

## Decision of the European Ombudsman closing the inquiry into complaint 257/2013/OV against the European Commission

Decision

**Case** 257/2013/OV - **Opened on** 05/03/2013 - **Recommendation on** 09/04/2014 - **Decision on** 11/09/2014 - **Institutions concerned** European Commission ( Critical remark ) | European Commission ( No further inquiries justified ) |

The complainant requested access to documents concerning the departure in October 2012 of Commissioner Dalli from the Commission. The Commission initially refused access on the grounds that the release of the documents would undermine an on-going investigation carried out by national authorities. Having inspected the documents, the Ombudsman found that they did not contain any significant information which was not already in the public domain. She thus recommended to the Commission that it disclose the documents. The Commission rejected this recommendation and, in its reply, said that the documents had been submitted as evidence in a case before the EU General Court and that their disclosure would harm those court proceedings. The Ombudsman accepted this new position and concluded that, since the complainant's request cannot be granted while the court proceedings are on-going, no further inquiries are justified.

The Ombudsman made a critical remark arising from the Commission's failure to identify all relevant correspondence covered by the complainant's access request. She also, by way of a further remark, proposed that the documents should be disclosed once the court proceedings have been concluded.

## The background

1. The complaint [1] , submitted by an NGO (Corporate Europe Observatory), concerned a refusal by the European Commission to grant public access to documents concerning the departure of Mr John Dalli ('the Commissioner') from the Commission on 16 October 2012.
2. In May 2012, a tobacco producer (Swedish Match) complained to the Commission that a Maltese businessman (Mr X), who claimed to be acting on behalf and for the benefit of the Commissioner, had requested money from the tobacco company in return for seeking to influence the EU's prohibition on the sale of 'snus' [2] in the context of the revision of the



Tobacco Products Directive . The Commission immediately informed the European Anti-Fraud Office (OLAF), which launched an investigation. OLAF sent its investigation report to the Commission on 15 October 2012. The President of the Commission, Mr Barroso ('the President'), met the Commissioner on 16 October 2012. The Commission issued a press release immediately after that meeting announcing that the Commissioner had decided to resign in order to be able to defend his reputation and that of the Commission. In the same period, OLAF sent its investigation report to the Attorney General of Malta [3] .

3. On 26 October 2012, the complainant made a request for public access under Regulation 1049/2001 to all documents related to the Commissioner's resignation over the issues covered in the OLAF investigation. The Commission granted access to several documents, but refused access, on the basis of the exception of Article 4(2), third indent, of the Regulation, to the following four documents:

- Two letters from the Commissioner to the President, dated 27 July and 21 October 2012;
- Two (undated) notes for the file concerning meetings between the President and the Commissioner (held on 27 July and 16 October 2012).

4. In its decision of 16 January 2013 on the complainant's confirmatory application, the Commission stated that disclosure of the four documents would undermine the purpose of the investigation of the Commissioner's alleged behaviour conducted by the competent Maltese authorities, as well as the purpose of its own follow-up actions.

5. On 31 January 2013, the complainant complained to the Ombudsman who opened an inquiry into the following two allegations and claim:

**Allegations:**

- 1) The Commission failed to identify in its files all documents relevant to the complainant's request for public access of 26 October 2012;
- 2) The Commission wrongly refused access to (i) two letters from the Commissioner to the President of 27 July and 21 October 2012, (ii) two Commission notes for the file concerning meetings between the President and the Commissioner, and (iii) other documents covered by the complainant's request but not identified by the Commission

**Claim:**

The Commission should grant access to the requested documents.

6. On 16 December 2013, Ombudsman's representatives inspected the Commission's file including the four specific documents in question.



## **A. Alleged failure of the Commission to identify all the documents relevant to the complainant's request and to give access to them**

7. With regard to the complainant's first allegation, that the Commission failed to identify in its files all the documents relevant to its request (in particular a letter of 14 May 2012 from Swedish Match to the Commission and the Secretary-General's reply of 30 May 2012), the Ombudsman found, in paragraphs 22 to 28 of her draft recommendation, that the Commission's failure to consider that these letters were covered by the complainant's request constituted an instance of maladministration [4] . The Ombudsman makes a corresponding critical remark below.

## **B. Allegation that the Commission wrongly refused access to two letters and two meeting notes**

### **The Ombudsman's draft recommendation**

8. In her draft recommendation [5] the Ombudsman noted that her services had carried out an inspection of the four requested documents. A careful examination of these documents and a subsequent careful review of all other information placed in the public domain, led to the conclusion that these documents did not contain any significant information that was not already in the public domain on 16 January 2013 when the Commission took its decision on the confirmatory application. In particular, these documents did not contain information which is essentially different from the information that was already made public through, amongst others, (i) the Commission's press release of 16 October 2012, (ii) OLAF's press release of 19 October 2012, (iii) the President's letter of 23 October 2012 to the Commissioner, and (iv) the various public declarations of Mr Dalli following his departure from the Commission, including that made in the press conference he gave on 24 October 2012.

9. The Ombudsman considered that, while there certainly exists a possibility that releasing *detailed* information relating to an on-going investigation could prejudice that on-going investigation (in particular if such information would constitute evidence in eventual criminal court proceedings), there is no absolute presumption that releasing *general* information in relation to an investigation would prejudice the investigation. She also found that the documents at issue made only general references to OLAF's investigation and its findings and that none of the documents contained any evidence relied upon by OLAF in its findings. The Ombudsman also noted that the two letters from the Commissioner to the President, and the two notes on their meetings, were not part of the OLAF investigation file which OLAF sent to the Maltese authorities.

10. The Ombudsman further found that the Commission's argument, that disclosing the documents would undermine the "*follow-up actions*" the Commission itself "*may decide to undertake*", was particularly vague. She concluded that the risk of any follow-up action being undermined appeared to be, at the very least, purely hypothetical.



**11 .** The Ombudsman noted that the application of the exceptions to public access under Regulation 1049/2001 is time sensitive and that the Maltese authorities had now ceased to investigate the actions of Mr Dalli. She also found that even more detailed information about OLAF's investigation was now available, such as the information contained in the publicly available speaking notes of OLAF's Director General for the meeting of the European Parliament's Budgetary Control Committee of 18 June 2013 [6] . Thus, it was even more evident that there was no good reason for the Commission not to release the documents.

**12.** In its opinion, the Commission stated that the documents in question had just been submitted to the court (Case T-562/12) and that their disclosure would undermine the court proceedings in question. It did not however explain how releasing the documents would specifically and effectively undermine those court proceedings.

**13 .** The Ombudsman concluded that the Commission had failed to explain to a sufficient standard how disclosing the four requested documents in January 2013 would specifically and effectively have undermined the investigation by the Maltese authorities or the Commission's own follow-up actions. She thus made a finding of maladministration and recommended that the Commission disclose the documents .

**14.** In its detailed opinion in response to the draft recommendation, the Commission again argued that disclosure of the documents would have prejudiced the investigation (on-going at the time) by the Maltese authorities. It stated that the documents were not of a "general" nature. On the contrary, the documents concerned a specific subject, namely Mr Dalli's behaviour as a Member of the Commission. As the documents were clearly connected to issues which were part of the on-going investigation, the Commission did not consider it necessary to consult the Maltese authorities on the possible disclosure, as it was beyond doubt that the documents could not be disclosed. The Commission therefore maintained its position that, at the relevant time, it correctly applied the exception laid down in Article 4(2), third indent, of Regulation 1049/2001.

**15.** In reference to the Ombudsman's statement, in paragraph 52 of the draft recommendation, that the Maltese authorities had ceased to investigate the actions of Mr Dalli, the Commission stated that it was not aware that the investigation had been officially closed. It claimed that the documents at issue were connected with an investigation concerning at least one other person. That investigation was currently on-going.

**16.** The Commission did not share the Ombudsman's view that the risk of potential interference with the Commission's ability to conduct any follow-up actions, and to make decisions free from external influences, was vague. It stated that this risk was even greater for high level cases, where political and media interference can certainly not be excluded.

**17.** The Commission stated that, regardless of the current state of the Maltese proceedings, the four documents in question are annexes either to the application or to the defence in court proceedings (Case T-562/12) brought by Mr Dalli against the Commission. (The two letters from the Commissioner to the President, of 27 July and 21 October 2012, are annexes A.10 and



A.18 to the application; and the two Commission notes for the file, concerning meetings between the President and the Commissioner on 27 July and 16 October 2012, are annexes B.1 and B.2 to the defence.) In particular, according to the Commission, the two meeting notes are key elements in its evidence in support of its line of defence.

**18.** The Commission said that, at the time of its confirmatory decision of 16 January 2013, it was not in a position to invoke the exception of Article 4(2), second indent, of Regulation 1049/2001. It explained that while Mr Dalli's application in Case T-562/12 was notified to the Commission on 11 January 2013, its decision on the confirmatory application had already been finalised even though it was not sent to the complainant until a few days later. As a result, this exception was not invoked in its decision on the confirmatory application.

**19.** The Commission argued that disclosure of the four documents at present, while Case T-562/12 is pending, would prevent the exchange of arguments between the parties and the deliberations of the Court from taking place in total serenity, and would negatively influence the vital balance between the parties to the proceedings. The Commission referred in this respect to the judgment of the Court of Justice in the *API* case according to which "*the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured*" and "*if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts*". The Court also held that "*the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity*" and that "*disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, [...] and would disturb the serenity of the proceedings*". The Court moreover recognised, in respect of court proceedings which are still on-going, like the proceedings in Case T-562/12, that "*[i]t is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, [...], while those proceedings remain pending*" [7].

**20.** The Commission further noted that, in the *API* judgment, the Court stated that neither the Statute of the Court of Justice nor the Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings and that, if third parties were able to obtain access to the pleadings (of which their annexes form an integral part), the system of procedural rules governing court proceedings would be called into question [8]. The Commission said that a general presumption does not exclude the right of an interested party to demonstrate that a given document is not covered by the presumption, but in the present case the complainant has not availed himself of that possibility, including in its observations to the Ombudsman of 30 August 2013.

**21.** The Commission concluded that the documents clearly fell under the protection of Article 4(2), second indent, of Regulation 1049/2001, as their release would undermine the court



proceedings protected by that provision. The Commission in this context pointed out that the Court of Justice specified in its *API* judgment that " *judicial activities are as such excluded from the scope [...] of the right of access to documents* " .

**22.** In reply to paragraphs 39 and 53 of the Ombudsman's draft recommendation, the Commission argued that the fact that the *information* contained in the four requested documents may in whole or in part already be public does not mean that these documents can no longer be protected as part of the case file of on-going court proceedings. The Commission contended that one must distinguish between the *information* contained in the four documents and the documents themselves, which constitute *evidence* adduced in the framework of a pending case. Indeed, the public has no knowledge of whether these documents are part of the case file, nor of their specific content, regardless of the fact that the information contained in them may be public in whole or in part. As a result, disclosing the documents as part of the pending judicial proceedings could upset the serenity of the on-going legal debates and also call into question the rules according to which third parties do not have access to the case file of court proceedings before the Union courts.

**23.** In its observations, the complainant stated that there was nothing in the Commission's detailed opinion that would require rejection of the Ombudsman's recommendation. The complainant argued that the Commission had decided in advance that the documents should not be disclosed. If the Commission was truly convinced that there were strong legal arguments against disclosure due to the on-going court case, it could have announced that it would disclose the documents as soon as the court case was over. However, according to the complainant, the Commission does not seem to be committed to the principle of transparency.

**24.** The complainant also stated that the Commission does not want to admit that it could and should have contacted the Maltese authorities to inquire whether there was any objection against the disclosure of the documents. The Commission's statement, that it is not aware that the investigation concerning Mr Dalli has been officially closed, is striking since the Commission does not seem to have made any effort to seek clarity on such a crucial issue. The Commission's further argument that the documents are connected with an investigation concerning at least one other person is also puzzling and the Commission made no effort to assess whether this actually constituted a valid reason to refuse disclosure of the documents.

**25.** The complainant finally stated that the Commission's interpretation of the *API judgment* was very one-sided. The complainant argued that the oral hearing in the court case *Dalli v Commission* had already taken place in early July 2014 and that the Commission in its opinion did not put forward any specific argument against disclosure at that stage of the annexes of the pleadings, except that disclosure " *could upset the serenity of the on-going legal debates* ". The complainant pointed out that the Commission very actively approached international media on the occasion of the hearing. It is entirely justified to do so, but then it seems inconsistent that the Commission insists that disclosure of the documents would "upset the serenity" of the court case.



## The Ombudsman's assessment after the draft recommendation

**26.** The Ombudsman is not convinced by that part of the Commission's reply (summarised in paragraphs 14 to 16 above) which concerns the exception based on the protection of the purpose of investigations.

**27.** The Commission again fails to show how the release of the four documents in January 2013 could have *specifically and effectively* undermined the purpose of an investigation by the Maltese authorities.

**28.** The Commission asserts that the four documents were "*connected*" to the OLAF investigation, without explaining, in any manner, how their release would undermine the investigation by the Maltese authorities which followed on from that OLAF investigation. The Ombudsman notes that her services have carefully reviewed all four documents. While the note of the meeting of 27 July 2012 and the follow up letter of Mr Dalli to the President refer, in general terms, to the fact that OLAF was conducting an investigation, at the time the note and the letter were drafted, they contain no specific information relating to that investigation which was not already in the public domain when the decision of the Commission to refuse access was taken. Likewise, while the note of the meeting of 16 October 2012, and the follow up letter of Mr Dalli to the President, refer to the then finalised OLAF investigation, they contain no specific information relating to that investigation which was not already in the public domain when the decision of the Commission to refuse access was taken.

**29.** The Commission argues that that the documents "concern" a "*specific subject, i.e. Mr Dalli's behaviour*". This statement is misleading. Certainly, the documents contain information revealing 1) how the Commissioner reacted, in July 2012, to the fact that OLAF was carrying out an investigation, and 2) how he reacted, in October 2012, when informed about the results of the OLAF investigation. However, they contain no specific information, which was not already in the public domain when the decision of the Commission to refuse access was taken, relating to the alleged behaviour that OLAF was investigating or had investigated. The documents contain no detailed and specific information concerning the allegations made against the Commissioner, no information concerning the evidence relied upon by OLAF in its investigation of those allegations and no detailed and specific information concerning the results of that OLAF investigation. Therefore, they contain no specific information relevant to the subject matter of the investigation by the Maltese authorities which was on-going when the request for public access was refused.

**30.** The Commission's position is also contradicted by its own actions. The Ombudsman notes that the Commission's press release of 16 October 2012 contained information concerning the Commissioner's reaction to the results of the OLAF investigation (it states that he decided to resign in light of the results of that investigation). Nevertheless, the Commission did not consider it problematic, in terms of protecting the purpose of the investigation by the Maltese authorities, to issue that press release.





**31.** The Ombudsman further notes that if the four documents at issue constituted relevant evidence, of use to the Maltese authorities, as regards the veracity of information in the public domain, they would have been submitted to the Maltese authorities. They were not. This demonstrates that the documents were of no relevance to the investigation by the Maltese authorities.

**32.** Second, the Commission also maintains its argument that Article 4(2), third indent, of Regulation 1049/2001, which concerns the need to protect the purpose of investigations, audits and inspections, can be invoked in order to protect the Commission's ability to take "follow-up actions". The Commission, in its response to the Ombudsman, states that it did not share "the Ombudsman's view" that the risk of potential interference with the Commission's ability to conduct any follow-up actions and to adopt decisions free from external influences was vague. It stated that this risk was even greater for high level cases, where political and media interference can certainly not be excluded.

**33.** The Ombudsman notes that the Commission, in its opinion in response to the Draft Recommendation, again fails to indicate what follow-up actions it envisages. There are thus no means for the complainant or the Ombudsman to know whether those follow up actions might fall within the scope of "inspections, investigations and audits". Obviously, if they did not fall within the scope of the need to protect the purpose of any future "inspections, investigations and audits" by the Commission, Article 4(2), third indent, of Regulation 1049/2001 cannot be invoked.

**34.** As regards the Commission's general statement relating to possible political and media interference on its (undefined) follow-up actions, it is certainly true that the resignation of a Commissioner, in the circumstances that arose in October 2012, gives rise to significant interest from political and media sources. It may even be reasonably foreseeable that various types of pressure may be imposed on the Commission, from media and political actors, in that context. Certainly, some of that pressure may be negative in nature. However, it cannot be presumed that the *content* of the documents would, if released, give rise to any additional pressure on the Commission. Indeed, a review of the documents, which, as noted above, do not contain any significant information which was not in the public domain in January 2013 when the request for access was refused, does not support the conclusion that their release would give rise to any additional pressure on the Commission.

**35.** On the basis of the above, the Ombudsman thus maintains her position (set out in paragraphs 39 to 52 of the draft recommendation) that the Commission was wrong to rely on the exception at Article 4(2), third indent, of Regulation 1049/2001 in order to refuse access to the four requested documents.

**36.** Notwithstanding the above, the Ombudsman is satisfied with the Commission's response to her draft recommendation (summarised in paragraphs 17 to 22 above) in so far as it concerns the exception relating to court proceedings (Article 4(2), second indent, of Regulation 1049/2001) .





37. In particular the Ombudsman accepts the new argument put forward by the Commission, in response to the draft recommendation, that a distinction should be made between the information contained in the requested documents (which the Commission now appears to concede is in the public domain) and the documents themselves which constitute evidence submitted for the purposes of a pending court case (that is, evidence potentially corroborating the veracity of the facts or information in those documents)

38. The Ombudsman notes that it is for the General Court to decide if and to what extent the documents in question are, in fact, relevant as evidence in the case which is pending before it [9]. Based on the inspection of these documents, the Ombudsman considers that these documents may be classified as evidence in the pending court case. On this basis, and taking into account the ruling of the Court of Justice in the API case, it is reasonably foreseeable, and not purely hypothetical, that pending the delivery of its ruling in this case by the Court, disclosure of the four documents in question could be regarded as undermining the court proceedings. [10]

39. The Ombudsman notes that, even if it is established that disclosure of these documents would undermine the court proceedings, it would still be necessary to apply the public interest test. This involves a consideration of whether there is an overriding public interest served by the disclosure of the documents. In this regard, it is relevant to note that the substantive content of these documents is already in the public domain. In these circumstances, the Ombudsman is of the view that there is not any overriding public interest served by the disclosure of the documents themselves.

40. The Ombudsman notes that for the purposes of Regulation 1049/2001 it is sufficient, in order to justify the refusal of access, that one exception applies. She therefore concludes that, since the exception for the protection of court proceedings applies, no further inquiries are justified into the complaint and closes the case. As she considers that the Commission should release the documents once the court proceedings end, she will make a further remark to that effect.

## Conclusions

On the basis of the inquiry into the first and second allegations, the Ombudsman closes it with, respectively, the following critical remark and conclusion:

**The Commission's failure to consider that the letter of 14 May 2012 from Swedish Match to the Commission, and the Secretary-General's reply of 30 May 2012, were covered by the complainant's request for access constitutes an instance of maladministration.**

**No further inquiries are justified into the second allegation since the complainant's claim cannot be satisfied as long as the court proceedings are on-going.**



## FURTHER REMARK

**Once the court proceedings have been concluded, the Commission should disclose the four documents in question.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 11 September 2014

[1] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's draft recommendation available at:

<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/54021/html.bookmark>  
[Link]

[2] Snus is an oral tobacco product currently only sold legally in Sweden.

[3] On 19 October 2012, OLAF stated that it had referred the case to the competent Maltese judicial authorities " *for their consideration of the criminal aspects of the actions of the persons involved* ".

[4] The Ombudsman however did not consider it to be in the interest of the complainant to make a draft recommendation to the Commission in this respect, since the complainant could obtain a quicker response from the Commission by immediately submitting a *new request* for public access to those documents. On 14 April 2014, the complainant did so. This new procedure is not part of the Ombudsman's present inquiry.

[5] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's draft recommendation available at:

<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/54021/html.bookmark>  
[Link]

[6] The speaking notes are available at:

[http://ec.europa.eu/anti\\_fraud/documents/speeches/speaking\\_points\\_mr\\_kessler\\_cont\\_18062013\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/speeches/speaking_points_mr_kessler_cont_18062013_en.pdf)  
[Link]

[7] Joined cases C-514/07 P, C-528/07 P and C-532/07 P, Sweden v API and Commission [2010] ECR I-8533, paragraphs 85 to 94.

[8] Ibidem, paragraph 99-100.

[9] The Ombudsman notes that the subject matter of Case T-562/12 is: 1) an action for



annulment, brought by Mr Dalli, concerning the oral decision of the President of the European Commission of 16 October 2012 to exercise his prerogative to require him to submit his resignation as a member of the Commission and 2) an action for damages seeking compensation for the harm allegedly suffered by Mr Dalli following that oral decision.

[10] This conclusion is based on the specific content of the documents in question. It is not necessary for the Ombudsman to take any view as to whether there exists a general presumption that access may be denied to annexes to pleadings submitted in the context of court proceedings.