OLAF's investigations. The Ombudsman considers that it is reasonable to conclude that the disclosure of this information, concerning the location of certain missions and the time spent by staff members in a specific place, could reveal sensitive details about OLAF's investigative activities. This could be prejudicial to the purpose of inspections, investigations and audit. [9]

23. The complainant did not put forward any specific arguments to support her assertion of the existence of an overriding public interest in disclosure of travel expenses relating to OLAF's investigatory activities. The Ombudsman therefore accepts that non-disclosure of such documents is justified because it could undermine the purpose of inspections, investigations and audits. However, this exception would not be applicable to documents concerning travel expenses unrelated to OLAF's investigatory activities.

24. In light of these considerations, the Ombudsman finds that OLAF's refusal to provide public access to the requested documents was justified and consistent with the EU law on data protection and public access to documents. Nevertheless, she makes a suggestion to OLAF to encourage a more transparent approach in future.

Conclusion



Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the European Anti-Fraud Office.

The complainant and the European Anti-Fraud Office will be informed of this decision .

Suggestion for improvement

The Ombudsman recognises that greater transparency concerning expenses incurred by EU officials enhances citizens' trust in the EU institutions. For this reason, the Ombudsman suggests that OLAF takes steps to review its policy and consider implementing a more transparent approach in relation to travel expenses which are not incurred in the course of investigatory activities. In particular, consideration should be given to regular proactive disclosure of the Director-General's expenses.

Emily O'Reilly

European Ombudsman

Strasbourg, 26/09/2019

[1] In accordance with Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at:
<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:en:PDF>

[2] Article 4(1)(b) of Regulation 1049/2001.

[3] Regulation 2018/1725 Article 9(1)(b) of 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, available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725> [Link].

[4] Articles 11-13 of Annex VII to the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (the Staff Regulations), available at:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501> [Link] .



[5] Article 4(2), third indent of Regulation 1049/2001.

[6] Article 4(3) of Regulation 1049/2001.

[7] Judgment of the Court, 16 July 2015, C-615/13 P, *Client Earth and PAN Europe vs EFSA* , ECLI:EU:C:2015:489, Paragraph 44, 46, 47, 50-53, 55-58.

[8] Judgment of the general court of 15 July 2015, T-115/13, *Dennekamp v Parliament* , ECLI:EU:T:2015:497, paragraph 119.

[9] Article 4(3) of Regulation 1049/2001.