

Decision of the European Ombudsman in complaint 1871/2014/EIS concerning the European Commission's handling of a request for access to documents following a fraud investigation

Decision

Case 1871/2014/EIS - Opened on 15/12/2014 - Decision on 15/03/2016 - Institution concerned European Commission (Critical remark) |

In 2006 the complainant, a German company, was successful in a tender procedure for services to help to develop the small and medium sized enterprise sector in Syria. In 2009, the European Anti-Fraud Office (OLAF) opened an investigation into the company. OLAF found that there was evidence that the company had wrongly sub-contracted parts of the contract and, as a result, breached its contractual obligations. These findings led the European Commission to impose financial penalties on the company. The company then sought access from the Commission to its file on the matter and was granted partial access. The company protested that, as it had not been given complete access to the final report of OLAF and certain other documents, it could not prepare a proper defence to the allegations against it.

The Ombudsman inquired into the issue and concluded that the Commission took an incorrect approach to the access request; it should have dealt with the request under the relevant provisions concerning access to one's own file under the Charter of Fundamental Rights of the European Union and not under Regulation 1049/2001 on public access to documents. While the Ombudsman found that the Commission's error in this case made no material difference to the complainant's right of defence, she found nevertheless that the Commission's error constituted maladministration.

The background to the complaint

1. The complainant is a German company. In 2006, it entered into a contract with the European Commission Delegation to Syria to support the development of the SME sector in Syria to make it more efficient and competitive. On 14 May 2014, the complainant received a letter from the Commission in which it announced its decision to impose a financial penalty of EUR 1 004 730 on the complainant. This letter also summarised the events leading up to the financial penalty as follows.



2. On 29 January 2009, the European Anti-Fraud Office (OLAF) opened an investigation regarding irregularities in the above-mentioned contract. On 17 December 2013, the complainant was given an opportunity to comment on the investigation. On 26 March 2014, the Commission was informed that the OLAF investigation had established the existence of irregularities affecting the financial interests of the European Union. According to the Commission, the complainant did not contest the findings, nor did it provide any information to the contrary.

3. The investigation concluded that the complainant had sub-contracted part of its activities [1] in breach of the Terms of Reference of the tender and of the General Conditions of the service contract. As a result, the Commission concluded [2] that it was entitled to impose financial penalties in accordance with Article 96(1) of Regulation 1605/2002 [3] and Article 134b of Regulation 2342/2002 [4]. These provisions allowed the Commission to impose financial penalties representing 2 to 10 per cent of the total value of the contract where there had been a serious misrepresentation in supplying information to the contracting authority, which in this case was the Commission. This was also reproduced in Article 10.2 of the General Conditions of the service contract. The complainant was given 30 calendar days after receipt of the letter of 14 May 2014 to submit any comments or documents relating to the matter.

4. On 10 June 2014, the complainant replied to the Commission's letter. The complainant stated that, in order for it to rebut the allegations made against it, it required "*access to the file*" in order to prepare comments or objections to the Commission. The complainant stated that access to the file was linked to the principle of respect for the right of defence. The complainant alleged that the Commission had failed to respect the rights of defence and inform the complainant of the facts against it. The complainant also argued that the Commission had "*certainly commented on the OLAF investigation prior to, during and after the on-the-spot check*" which had been carried out by OLAF during its investigation.

5. On 30 July 2014, the Commission informed the complainant that its request for access to documents had been dealt with under Regulation 1049/2001 on public access to documents [5]. The Commission stated that, on the basis of that Regulation, partial access could be granted to the file. It thus granted partial access to OLAF's Final Case Report. The Commission then stated that the expunged parts of the documents contained "*personal and confidential data and commercially sensitive business information*".

6. The Commission noted that as the information expunged referred to personal data, Regulation 45/2001 [6] was applicable. This meant that the complainant had to demonstrate that there was a necessity to have the data transferred to it. The Commission concluded that the necessity of disclosure and/or transfer had not been established and that it could not be assumed that the legitimate rights of the persons concerned would not be harmed. The Commission stated that the other information which had been expunged related to commercially sensitive business information. In order for the information to be disclosed, in accordance with the relevant provisions of Regulation 1049/2001, there would have to be an overriding public interest to justify the disclosure of the document, which



was not the case here. The Commission then informed the complainant that it was entitled to make a confirmatory application (that is, exercise the right to seek a review) in accordance with the relevant provisions of Article 8 of Regulation 1049/2001.

7. On 19 August 2014, the complainant submitted a confirmatory application to the Commission. The complainant found it wrong that the Commission had disclosed only the OLAF Final Case Report and no other documents forming part of the case file against it. Moreover, the OLAF Final Case Report had been redacted. The complainant challenged the fact that the Commission treated the request under Regulation 1049/2001, as it considered itself to be "*directly affected by OLAF's investigation*". In its view, the Commission should instead have applied Article 41(2) of the Charter of Fundamental Rights which recognises "*the right of every person to have access to his or her file*". The penalty imposed on it, it stated, was significant, and was a direct result of the investigation. Thus, the complainant was not to be treated as the public at large but rather as an accused party. In addition, the Commission had failed to take into account the fact that the information that had been blanked out was necessary for the complainant to be able to defend itself effectively. In case of court proceedings, such information would have to be disclosed, since it identified witnesses.

8. On 9 October 2014, the Commission replied to the confirmatory application by refusing to grant further access to the file. The Commission said that, as OLAF was in charge of the investigation, the only document it held in relation to the investigation was the final report sent to it by OLAF. The Commission stated that it could not grant broader access to that document due to the need to protect the privacy and the integrity of the individual [7] and the need to protect commercial interests [8].

9. As regards the protection of commercial interests, the Commission stated that this exception applied only to very limited parts redacted from the final case report. These parts would enable the identification of companies which were the subject of OLAF's investigation. Disclosing this information would potentially damage their commercial interests. In particular, disclosure of their names and other pertinent data would make them recognisable and would have adverse effects on their reputation. It could also potentially be used by third parties to discredit these companies. This would harm their business interests and would have a negative impact on their ability to exercise their commercial and business activities.

10. Concerning the protection of the privacy and integrity of the individual, the Commission referred to the judgment of the Court of Justice of the European Union in the *Bavarian Lager* [9] case, according to which Regulation 45/2001 is applicable alongside Regulation 1049/2001. The document the complainant had requested contains the names and functions of the Commission's staff, names of all persons concerned by the OLAF investigation, implementing institutions, names of candidates and companies of the relevant call for tender, names of companies and institutions which were beneficiaries of the grant, names of key-experts, consultants and subcontractors and finally e-mail and ordinary addresses, telephone numbers as well as consultants' passport numbers. In the



Commission's view, these references undoubtedly constituted personal data. The Commission considered that the complainant had failed to establish the necessity of disclosure or transfer of this personal data. The complainant, according to the Commission, had referred only to its defence rights. However, such a private interest could not be taken into account in this context. This conclusion was reinforced by the fact that the exception relating to the protection of the privacy and integrity of the individual was an absolute exception which does not require the institution to balance it against a possible public interest. In addition, the disclosure would carry a real and non-hypothetical risk of harming the privacy and integrity of the individuals concerned, as this would expose the latter to undue external pressure, criticism and unsolicited contacts, having regard to the particular context, namely, OLAF investigations.

11. As regards the issue of a possible overriding public interest, the Commission considered that the complainant did not point to any public interest but, again, referred only to the exercise of its defence rights. This private interest could not be taken into account in the context of Regulation 1049/2001.

12. On 5 November 2014, the complainant submitted its complaint to the Ombudsman. The inquiry

13. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission wrongly refused to grant full access to its file concerning the complainant and, in particular, to OLAF's final case report. Moreover, the Commission wrongly assessed the complainant's request for access to the relevant file under Regulation 1049/2001 and not under the EU Charter of Fundamental Rights (Articles 41(2)(b) and 48(2) concerning access to one's own file and respect for the rights of defence, respectively).

2) The Commission should grant full access to its file concerning the complainant and, in particular to OLAF's final case report.

The Commission was invited, in responding to the complaint, to take a position on any other documents forming part of its file concerning the complainant which were covered by the complainant's request and on which the Commission had not taken a position so far.

14. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. Her services also carried out an inspection of the Commission's file concerning the case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission wrongly assessed the complainant's request for access to the file under Regulation 1049/2001 rather than under the Charter of Fundamental Rights and related claim

15. The Commission's position was that, as it was not responsible for carrying out the



relevant investigation, it was not in a position to consider the complainant's request as a request for access to one's own file under the Charter of Fundamental Rights. This was because OLAF is completely independent of the Commission in relation to its investigation functions. Furthermore, with reference to the relevant case law [10] , the Commission argued that the right of defence in relation to Article 4 Commission Decision 1999/396/EC [11] should not be interpreted widely , as the OLAF document does not in and of itself adversely affect the rights of the individual.

16. The Commission stated that the complainant's contract was governed by Regulation 1605/2002, Regulation 2342/2002 as well as the general terms and conditions of the contract. Against this background, the request for access to documents was treated under Regulation 1049/2001, rather than under Article 41(2), second indent of the Charter.

17. The Commission added that privileged access fell outside the scope of Regulation 1049/2001. It also stated that it did not hold any documents relevant to the complainant's case other than the OLAF Final Case Report.

18. The Commission invoked the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual) and Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001 for its refusal to grant full access to the file. The Commission stated also that the complainant had already got access to five out of the six documents referred to in the OLAF Final Case Report as the complainant was the author of those documents. It also argued that the "*partial access granted went beyond its strict legal obligations, as the Commission considers that OLAF reports are covered by a general presumption of non-disclosure* ", basing this presumption on case law in the field of competition law [12] . Thus the Commission considered that there was a general presumption of non-disclosure covering the OLAF report during and after the investigation was closed. The Commission also stated that there were no further documents in its possession upon which it could take a position.

19. The Commission added that it acted in line with the OLAF guidelines on the use of OLAF final reports by the Commission services [13] in disclosing to the complainant only the parts of the OLAF Final Case Report which were relevant for the recovery procedure, the application of exclusion measures and/or other administrative financial penalties.

20. The Commission also stated that, as a general rule, OLAF expects that the personal data of persons subject to its investigation must not be communicated to any other party. The Commission also emphasised that all contractual documents relevant to the allegations against the complainant were already in its possession.

21. The Commission concluded that there was a public interest to protect the privacy and integrity of the individuals concerned as well as the commercial interests of the companies referred to in the relevant document, whereas the complainant's interest was private. Whereas the purpose of Regulation 1049/2001 is to provide access to the public at large, the possible rights of an interested party to have privileged access cannot be taken into



account. Ultimately, the Commission considered that there was no overriding public interest in full disclosure.

22. The complainant considered it to be irrelevant whether the Commission or OLAF was the owner of the file as OLAF is itself a part of the Commission. The complainant stated that it addressed its complaint to the Commission as the "*legal entity*" and argued that it could have been different if OLAF was a legally independent body. The complainant accepted that the Commission did not have access to any other documents or files concerning the case.

23. As regards the OLAF Final Case Report, the complainant took the view that it is not merely an internal document, as it forms the main documentary evidence for imposing a financial penalty upon the complainant. According to the complainant, such a document would "*have to be adduced in evidence and produced in court proceedings*".

24. Finally, the complainant took the view that, because the penalties are similar to criminal proceedings, an analogy could be drawn with the rights contained in German national law on this point. It stated that, under German law, "*access to the file must be given to the defence lawyer, as a rule*".

25. Concerning the applicability of Regulation 1049/2001 and the protection of personal data invoked by the Commission, the complainant felt that the Commission had failed to demonstrate that the integrity of individuals would be put at risk if their identity was disclosed. Moreover, the Commission had not provided specific reasons as to why individuals residing in Syria would be put at risk through disclosure of their identity, given the current situation in that country. Further, the identities of those involved in the OLAF investigation had possibly already been disclosed during the on-the spot checks at the complaint's premises.

The Ombudsman's assessment

26. In accordance with Article 41(2), second indent of the Charter of Fundamental Rights of the European Union, every person has the right "*to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*".

27. The Ombudsman notes that it follows from Article 3 of Decision 1999/352/EC, [14] as well as the third recital of Regulation 883/2013, [15] that the Commission has given OLAF **full independence** to exercise its investigative function. Against this background, it is clear that the Commission was not in possession of the relevant investigation file to which the complainant had requested access. However, as the owner of the penalties file, it also possessed certain documents.

28. It was the Commission, and not OLAF, which took the decision to impose the financial penalties on the complainant. The complainant requested access to the OLAF Final Case



Report after the OLAF investigation had ended. Thus, the complainant's request was not made to defend its rights in the framework of the OLAF investigation, but to defend itself against the Commission's decision imposing penalties. In light of the clear wording of Article 41(2) of the Charter, according to which the right to good administration includes "[...] *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*", the Ombudsman takes the view that the Commission should have handled the complainant's request to his **own file** under that specific provision [16]. Article 4 of Commission Decision 1999/396, to which the Commission referred, is not relevant in the circumstances of the present case, as it applies only to a "*Member, official or servant of the Commission*" [17].

29. Public access to documents under Regulation 1049/2001 provides a clear legal basis for citizens to have access to documents held by the EU. However, the Ombudsman takes the view that the Commission should assess a request for access to one's own file as a request made under the Charter when it is clear that such a request concerns a decision taken by the Commission which adversely affects the interests of the access seeker. In this case, the Commission has not adequately explained why, given that it is undisputed that the decision to impose penalties on the complainant adversely affects it, Article 41(2) of the Charter should not apply. It is important to note that such access would never be narrower than the access granted under Regulation 1049/2001 and may well, **depending on the specific content of the documents**, be broader. Thus, in such circumstances, a decision not to consider an access request as a request for access to one's own file **may** give rise to a material limitation of a fundamental right.

30. It follows that the failure of the Commission to carry out an assessment under Article 41(2) of the Charter amounts to maladministration.

31. Where the Ombudsman finds that there has been maladministration by an institution, she considers whether it will be possible to provide redress or otherwise correct the action causing the maladministration. If so, the Ombudsman is likely to propose a solution or make a recommendation to the institution concerned. However, in this particular case, the Ombudsman takes the view that correcting the maladministration will not serve any useful purpose.

32. Even if the assessment had been carried out under Article 41(2) of the Charter, the inspection carried out by the Ombudsman's services showed that, in this case, in all likelihood there would not have been a different outcome. Even if Article 41(2) of the Charter had been applied, the Commission could still have denied access to any information the disclosure of which would undermine "*the legitimate interests of confidentiality and of professional and business secrecy*".

33. The Ombudsman points out that her inspection of the file showed that, as far as data concerning third companies is concerned, the disclosure of the entire document would enable the identification of third companies which had also been part of OLAF's investigation. The disclosure could thus be harmful for the parties concerned.



34. The inspection also revealed that the names blanked out were those of OLAF's staff members. Disclosing their names in the particular context would risk harming the persons concerned, exposing them to external pressure and thereby undermining the very mission of OLAF. For this reason, and notwithstanding the need also to ensure that data protection rules are respected, such information must be considered "confidential".

35. In light of the foregoing, in circumstances where redress for the complainant is not possible, the Ombudsman has decided to close this inquiry with a finding of maladministration, as identified in point 30 above.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark:

Critical remark

The Commission wrongly failed to deal with the complainant's request for access to its own file under Article 41(2) of the Charter of Fundamental Rights of the European Union. This amounts to maladministration.

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

Emily O'Reilly

Strasbourg, 15/03/2016

[1] This amounted to 14 per cent of the entire value of the contract.

[2] It informed the complainant of this conclusion on 14 May 2014.

[3] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities , OJ 2002 L 248, p. 1.

[4] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities , OJ 2002 L 357, p. 1.

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

[6] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal



data by the Community institutions and bodies and on the free movement of such data , OJ 2001 L 8, p. 1.

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

[8] See Article 4(1), first indent of Regulation 1049/2001.

[9] Judgment of the Court of Justice (Grand Chamber) of 29 June 2010, *Commission v Bavarian Lager* , C-28/08 P, ECLI:EU:C:2010:378.

[10] Order of the General Court of 18 December 2003, *Gómez-Reino v Commission* , T-215/02, ECLI:EU:T:2003:352, paragraph 65.

[11] Commission Decision 1999/396 of 2 June 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, OJ 1999 L 149, p. 57. Article 4 of that Decision reads as follows: "*Where the possible implication of a Member, official or servant of the Commission emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to a Member, official or servant of the Commission may not be drawn once the investigation has been completed without the interested party's having been enabled to express his views on all the facts which concern him.*

In cases necessitating the maintenance of absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the Member, official or servant of the Commission to give his views may be deferred in agreement with the President of the Commission or its Secretary-General respectively. "

[12] Judgment of the Court of Justice of 27 February 2014, *Commission v EnBW* , C-365/12 P, ECLI:EU:C:2014:112, paragraph 66.

[13] These guidelines are not publicly available on the internet.

[14] 1999/352/EC, ECSC, Euratom: Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ 1999 L 136, p. 20.

[15] 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) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ 2013 L 248, p. 1.

[16] See also Judgment of the Court of Justice of 18 July 2013, *Commission and Others v Kadi* , C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518, paragraph 100.



[17] See footnote 11 above.