

Recommendation of the European Ombudsman in case 2309/2013/JAS on the European Anti-Fraud Office's handling of a request for public access to documents

Recommendation

Case 2309/2013/JAS - **Opened on** 17/12/2013 - **Recommendation on** 22/11/2016 -
Decision on 05/07/2017 - **Institution concerned** European Anti-Fraud Office (Maladministration found) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The case concerned a request for public access to documents drawn up by the European Anti-Fraud Office (OLAF) arising from an inquiry by the European Ombudsman. OLAF failed to deal with the initial access request within the statutory time limit. When the requester then sought a review of this effective refusal decision, OLAF suspended the review on the grounds that it had doubts about the identity of the complainant, a German national.

Following a solution proposal by the Ombudsman, OLAF agreed to review its effective refusal decision. It gave the complainant access, in full or in part, to four documents that it had found to fall within the scope of the request. The complainant argued that it had taken OLAF too long to respond to his request for access. He also questioned whether OLAF had identified all documents falling within the scope of his request.

The Ombudsman stressed the importance of timely replies to requests for access to documents but found no reason to inquire further into the delay issue following OLAF's apology for the delay. However, the Ombudsman concluded that OLAF had failed to identify two documents that should have been considered as falling within the complainant's request for public access. That failure constituted maladministration. The Ombudsman thus recommended that OLAF should now decide if there is a right of public access to these documents and, in doing so, should have regard to the Ombudsman's preliminary view that, with minimal redactions, these two documents should be disclosed. The Ombudsman also recommended to OLAF that it again search its files to establish if it holds any other documents falling within the scope of the complainant's request for documents; and, if such documents are found, OLAF should decide on whether there is a right of public access to those documents.

The background to the complaint



1. The complaint concerns the refusal of the European Anti-Fraud Office (OLAF) to grant the complainant, a German national, public access [2] to “ *a list of OLAF's documents produced following, and in connection with, the decision of the European Ombudsman of 15 March 2013 in case 1697/2010/(BEH)JN* [3] *and copies of these documents* ” [4] . The access request was made in September 2013.

2. OLAF twice extended the deadline for responding to the complainant's request for public access. The complainant then requested an internal review of this decision by making a so-called confirmatory application. He argued that the second extension constituted a violation of the relevant EU rules on public access to documents. He clarified that his request “ *relates only to those documents which were produced by OLAF following, meaning after, the decision of the Ombudsman in March [2013]* ” [5] .

3. OLAF refused to deal with the review request because, it said, of doubts about the complainant's identity. It demanded that the complainant should provide a certified copy of his passport and a copy of his initial request for access. The complainant then turned to the Ombudsman.

The inquiry

4. The Ombudsman opened an inquiry into the following allegations and claims:

Allegations:

1) OLAF wrongly suspended the handling of the complainant's confirmatory application for public access to documents.

2) OLAF failed to grant the complainant access to the requested documents.

Claims:

1) OLAF should apologise for the delay caused.

2) OLAF should grant the complainant full access to the requested documents without further delay.

5. In the course of the inquiry, the Ombudsman made a proposal for a solution and received the response of OLAF as well as the comments of the complainant on OLAF's response. The Ombudsman's recommendation takes into account the arguments and views put forward by the parties.

Allegation that OLAF wrongly suspended the handling of the complainant's confirmatory application

The Ombudsman's solution proposal, OLAF's reply and the Ombudsman's final assessment



6. In the spirit of seeking a rapid and citizen-friendly solution to this allegation, the Ombudsman proposed in March 2014 that OLAF should proceed with its handling of the complainant's request for public access to documents.

7. OLAF replied that it would do as proposed by the Ombudsman. However, OLAF reserved the right to take appropriate measures in future whenever it had serious doubts about the identity of a person asking for public access to documents.

8. The Ombudsman welcomes OLAF's positive reply to the solution proposal and considers that OLAF has settled this aspect of the complaint. However, the Ombudsman notes that, in a request for public access to documents, the identity of the requester should not be a consideration in terms of the decision to be made on that request. The decision should be the same irrespective of the identity of the requester. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access (subject to some exceptions) to documents held by an EU institution. Very occasionally there may be reasons why, in the interests of preventing an abuse of the right of public access to documents, it may be acceptable to seek proof of the identity of the requester. However, any requirements in this regard must be both appropriate and proportionate. In this case, the Ombudsman is not satisfied that OLAF was justified in making the particular demands it made of the complainant regarding proof of his identity.

Allegation that OLAF failed to grant the complainant access to the requested documents

Arguments presented to the Ombudsman

9. In dealing with the complainant's request for access as proposed by the Ombudsman, OLAF identified four documents as falling within the scope of the complainant's request. These were a letter to the European Ombudsman, a letter to the European Parliament, a reply to written questions from the Parliament's Committee on Budgetary Control [6] and a reply to a parliamentary question [7] .

10. OLAF disclosed the latter three documents in full and granted partial access to the first document. Regarding the undisclosed parts, OLAF invoked the exceptions aiming at protecting the privacy and integrity of the individual, the purpose of investigations and its decision-making process [8] . OLAF apologised for the delay in dealing with the complainant's request for an internal review of its original position, which had occurred " *due to the necessity to consult other Union bodies and services* " .

11. The complainant argued that the time it had taken OLAF to handle his confirmatory application was unreasonably long. He questioned whether the consultations mentioned by OLAF could really have caused the delay, given that consultations would have been necessary for the first document only and would have involved one Union body only, namely the European Ombudsman. The complainant argued that such consultations should not lead to a violation of



the time limits laid down for handling access requests. The complainant also questioned whether OLAF had indeed identified all documents falling within the scope of his request. It was contrary to his experience with large public authorities that there existed no written correspondence within OLAF, and with departments of the Commission, concerning the Ombudsman's decision in case 1697/2010/(BEH)JN. He also questioned whether it was true that OLAF had sent one letter only to the Ombudsman and that there had not been any follow-up correspondence.

The Ombudsman's assessment

12. OLAF has given full access to three documents and partial access to one document identified as falling within the scope of the complainant's access request. The complainant did not question the fact that OLAF gave partial access only to one of the documents. The Ombudsman therefore considers that OLAF has now dealt satisfactorily with the complaint in so far as these four documents are concerned.

13. Regarding the **time** it took OLAF to respond to the complainant's confirmatory application, the Ombudsman notes that it took OLAF, from the time that it agreed to the Ombudsman's solution proposal, more than four months to reply. The relevant rules set a time limit of 15 working days for an institution to respond to a request for review [9] , which may be extended by another 15 working days in exceptional cases [10] .

14. The EU rules on public access to documents expressly provide for consultations with third parties. Indeed, OLAF consulted with the Ombudsman's office before responding to the complainant's request for review. However, given the formulation of the EU rules on public access to documents, it must be assumed that the legislators considered that consultations should take place within the confines of the time limits specified.

15. Delays in handling request for access to documents are clearly undesirable in that they negatively affect citizens' right to access documents and the benefits that such access entail in terms of, for instance, citizens' participation in decision-making and accountability of the EU administration. The time limits for dealing with requests for public access to documents are intended to ensure that citizens' rights of access to documents are not deprived of real effect. If an EU institution does not respect the time limit for handling a confirmatory application, the applicant can choose to go to Court or turn to the Ombudsman [11] . In the present case, the Ombudsman was already involved in OLAF's handling of the access request through the present inquiry. Although it is regrettable that it took OLAF so long to grant access to the documents, the Ombudsman notes that **OLAF has apologised to the complainant for the additional delay** . The Ombudsman therefore finds no reason to inquire further into this aspect of the case.

16. Regarding the question of whether OLAF properly **identified all documents falling within the scope of the complainant's request for access** , the presumption of legality of the acts of EU institutions implies that, where an institution states that a particular document to which



access has been sought does not exist, there is a presumption that this statement is correct. However, the applicant may rebut this presumption by putting forward relevant and consistent evidence [12] .

17. As mentioned in the documents provided to the complainant, OLAF initiated, in the context of the Ombudsman's decision, a broader review of its rules on whistleblowing. This included, for example, the adoption of "Guidelines on Investigation Procedures for OLAF Staff" [13] . However, the adoption of those Guidelines cannot be considered as "*documents produced following, and in connection with* " the Ombudsman's decision, as the Guidelines concern the broader subject of whistleblowing rather than a single case.

18. Therefore, while the Ombudsman's decision in case 1697/2010/(BEH)JN might have contributed to a wider reflection on OLAF's whistleblowing rules, it is reasonable for OLAF to consider documents produced in such a context not to fall within the scope of the complainant's request for access to documents.

19. When closing case 1697/2010/(BEH)JN, the Ombudsman asked OLAF to provide information on any action taken in relation to the Ombudsman's findings. OLAF replied to the Ombudsman's request in the form of a letter, which was later made available to the complainant in the present case in response to his request.

20. However, the Ombudsman notes, OLAF sent two additional letters to the Ombudsman following the decision in case 1697/2010/(BEH)JN . These letters were sent on 3 April and 23 August 2013, that is, prior to the complainant's request for access in September 2013.

21. Unlike the letter referred to in paragraph 19 above, which has a direct connection with the decision in case 1697/2010/(BEH)JN, the letters sent on 3 April and 23 August 2013 do not deal with the subject matter of case 1697/2010/(BEH)JN or the decision taken in that case. Rather, these letters relate to separate issues that arose **in the aftermath** of the closure of that case. The subject matter of case 1697/2010/(BEH)JN and the decision taken in that case constitute the background to the issue that is raised in those letters. However, both letters do refer explicitly to case 1697/2010/(BEH)JN and it is clear that there is some *connection* between the issue discussed in those letters and the decision taken in case 1697/2010/(BEH)JN.

22. The Ombudsman considers that, when faced with a request for access to documents, an institution should interpret that request appropriately. If the institution has doubts about the scope of the request, it should confer with the person seeking access in order to find a citizen-friendly solution. If the institution fails to do so, citizens are prevented from challenging decisions refusing access, or are led to believe that certain documents do not exist at all. Both scenarios are detrimental to citizens' fundamental right of access to public documents. The Ombudsman thus considers that OLAF should have taken the immediate view that these two letters fell within the scope of the complainant's request for access to documents. Failing that, OLAF should have conferred with the complainant to clarify the scope of the request for access.

23. The Ombudsman takes the view that it was maladministration on the part of OLAF to have



failed to identify these two additional letters as being captured by the complainant's request or, in the alternative, to have consulted the complainant as to the scope of his request.

24. In order to remedy the maladministration, the Ombudsman recommends that OLAF grant access to the two letters mentioned above, unless an exception to access applies to all or parts of the documents [14]. The Ombudsman further recommends that, in considering the right of public access to these two letters, OLAF should have regard to her preliminary view that, subject only to minimal redactions [15], there is a right of public access to the two letters.

25. Furthermore, taking into account that the Ombudsman has identified additional documents she considers to be covered by the complainant's request, she recommends that OLAF conducts further searches to establish whether it holds any other documents falling within the scope of the complainant's request for documents. These further searches should, in particular, be made in files dealing with issues related to the subject matter of the Ombudsman's inquiry in case 1697/2010/(BEH)JN. The Ombudsman asks OLAF to inform her in its opinion of the outcome of this search and of any decision it has taken in relation to the right of public access to such documents.

The recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendations to OLAF:

OLAF should grant the complainant access to the letters it sent to the Ombudsman on 3 April and 23 August 2013, except it considers that an exception to access applies to all or parts of the letters. In deciding on whether or not to grant public access to the letters, OLAF should have regard to the Ombudsman's preliminary view that, subject to minimal redactions, there is a right of public access to the two letters. If OLAF considers that redactions to the letters are necessary, it should inform the Ombudsman of the redactions and the reasons therefor.

OLAF should conduct further searches to establish whether it holds any other documents falling within the scope of the complainant's request for public access to documents; these further searches should, in particular, be made in files dealing with issues related to the subject matter of the Ombudsman's inquiry in case 1697/2010/(BEH)JN. OLAF should take a decision on the right of public access to any such documents identified. OLAF should inform the Ombudsman of the outcome of these searches and of its decision on the right of public access to any documents identified.

OLAF and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, OLAF shall send an opinion by 24 February 2017.

Strasbourg, 22/11/2016,



[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] On the basis of 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.

[3] Decision of the European Ombudsman closing his inquiry into complaint 1697/2010/(BEH)JN against the European Anti-Fraud Office.

[4] The complaint was lodged in German. The German text reads: *“Eine Liste der von OLAF im Anschluss an und im Zusammenhang mit der Entscheidung des Europäischen Bürgerbeauftragten vom 15. März 2013 im Fall 1697/2010/(BEH)JN erstellten Dokumenten sowie Kopien dieser Dokumente.”*

[5] The German text reads: *“ [Der] Antrag bezieht sich lediglich auf diejenigen Dokumente, die von OLAF im Anschluss an, also nach der Entscheidung des Bürgerbeauftragten vom März dieses Jahres erstellt wurden.”*

[6] Available at:

<http://www.europarl.europa.eu/document/activities/cont/201401/20140117ATT77782/20140117ATT77782EN.pdf>
[Link]

[7] Available at:

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-004680&language=EN>
[Link]

[8] Article 4(1)(b), Article 4(2), third indent, and Article 4(3) of Regulation 1049/2001.

[9] See Article 8(1) of Regulation 1049/2001.

[10] See Article 8(2) of Regulation 1049/2001.

[11] Article 8(3) of Regulation 1049/2001.

[12] See Decision of the European Ombudsman closing his inquiry into complaint 375/2013/ANA against the European Commission, paragraph 19, and case-law cited.

[13] Available at:



https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/gip_18092013_en.pdf [Link]

[14] In accordance with Article 4 of Regulation 1049/2001.

[15] The Ombudsman will inform OLAF of the minimal redactions to the letters which, in her preliminary view, are necessary.