

Decision in case OI/2/2020/NH on the European Anti-Fraud Office's refusal to grant public access to documents related to its investigation of possible links between Japan Tobacco International (JTI) and a family member of the Syrian President

Decision

Case OI/2/2020/NH - **Opened on** 06/03/2020 - **Decision on** 29/07/2020 - **Institution concerned** European Anti-Fraud Office (No maladministration found) |

The case concerned how the European Anti-Fraud Office (OLAF) handled a request by a journalist for public access to documents about an OLAF investigation into a tobacco product manufacturer and its possible links to a family member of the Syrian President.

OLAF invoked the general presumption that public access to the requested documents would be particularly detrimental to its ability to fulfil its mission to fight fraud in the public interest. OLAF therefore concluded, without assessing each document individually, that access to the documents could not be granted.

The Ombudsman found that OLAF had correctly applied the EU rules on public access to documents. After reviewing the final OLAF report in this case, the Ombudsman found that only one short section was relevant to the complainant's request.

The Ombudsman closed the inquiry with a finding that there had not been maladministration by OLAF. She nevertheless suggested to OLAF that it assess the relevant section of the report and consider granting public access to it.

Background to the complaint

1. The complainant [1] is a journalist working for an investigative reporting platform. In October 2019, she made a request for public access to documents [2] to the European Anti-Fraud Office (OLAF). She asked OLAF to disclose all documents and correspondence related to its investigation of links between tobacco product manufacturer Japan Tobacco International (JTI) and a family member of the Syrian President.

2. OLAF refused to disclose the requested documents. OLAF argued that the documents are



covered by a general presumption of non-disclosure recognised by EU case law [3] , according to which disclosure of documents related to OLAF investigations would fundamentally undermine the objectives of its investigative activities, as well as its decision making process. OLAF considered that the complainant had not provided any clear elements to indicate the existence of an overriding public interest to justify disclosure.

3. The complainant challenged OLAF's refusal with a confirmatory application. [4] She argued that there was an overriding public interest in disclosure, notably because similar investigations had shown that tobacco companies bribed authorities and exploited war zones to sell their products.

4. OLAF maintained its decision to refuse access to the documents. It said that the complainant had failed to demonstrate the existence of an overriding public interest in disclosing the requested documents and argued that disclosure would undermine the protection of the purpose of inspections, investigations and audits as well as undermine the protection of privacy and personal data. [5] Disclosing the documents would also constitute a risk to the presumption of innocence of the persons concerned by the investigation. OLAF added that it was not possible to give partial access to the documents, given that all the information therein falls under the general presumption of non-disclosure confirmed by EU case law.

5. Dissatisfied with OLAF's refusal to disclose the documents, the complainant turned to the Ombudsman in January 2020.

The inquiry

6. The Ombudsman opened an inquiry into the decision by OLAF to refuse public access to the requested documents.

7. Bearing in mind the general presumption that public access should not be granted to an OLAF investigation file, the Ombudsman's first step was to ask OLAF to provide her with the final report of its investigation. The Ombudsman also gave OLAF the opportunity to provide further comments on the complaint (in addition to the reasoning already given to the complainant). The Ombudsman did not receive any further comments from OLAF.

The Ombudsman's assessment

8. As a general rule, when receiving a request for public access to documents, EU institutions have to assess each document individually to determine whether it can be (fully or partially) released. That assessment must be specific and individual in nature, relating to the content of each document. [6]

9. In this case, OLAF invoked the general presumption that public access to the requested documents would be particularly detrimental to its ability to fulfil its mission to fight fraud in the



public interest. OLAF therefore concluded, without assessing each document individually, that access to the documents could not be granted.

10. The EU courts have established that a **general presumption of non-disclosure** may apply to documents related to OLAF investigations. The general presumption of non-disclosure allows OLAF to refuse access without having to assess the documents individually and without having to consider whether partial access could be granted to one or more documents. [7] The general presumption is applicable to the entire file of an OLAF investigation and the EU courts have confirmed that it applies both during the investigation and after it has been concluded. The courts have also determined that the protection of OLAF's investigations extends to their follow-up, insofar as that follow-up takes place within a reasonable period. [8] This is to allow the relevant EU or national authorities time to decide on the actions, if any, they will take following OLAF's recommendations.

11. The Ombudsman is aware of the practical benefits of applying this presumption of non-disclosure, which the Court recognised to allow for some proportionality in the institutions' handling of requests for public access to documents. At the same time, the application of the presumption of non-disclosure is a possibility, not an obligation as such.

12. To help determine whether OLAF had correctly applied the general presumption in this case, the Ombudsman considered it appropriate for the purposes of this inquiry to **inspect OLAF's final report [9] of the investigation**. The final report is dated 24 April 2015. It is clear from reading the report, which is 22 pages long, that only one short section, on page 7, is relevant to the subject matter of the complainant's request, that is, the possible links between JTI and Syria. The entire file, however, contains thousands of documents.

13. The Ombudsman therefore accepts that it was reasonable for OLAF to apply to the entire investigation file the general presumption of non-disclosure in this case.

14. The EU courts have confirmed that the general presumption of non-disclosure applicable to OLAF files may be rebutted if there is an overriding public interest in disclosure. [10] In this case, the Ombudsman considers that the public interest in OLAF being able to fulfil its mission prevails. **The inquiry thus has not revealed any maladministration by OLAF in refusing access to the requested documents.**

15. The Ombudsman considers that although there is, in this case, no legal obligation to disclose any extracts of the OLAF report, there is still a significant public interest in knowing about investigative steps taken in relation to tobacco product manufacturers and a warzone.

16. The Ombudsman further notes that the final report was drafted in 2015, and the relevant section is based on information gathered some years earlier. In addition, the Commission already made some information on the subject matter public in a 2013 reply to a parliamentary question. [11]

17. Therefore, the Ombudsman suggests that OLAF makes an individual assessment of the



relevant section in the report to determine whether at least partial access can be granted.

Conclusion

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

The inquiry has not revealed any maladministration by OLAF in refusing access to the requested documents.

The complainant and OLAF will be informed of this decision .

Suggestion for improvement

Even though OLAF correctly applied the general presumption of non-disclosure foreseen under EU law, the Ombudsman suggests that, in this case, OLAF makes an individual assessment of the relevant section in the report to determine whether at least partial access can be granted.

Emily O'Reilly European Ombudsman

Strasbourg, 29/07/2020

[1] Even though the complainant is not an EU citizen nor resident in an EU Member State, the Ombudsman decided to inquire into this complaint using her 'own initiative' given the importance of the matter.

[2] Under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link].

[3] Judgment of the General Court of 26 April 2016, *Strack v [Link] Commission* , T-221/08, paragraph 162.

[4] That possibility is laid down in Article 7(4) of Regulation 1049/2001.

[5] This exception is laid down in Article 4(1)(b) of Regulation 1049/2001.

[6] Judgment of the Court of First Instance of 13 April 2005, *Verein für Konsumenteninformation v [Link] Commission* , T-2/03, paragraphs 69 ff.



[7] See the *Strack* judgment referred to in footnote 3, paragraph 168.

[8] Judgment of the General Court of 26 May 2016, *IMG v [Link] Commission*, T-110/15, para. 35.

[9] OLAF requested that this document be treated as confidential by the Ombudsman.

[10] See, by analogy, judgment of the Court of 14 November 2013, *LPN and Finland v [Link] Commission*, joined cases C-514/11 P and C-605/11 P, para. 93.

[11] See the Commission's answer dated 30 September 2013 to parliamentary question E-007681-13:

<https://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-007681&language=EN>
[Link]