



Decision in case 193/2021/AMF on the European Anti-Fraud Office's refusal to provide public access to a call for tenders for an EU funded project that was the object of an investigation

Decision

Case 193/2021/AMF - **Opened on** 18/03/2021 - **Decision on** 17/06/2021 - **Institution concerned** European Anti-Fraud Office (No maladministration found) |

The case concerned a request for access to a public call for tenders for an EU funded project that was investigated by the European Anti-Fraud Office. OLAF had argued that providing the complainant with the call (which is already in the public domain) would damage its decision-making process and the purpose of its investigations because it would allow the complainant to identify the project in question and therefore the subject matter of the investigation. The Ombudsman's inquiries team asked OLAF to clarify how its decision making process and the purpose of its investigations could be damaged when the call was public and the investigation was closed in 2019.

Taking into account the arguments put forward by OLAF in its reply to the Ombudsman's inquiries team, the Ombudsman agreed that the disclosure of the call would undermine OLAF's decision-making process and the purpose of its investigations. Therefore, the inquiry was closed with a finding of no maladministration.

Background to the complaint

1. In November 2020, the complainant wrote to the European Anti-Fraud Office (OLAF) requesting the link to the details of a call for tenders of an EU-funded project that, according to the OLAF annual report 2019, resulted in an investigation [1] . OLAF replied that it could not provide such information " *given the requirements of investigative and potentially judicial secrecy* " in its investigations.
2. The complainant replied to OLAF that he wanted to have access to the publicly available details of the call for tenders. OLAF replied that it is bound [2] to respect the confidentiality of its investigations as well as general data protection rules. OLAF added that all available information about EU funding and tendering could be found at the Single Electronic Data Interchange Area (SEDIA) [3] .
3. The complainant wrote back to OLAF challenging its refusal to provide the call for tenders and asking it explicitly to " *consider [his] email as a confirmatory application for the purposes of Article 7 paragraph 2 of Regulation (EC) No 1049/2001* " [4] .



4. OLAF replied to the confirmatory application arguing that granting public access to the specific call for tenders would amount to disclosing the subject of its investigation, which is not public and is protected by the confidentiality of OLAF investigations [5] . It added that disclosing the call for tenders would undermine the purpose of its investigation, and cited the relevant exception provided for in Regulation 1049/2001 [6] .

5. OLAF stated that the EU Courts have recognised the existence of a general presumption of non-disclosure for all documents in OLAF case files. [7] In particular, the EU Courts have ruled that the public disclosure of documents related to OLAF investigations could fundamentally undermine the objectives of its investigative activities, as well as its decision making process, both now and in the future. The protection of confidentiality extends therefore to closed cases.

6. The complainant was not satisfied with OLAF's response and therefore turned to the Ombudsman in January 2021.

The inquiry

7. The Ombudsman opened an inquiry into OLAF's refusal to disclose the call for tenders. In the course of the inquiry, the Ombudsman's inquiries team contacted OLAF and asked it to reply to the complaint against the following background:

1) It is hard to see how the disclosure of a call for tenders can undermine OLAF's decision-making and investigation when the investigation was closed in 2019 and OLAF has not indicated that there is any on-going follow-up by another authority;

2) EU case-law has established that the general presumption of non-disclosure can be rebutted, and it is hard to see how the presumption can be rebutted at all if it is not rebutted as concerns a document that is already lawfully in the public domain.

8. In the course of the inquiry, the Ombudsman's inquiries team received OLAF's reply to the complaint.

Arguments presented to the Ombudsman

9. The complainant argued that, if the call for tenders was published and is still available on the dedicated website (see footnote 3), there is no valid reason for OLAF not to disclose it upon request.

10. While OLAF agreed that there might be a justified need to communicate a degree of information about its investigations to the public, OLAF is also bound by the requirements of confidentiality and professional secrecy [8] when it issues press releases and annual reports. [9] OLAF is therefore not required to make public comprehensive information on whether there are (or not) on-going follow-up actions to its investigations.

11. OLAF acknowledged that a call for tenders is, by nature, a public document. OLAF explained that its case files usually contain both non-public and public documents. OLAF



argued that the general presumption applies to all documents in OLAF case files because they are all part of the OLAF investigation file, irrespective of whether they are public or not. This requirement applies also to closed investigations [10] even where there are no ongoing follow-up actions.

12. In this case, as OLAF explained in its reply to the complainant, disclosure of the document requested would have resulted in providing information about the content of the call that was at the basis of the project in Albania that was subject to an OLAF investigation. The public document, which is part of the investigation case file, thus contains not only the public information expressed therein, but also the facts and circumstances that have become the subject of the investigation. OLAF considers that revealing such information would amount to disclosing the subject matter of its investigation, which is not public and is protected under the rules of confidentiality of OLAF investigations. This would fundamentally undermine the objectives of its investigative activities, as well as its decision making process, both now and in the future.

13. OLAF has provided the Ombudsman with additional confidential information on the latter point. The nature of this information is such that the Ombudsman is led to conclude that OLAF cannot, at the present time, disclose this information. The Ombudsman also concludes that providing any details as to the reasons for the non-disclosure of this information would not be possible without revealing the core nature of the information and thus compromising legitimate public interests.

The Ombudsman's assessment

14. As OLAF stated in its reply to the complainant, EU case-law has established a general presumption of non-disclosure of documents from OLAF's investigations, on the basis that disclosure could undermine the objectives of an investigation. This presumption applies to ongoing investigations and continues to apply for a "reasonable period" following their conclusion.

15. In the present case, the complainant requested public access to a call for tenders for an EU-funded project that had resulted in an investigation that was concluded in 2019. The requested call for tenders is available to the public on the dedicated website for EU funding and tendering (see footnote 3), but the complainant is not able to identify it because the OLAF report 2019 does not give details on the EU funded project in Albania that had been the object of the investigation. What the complainant is thus seeking to obtain is the necessary information that would allow him to identify the published call and, subsequently, the project in question.

16. The Ombudsman's inquiries team asked OLAF to clarify how allowing the complainant to identify a call for tenders that is already in the public domain would seriously damage its decision-making process and investigations if the investigation in question was closed in 2019 and there was no indication of any on-going follow up action by other authorities.



17. Following an examination of the confidential information that OLAF provided, the application of the general presumption of non-disclosure is justified in this case. Given the nature of this new information, which the Ombudsman has received in confidence, it is not possible for the Ombudsman to disclose in any detail what she has learned from the documents or information provided. However, it is reasonably foreseeable that providing access to the call would undermine OLAF's decision-making process and the purpose of its investigations. The Ombudsman has not identified any overriding public interest in disclosure.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [11] :

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

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

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 17/06/2021

[1] The OLAF report 2019 is available at:

https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2019_en.pdf " *A separate case in Albania also highlighted the manipulation of the tendering process linked to one EU-funded project there. The company that won the tender had benefited from confidential information ahead of the procedure, giving it a competitive advantage. The information was found to have been leaked by a former contractor of the EU that had assisted the Albanian authorities in preparing the tender documentation. The OLAF investigation concluded with recommendations to exclude both companies from receiving EU funds, and to recover the full amount of the contract, roughly €900 000 .*"

[2] Under 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),

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0883> .

[3] See: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/home>

[4] 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, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049>.

[5] Article 10 of Regulation No 883/2013 (See footnote 2).



[6] Article 4(2) third indent of Regulation 1049/2001 (See footnote 4).

[7] Judgment of the General Court of 26 April 2016, *Strack v Commission*, T-221/08,

[8] Article 10 of Regulation 883/2013 (see footnotes 2 and 5).

[9] Judgment of 12 September 2007, *Nikolaou v Commission*, T-259/03, paragraph 218.

Available at :

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=A3734C393EC2730240F8EC6C0ADD75D>

See also Article 10(5) of Regulation 883/2013: "*The Director-General shall ensure that any information provided to the public is given neutrally and impartially, and that its disclosure respects the confidentiality of investigations and complies with the principles set out in this Article and in Article 9(1).*"

[10] Judgment in *Strack v Commission*, T-221/08, paragraph 162 (see footnote 7) "*the general presumption that the interests protected, inter alia, by the second subparagraph of Article 4(3) of Regulation No 1049/2001 would be undermined, which is justified in order to prevent any risk of seriously undermining the institution's decision-making process within the meaning of that provision, must be applied irrespective of the question whether the request for access concerns an investigation procedure which has already been closed or one which is ongoing.*"

[11] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the Decision of the European Ombudsman adopting Implementing Provisions