

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

Decision

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) |

The case concerned a request for public access to documents drawn up by the European Anti-Fraud Office (OLAF) in connection with a decision by the European Ombudsman. Following a solution proposal by the Ombudsman, OLAF gave the complainant access to four documents that it had found to fall within the scope of the access request. The complainant questioned whether OLAF had identified all relevant documents.

The Ombudsman then made a recommendation to OLAF, asking it to disclose, subject to any necessary redactions, two additional documents that the Ombudsman considered should have been considered as falling within the scope of the complainant's request.

In its reply to the Ombudsman's recommendation, OLAF explained why it did not consider the two documents to fall within the scope of the complainant's access request. However, the Ombudsman did not consider those explanations persuasive and closed the case maintaining the finding of maladministration by OLAF.

The background

1. The complaint concerns the refusal of the European Anti-Fraud Office (OLAF) to grant the complainant, a German national, public access [1] 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* [2] *and copies of these documents* ” [3] . The access request was made to OLAF in September 2013.

2. OLAF twice extended the deadline for responding to the complainant's access request. The complainant then made a so-called confirmatory application, asking again for access to the documents. OLAF refused to deal with this request because it had doubts about the complainant's identity.



3. In December 2013, the complainant turned to the Ombudsman. The complainant was concerned that OLAF had wrongly refused to deal with his request and that it had failed to grant him full access to the requested documents. The complainant wanted OLAF to apologise for the delay caused and to grant him full access to the documents without further delay.

4. Following a solution proposal by the Ombudsman, OLAF dealt with the complainant's review request. However, in doing so, the Ombudsman considered that OLAF had overlooked certain documents and she therefore made a subsequent recommendation [4] to OLAF that it should disclose these documents and look for others that would fall within the scope of complainant's request for access.

5. The present decision takes into account, in particular, OLAF's detailed opinion on the Ombudsman's recommendation, as well as the complainant's comments.

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

The Ombudsman's recommendation

6. In her **recommendation**, the Ombudsman noted that OLAF had dealt satisfactorily with the complaint in so far as the documents identified by OLAF as falling within the scope of the complainant's request were concerned. OLAF also apologised to the complainant for the delay that had occurred.

7. However, the Ombudsman noted that OLAF had sent two additional letters to the Ombudsman following the decision in case 1697/2010/(BEH)JN. The subject matter of that case and the decision taken constitute the background to the issue that is raised in those letters. 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. The Ombudsman thus took 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 with the complainant as to the scope of his request. The Ombudsman made 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.

8. In its opinion on the Ombudsman's recommendation, OLAF stated that the complainant's request had been clear in the sense that in order for documents to fall within the scope of the request, they had to fulfil the following three conditions: they had to be produced (i) by OLAF (ii) between 15 March and 13 September 2013 (iii) in connection with the Ombudsman's decision of 15 March 2013 in case 1697/2010/(BEH)JN.

9. OLAF emphasised that the complainant did not ask for documents that had any *relation* to case 1697/2010/(BEH)JN, but limited the scope of the request to documents **following and in connection with** the Ombudsman's **decision** of 15 March 2013. The scope of the request was therefore clearly circumscribed by the subject-matter of the Ombudsman's decision. For example, such documents could be reports or comments on the factual and legal analysis and/or the conclusions of the Ombudsman's decision, could relate to any action needed or already taken to implement the Ombudsman's findings or could contain suggestions or possible replies to questions that have been generated either internally or externally by the decision. The documents which OLAF had identified and provided to the complainant in reply to his request for access to documents were such documents.

10. On the contrary, OLAF stated, documents which concern other circumstances or issues, even if these documents were sent during the period in question and even if they are broadly related to the case dealt with by the Ombudsman, fall outside the scope of the request. In particular, none of the two letters in question was written in connection with the Ombudsman's decision.

11. OLAF stated that the **first letter** concerned the treatment of particular confidential information. Although the issue raised in that letter was linked to two cases before the Ombudsman, including case 1697/2010/(BEH)JN, the letter was not written in connection with the decision of the Ombudsman in case 1697/2010/(BEH)JN. More specifically, the letter did not concern the subject-matter of the Ombudsman's decision, namely a potential "whistleblowing" complaint by an EU staff member and OLAF's reaction to that complaint.

12. According to OLAF, the time-line also supports this view. OLAF said that the letter was drafted before the Ombudsman issued the decision. However, OLAF's internal procedure for signing and dispatching the letter took longer than usual and the letter was only sent to the Ombudsman on 3 April 2013, that is, after the Ombudsman's decision had been published. However, the internal discussion concerning the subject matter of the letter and the decision to send the letter to the Ombudsman pre-dated 15 March 2013, the date of the Ombudsman's decision. The fact that, chronologically, the letter was sent after the Ombudsman's decision in case 1697/2010/(BEH)JN was a mere coincidence.

13. OLAF stated that the **second letter** has a similar content to the first one and concerns the



same issue. It was, in a way, a follow-up to the first letter. The information provided to the Ombudsman in the second letter does not concern any follow-up or other issues that arose in connection with the decision in case 1697/2010/(BEH)JN.

14. OLAF concluded that the two letters that the Ombudsman had recommended it to disclose fell outside the scope of the complainant's access request: While the letters were indeed *related* to case 1697/2010/(BEH)JN in a broad sense, the complainant's access request was clearly for documents drawn up in *connection* with the Ombudsman's *decision* in that case.

15. OLAF argued that since the complainant's request had been clear and well defined, OLAF had had no doubts as to the scope of the request. According to OLAF, there had thus been no need to consult the complainant on the request.

16. OLAF stated that it does not hold any additional documents falling within the scope of the complainant's request for public access to documents.

17. In his comments, the **complainant** criticised what he considered to be OLAF's continued efforts to prevent him from effectively exercising his right to public access to documents.

The Ombudsman's assessment after the recommendation

18. The Ombudsman notes that the complainant's request for public access to documents concerned " *documents produced following, and in connection with, the decision of the European Ombudsman of 15 March 2013 in case 1697/2010/(BEH)JN* ".

19. OLAF has clarified its view that, in order for a document to fall within the scope of the complainant's request, it is not sufficient that it has some connection with the Ombudsman's *inquiry* in case 1697/2010/(BEH)JN. According to OLAF, for a document to fall within the scope of the complainant's request, it must have a link to the Ombudsman's closing *decision* in that case, that is, it would have to concern OLAF's follow-up to the findings in the Ombudsman's decision.

20. The documents that OLAF identified as falling within the scope of the request are indeed such documents [5] : The first document is the official letter from OLAF to the Ombudsman explaining its follow-up to the Ombudsman's findings in the decision on case 1697/2010/(BEH)JN. The second document explains OLAF's follow-up to the Ombudsman's decision to a Member of the European Parliament. The third document contains OLAF's explanations on the follow-up to the Ombudsman's decision and the underlying substantive issues made in the context of the 2012 discharge procedure [6] . The fourth document is the reply to a parliamentary question containing OLAF's conclusions regarding the Ombudsman's decision.

21. Following receipt of OLAF's opinion, the Ombudsman again reviewed the two letters in question, sent by OLAF to the Ombudsman on 3 April and 23 August 2013 and bearing those dates. The letters clearly have some connection to the Ombudsman's case. Indeed, both refer



to case 1697/2010/(BEH)JN. The Ombudsman accepts that they do not concern the follow-up to the decision on the case, but they are still connected to it. The wording of the first letter supports OLAF's argument that it was originally drafted before the Ombudsman's decision of 15 March 2013, but the Ombudsman does not accept that that takes the letter, dated and sent almost three weeks after the Ombudsman's decision, outside the scope of the complainant's request. The second letter relates to similar issues, refers to the Ombudsman's complaint reference number 1697/2010/BEH in its heading and is likewise connected to that case, which culminated in the Ombudsman's decision of 15 March 2013.

Conclusion

22. The Ombudsman thus considers that OLAF's opinion has not undermined the Ombudsman's conclusion that the two letters of 3 April and 23 August 2013 can reasonably be considered as covered by the complainant's request for public access to documents.

23. The Ombudsman therefore confirms the finding of maladministration in her recommendation dated 22 November 2016 and closes the case on that basis.

24. The Ombudsman hopes that OLAF will now reconsider its position rather than require the complainant submit a new request for public access to documents in question.

The complainant and OLAF will be informed of this decision.

Strasbourg, 05/07/2017

Emily O'Reilly European Ombudsman

[1] 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, available at:
<http://data.europa.eu/eli/reg/2001/1049/oj> [Link]

[2] Decision of the European Ombudsman closing his inquiry into complaint 1697/2010/(BEH)JN against the European Anti-Fraud Office, available at:
<https://www.ombudsman.europa.eu/en/cases/decision.faces/ga/49601/html.bookmark> [Link]

[3] 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 Dokumente sowie Kopien dieser Dokumente."*



[4] 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 recommendation available at:

<https://www.ombudsman.europa.eu/cases/recommendation.faces/en/73475/html.bookmark>
[Link]

[5] See paragraph 9 of the Ombudsman's recommendation.

[6] The procedure through which the European Parliament scrutinises the use of the EU budget.