

## **Decisione nel caso 598/2013/OV - Rifiuto di concedere l'accesso a una relazione d'indagine dell'OLAF**

Decisione

**Caso 598/2013/OV - Aperto(a) il 02/05/2013 - Decisione del 16/12/2013 - Istituzione coinvolta** L'ufficio europeo per la lotta antifrode ( Cattiva amministrazione non riscontrata ) |

Nell'ottobre 2012, Corporate Europe Observatory, un'ONG con sede a Bruxelles, aveva chiesto alla Commissione di fornirle una copia di una relazione d'indagine dell'OLAF che aveva portato alle dimissioni dell'ex commissario John Dalli. La Commissione aveva chiesto all'OLAF di trattare la richiesta. L'OLAF aveva rifiutato di concedere l'accesso alla relazione poiché aveva ritenuto che la sua divulgazione avrebbe compromesso l'obiettivo di un'indagine in corso da parte delle autorità investigative maltesi.

La denunciante riteneva che vi fosse un interesse pubblico prevalente alla divulgazione e, di conseguenza, si era rivolta al Mediatore.

Il Mediatore ha ritenuto che l'accesso pubblico a una relazione dell'OLAF potrebbe compromettere l'obiettivo di un'indagine nazionale in corso nel caso in cui la relazione costituisca un elemento prova nell'ambito di tale indagine. Il Mediatore ha rilevato che dalla sua indagine è emerso che alla data in cui era stato negato l'accesso pubblico alla relazione d'indagine dell'OLAF era in corso un'indagine penale basata su detta relazione. Tale circostanza giustificava il rifiuto di rendere pubblica la relazione d'indagine dell'OLAF in quel momento. Il Mediatore non ha pertanto riscontrato gli estremi di una cattiva amministrazione da parte dell'OLAF.

Il Mediatore ha tuttavia formulato osservazioni ulteriori riguardo all'errore procedurale che l'OLAF ha commesso quando ha rifiutato di concedere l'accesso pubblico alla sua relazione senza avere controllato lo stato dell'indagine maltese.

## **The background to the complaint**

1. The complaint concerns a refusal by the European Anti-Fraud Office (OLAF) to grant public access to its investigation report relating to activities of, amongst others, former Commissioner John Dalli [1] .



2. The background to the request for public access to the OLAF investigation report was as follows. In May 2012 a tobacco producer complained to the Commission that a Maltese businessman, Mr X (who claimed to be acting on behalf, and for the benefit, of the then Commissioner Dalli) requested a bribe from the tobacco company in return for seeking to influence the EU's prohibition on the sale of 'snus' [2] in the framework of the revision of the Tobacco Products Directive . After investigating the matter, OLAF sent its investigation report to the Commission on 15 October 2012. Commissioner Dalli left office [3] on 16 October 2012 after a meeting with Commission President Barroso.

3. OLAF also sent its investigation report to the Attorney General of Malta [4] .

4. On 26 October 2012, the complainant (Corporate Europe Observatory) requested the Commission to give public access, under Regulation 1049/2001 [5] , to all documents related to Commissioner Dalli's departure from the Commission, including the afore-mentioned OLAF investigation report. The Commission asked OLAF to deal with the request for access to the OLAF investigation report.

5. OLAF then wrote to the complainant stating that, as the investigation report had been forwarded to the competent Maltese investigatory authorities, its release would undermine the protection of the purpose of inspections, investigations and audits [6] . OLAF also argued that there was no overriding public interest and that partial access was not possible.

6. On 7 January 2013, the complainant responded to OLAF arguing that there was a clear overriding public interest in disclosure of the OLAF investigation report. It also stated that, in any case, OLAF had not convincingly demonstrated that partial access to the report was not possible. It asked, in particular, why it would not be possible to release those parts of the report that do not risk impacting on any possible court proceedings (such as the colophon, the table of contents and the description of the complaint submitted by the tobacco company).

7. When, in its decision of 31 January 2013, OLAF maintained its view that it could not release its investigation report, the complainant turned to the Ombudsman.

## **The subject matter of the inquiry**

8. On 27 March 2013, the complainant submitted the present complaint to the Ombudsman making the following allegation and claim:

### **Allegation:**

OLAF wrongly refused public access to the OLAF investigation report.

### **Claim:**



OLAF should provide full or partial access to the investigation report.

9. In his letter opening the inquiry, the Ombudsman asked OLAF to give precise information as regards the existence and the nature of the investigation by the Maltese authorities, and as regards why that investigation would be undermined by the release of the report. The Ombudsman also asked OLAF to inform him whether it had requested the views of the Maltese judicial authorities as regards the likely impact on their procedures, if any, of the public disclosure of the report. The Ombudsman pointed out in this context that he was aware, through press reports, of the publication in Malta of a version of the OLAF investigation report. In sum, it appears that in April 2013, the entire OLAF investigation report (with the exception of 2 pages and some pages from the annexes) was leaked to the press (apparently in Malta). The greater part of the report is therefore, now in the public domain.

## **The inquiry**

10. The complaint was forwarded to OLAF for an opinion on 2 May 2013. OLAF sent its opinion on 11 October 2013. The opinion was then forwarded to the complainant, who sent observations on 6 December 2013.

## **The Ombudsman's analysis and conclusions**

### **A. OLAF's allegedly wrong refusal to grant access to the investigation report**

#### **Arguments put forward by OLAF in its decision refusing access**

11. In its decision refusing access to the report, OLAF argued that it is legally bound, under Article 8(2) of Regulation 1073/99 concerning investigations conducted by OLAF [7], to treat as confidential and subject to professional secrecy the information it obtains during an investigation. OLAF also argued that it was not required to release the investigation report pursuant to Regulation 1049/2001, since the investigation report was covered by three exceptions under Regulation 1049/2001, including the need to protect the purpose of inspections, investigations and audits (Article 4(2), third indent, of the Regulation).

#### **The protection of the purpose of inspections, investigations and audits (Article 4(2), third indent, of the Regulation):**

12. OLAF argued, specifically, that the report contained information related to the identification of witnesses and to the treatment of information received from these witnesses. It stated that the public disclosure of the identity and information related to witnesses would undermine future



OLAF investigations as it would discourage private persons from sending information to OLAF on possible financial irregularities. This would deprive OLAF and the Commission of information and would undermine the essential element for the conduct of investigations aiming at protecting the financial and economic interests of the EU.

**13.** OLAF also pointed out that the General Court in Joined cases T-391/03 and T-40/04 *Franchet and Byk* held that disclosure of documents that could constitute evidence in national court proceedings might compromise the effective use of this evidence by the national authorities [8]. OLAF underlined that the fact that its investigation might be at an end does not relieve it from the obligation to do nothing which might harm follow-up actions being undertaken or being contemplated by national authorities. OLAF referred to Case T-50/00 *Dalmine v Commission* (which is a cartel case), in which the General Court recognised that even a party subject to an investigation may be refused certain information if the disclosure of that information prejudices the effectiveness of an investigation [9]. OLAF argued that this reasoning also necessarily applied to disclosure of documents to the public under Regulation 1049/2001. OLAF, however, argued that this protection was not absolute: If national authorities do not take action within a reasonable time, there can be an obligation for disclosure under the Regulation [10]. OLAF stated that, in the present case however, the report was transmitted to the Maltese authorities relatively recently and, therefore, this caveat did not yet apply.

**14.** OLAF further referred to the judgements of the Court of Justice in cases C-404/10 P *Commission v Odile Jacob* and C-477/10 P *Commission v Agrofert Holding* [11], in which the Court introduced the general presumption that the disclosure of documents to the public could undermine, in principle, the objective of investigations. OLAF stated that that this applies to pending and closed proceedings. OLAF pointed out that the Court had referred to two distinct regulatory environments which must be reconciled. In the present case, on the one hand, Regulation 1049/2001 applies to OLAF, but, on the other hand, OLAF is bound to treat the information it obtains during an investigation as confidential and subject to professional secrecy, pursuant to Article 8 of Regulation 1073/99. Moreover, the exception of Article 4(2), third indent, in Regulation 1049/2001 is closely related to OLAF's investigation and inspection activities. Thus, in OLAF's view, transparency requirements and requirements linked to the confidentiality of case documents and data protection must be reconciled in order to apply the law coherently. In the case of OLAF, there is a need to ensure that allegations and information given to OLAF in confidence are not made public, but investigated. OLAF concluded that the public disclosure of the investigation report would be contrary to the purposes of Regulation 1073/99. Also, OLAF's future ability to conduct investigations in cooperation with the EU institutions and other Commission services would be seriously undermined by such disclosure.

**The protection of the privacy and integrity of the individual, in accordance with Union legislation regarding the protection of personal data (Article 4(1)(b) of the Regulation):**

**15.** OLAF stated that this exception related to, inter alia, personal data of officials of authorities of the Member States, informants, witnesses, employees of legal entities and persons concerned. Disclosing these data would, it insisted, clearly undermine the privacy and the integrity of these persons, contrary to Regulation 45/2001 [12]. OLAF argued that, in so far as



the report identifies individuals and gives specific detail of matters which directly relate to the investigation, such information constitutes personal data and its public disclosure may have an adverse effect on a person's reputation. OLAF also stated that the European Data Protection Supervisor (EDPS), in his Opinion C 2010-0458 of 30 July 2010, recommended that OLAF should guarantee the confidentiality of whistleblowers and informants, except where this would contravene national judicial procedure rules or where false statements are made maliciously.

**The protection of commercial interests of natural or legal persons (Article 4(2), first indent, of the Regulation):**

16. OLAF argued that the investigation report contained the names of private legal entities, the disclosure of which would harm their reputation, and thus their commercial interests. It stated that public disclosure of names of legal entities involved in an investigation risks showing them in a negative light and might give rise to misrepresentations about their performance and consequently harm their reputation and other legitimate business interests.

17. OLAF also concluded that, considering the nature of its investigations and in particular the confidential nature of the information it collected, there were no elements showing the existence of an *overriding public interest* in disclosure of the investigation report that outweigh the exceptions of Article 4(2) of Regulation 1049/2001.

18. With respect to *partial access*, OLAF considered that the report, in order to be well understood and to avoid the risk of distortion and incompleteness, could not be edited in such a way as to present an accurate account of what was investigated, how it was investigated and what was found. Such excision or redaction would result in a report being publicly disclosed which would not properly reflect OLAF's methods of work, matters taken into account, material relied upon and the reasonableness of views expressed and recommendations made.

## **Arguments presented to the Ombudsman**

19. In its complaint to the Ombudsman, the complainant put forward the following arguments:

20. As regards the protection of witnesses, the complainant admitted that OLAF clearly needed to act with some caution to protect witnesses. However, this was not a convincing argument to refuse access to the investigation report, since the tobacco company concerned had itself pro-actively sought publicity in presenting its version of the "Dalli case". There was thus no reason to protect the identity of that tobacco company and its representatives. The complainant made the same remark with regard to OLAF's argument referring to the need to guarantee the confidentiality of whistle-blowers and informants.

21. With regard to the confidentiality of OLAF's investigations, the complainant argued that OLAF had not elaborated on the specificities of the investigation concerning Mr Dalli and had not convincingly demonstrated that the partial release of the report would harm follow-up actions by the Maltese authorities. In relation to OLAF's argument that the transmission of the case to



the Maltese authorities took place relatively recently, the complainant stated that it had already been six months since Commissioner Dalli had resigned on the basis of the OLAF investigation report.

**22.** The complainant argued that OLAF's argument that it has to reconcile transparency requirements with the confidentiality of its investigations in fact meant that all OLAF investigation reports would be exempted from Regulation 1049/2001. In the complainant's view, this was clearly unacceptable.

**23.** The complainant stated that OLAF's argument relating to the protection of the privacy and integrity of individuals could not apply to the representatives of the tobacco company since that company had itself publicised its version of the "Dalli case". The complainant argued that the non-disclosure of the OLAF investigation report was in fact a serious problem for the reputation of the persons concerned, including Commissioner Dalli, who had not been allowed to see the report.

**24.** With regard to OLAF's argument relating to the protection of commercial interests of legal entities, the complainant stated that this could apply to the tobacco company. However, as the tobacco company had adopted a very high public profile in the case, it was a matter of public interest to be able to judge the role the company had played in the investigation which led to Commissioner Dalli's resignation.

**25.** As regards whether there is an overriding public interest in disclosure, the complainant stated that OLAF had not dealt with the arguments put forward in its confirmatory application. It argued that, as a matter of avoiding erosion of public trust in the EU institutions, there was an overriding public interest in releasing details of the circumstances that led to Mr Dalli's resignation. The complainant stated that a court case in Malta against the persons mentioned in the investigation report could easily take several years. This would mean that European citizens would be denied the right to know the basic facts for an unacceptably long time. The complainant argued that it is the need for legitimacy and accountability, as referred to in Regulation 1049/2001, which was at stake in OLAF's handling of the "Dalli case". The complainant underlined that the present case concerned the integrity of the body entrusted with investigating corruption or serious misconduct within the EU institutions (the complainant, in this context, referred to concerns expressed by OLAF's Supervisory Committee about procedural breaches by OLAF and allegations of illegal wire-tapping in the case).

**26.** The complainant also rejected OLAF's argument that it was impossible to grant partial access. It stated that OLAF's position, which could be applied to any OLAF document, in fact ruled out altogether the possibility of partial access.

**27.** On the basis of the above, the complainant alleged that OLAF had wrongly rejected its request for access to the investigation report, and that OLAF's reasoning practically meant exempting OLAF from Regulation 1049/2001. The complainant maintained its claim that OLAF should release the investigation report in its entirety or provide partial access.



**28.** In its opinion sent to the Ombudsman, OLAF first pointed out that the complainant is entitled, at any time, to make a new initial application and to provide new elements which, in its opinion, would compel OLAF to change its earlier position [13] . OLAF stated, in this context, that the complainant has referred to various facts (based on documents and media reports published after 31 January 2013) which took place after the decision on the confirmatory application and which could have provided a basis for a new initial request for access. It is questionable, however, whether these facts should be taken into consideration when assessing the way OLAF dealt with the request for access.

**29.** OLAF rejected the complainant's arguments that there was an overriding public interest in disclosure. It stated that, according to the case-law, the public interest in obtaining access to a document pursuant to the principle of transparency is not the same where the document relates to an administrative procedure as it is where the document relates to a procedure in which the institution in question acts in its capacity as legislator [14] .

**30.** OLAF stated that the Commission and OLAF had provided accurate and detailed explanations of their actions in several public hearings before the European Parliament's Committee on Budgetary Control. For that purpose, the President of Parliament granted the members of the Committee access to both the OLAF investigation report and to the Supervisory Committee's Report on condition of strict confidentiality. In OLAF's view, these discussions which were still ongoing contributed to maintaining the trust of the European citizens in the sound performance of the EU institutions, without that there being a need to disclose all sensitive documents to the public.

**31.** OLAF recognised that informing the entire public about its investigations plays an important role in the prevention of fraud, raises awareness and builds public trust in the EU institutions. However, at the time when the decision on the confirmatory application was sent to the complainant, the General Court was already examining the pleas submitted by Mr Dalli under Article 263(4) TFEU. OLAF argued that the public interest in the sound administration of justice is equally important as that in transparency and political accountability of public institutions. The public interest invoked by the complainant was therefore already being addressed by other legitimate means.

**32.** In relation to the complainant's argument that the tobacco company concerned has pro-actively sought publicity in presenting its views on the "Dalli case", OLAF stated that it did not understand how the content of the press articles referred to by the complainant could plausibly lead to a conclusion in favour of disclosure. The tobacco company concerned was not, OLAF stated, alone in presenting its version of the facts and the media widely reported on other versions. In OLAF's view, the question of whether a witness or a person concerned in an investigation provides public statements concerning their role in OLAF investigations does not affect the overall need to protect the reputation of persons concerned by the investigation and the identity of OLAF's informants and witnesses. OLAF reiterated that it has a general obligation to protect the identity of its informants [15] .

**33.** OLAF also stressed that the notion of an overriding public interest only applies to





exceptions listed in Article 4(2) and 4(3) of Regulation 1049/2001. The exception under Article 4(1)(b), namely the protection of personal data, is subject to different rules. As the Court of Justice held, that provision establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public. Consequently, where a request seeks to obtain access to documents containing personal data, the provisions of Regulation 45/2001 become applicable in their entirety [16]. In OLAF's opinion, the complainant did not provide any express and legitimate justification or any convincing argument showing the necessity for OLAF to transfer the personal data contained in the final report [17].

**34.** Contrary to what the complainant stated, OLAF did not argue that all its final reports and other documents are exempted from Regulation 1049/2001. OLAF only considers that final reports and similar categories of documents held by OLAF are covered by the general presumption of confidentiality recognised on several occasions by the Court [18]. This presumption does not exclude OLAF's final reports from the scope of Regulation 1049/2001, but represents a legitimate exception to OLAF's obligation to examine specifically and individually, certain categories of documents to which access has been requested [19]. It remains nevertheless open to citizens to prove that particular documents falling within those categories or their specific parts should be disclosed on the basis of an overriding public interest.

**35.** OLAF finally maintained that it carefully assessed the possibility of granting partial access to the investigation report. However, at the time of its decision on the confirmatory application, OLAF came to the conclusion that such partial access was not possible without undermining the public interests covered by the exceptions of Article 4 of Regulation 1049/2001.

**36.** In reply to the Ombudsman's request to give precise information as regards the investigation by the Maltese authorities and whether that investigation would be undermined by the release of the report, OLAF stated that its recommendations are not binding for the national judicial authorities. OLAF argued that, pursuant to Article 9(2) of Regulation 1073/99, its final reports constitute admissible evidence in Member States' administrative or judicial proceedings. Under Article 27 of OLAF's Instructions to Staff on Investigative Procedures, the investigation unit in charge must monitor on an annual basis the implementation of recommendations of a judicial nature made to Member States. In practice, the authorities concerned are invited to inform OLAF within 12 months from the transmission of the recommendations. OLAF usually does not approach the judicial authorities without a specific reason to seek information on the follow-up measures taken, as this may be perceived as unnecessary pressure by OLAF and could negatively affect the good relations between OLAF and the Member States' judicial authorities. Moreover, according to established case-law, OLAF is not obliged to consult national courts on whether national procedural law precludes disclosure of a document if OLAF invokes the exception of the protection of the purpose of inspections, investigations and audits under Article 4(2), third indent, of the Regulation. OLAF stated that this was the case here.

**37.** In its observations, the complainant stated, among other things, that it did not submit a new initial application because of the firm tone of OLAF's decisions rejecting its request for access. The complainant also disagreed with the distinction OLAF made between transparency in an





administrative and in a legislative procedure. It stated that, in its opinion, transparency in administrative procedures is often equally important. The complainant further found it questionable whether the court case initiated by Mr Dalli could be used by OLAF as an argument against disclosure.

## The Ombudsman's assessment

**38.** The Ombudsman notes the statement of OLAF (see paragraph 30 above) that OLAF and the Commission provided "accurate and detailed explanations" of their actions in several public hearings before the European Parliament's Committee on Budgetary Control, and that, for that purpose, the President of Parliament granted the members of the Committee access to both the OLAF investigation report and to the Supervisory Committee's Report (on condition of strict confidentiality).

**39.** The Ombudsman agrees with OLAF's view that such public hearings contribute to maintaining the trust of European citizens in the sound performance of the EU institutions. She also notes that the President of Parliament decided to grant the members of the Committee access to both the OLAF investigation report and to the Supervisory Committee's Report (on condition of strict confidentiality). However, while it is certainly true that bringing the issue, and the supporting documents, to the attention of Parliament, through public hearings, is vital to maintaining the trust of the European citizens in the sound performance of the EU institutions, this fact does not, of itself, imply that **public access** to the relevant supporting documents, such as the OLAF investigation report, should not be granted. Public access to the documents may only be refused if the refusal is justified in accordance with the rules on public access to documents set out in Regulation 1049/2001.

**40.** In this context, the Ombudsman notes, with approval, that OLAF itself recognises that informing the public about its investigations plays an important role in the prevention of fraud, raises awareness and builds public trust in the EU institutions (see paragraph 31 above).

**41.** OLAF relies firstly on the protection of the purpose of inspections, investigations and audits (Article 4(2), third indent, of Regulation 1049/2001) to justify why public access to the investigation report should be denied.

**42.** OLAF's definitive decision refusing access to the OLAF investigation report was taken on 31 January 2013. The question of whether that refusal was justified must be examined on the basis of the factual situation that existed at the time.

**43.** In her decision in case 2048/2011/OV, the Ombudsman found that there exists a general presumption that public access to documents relating to an **ongoing OLAF investigation** could, in principle, undermine the purpose of that ongoing OLAF investigation. The Ombudsman also concluded that where an OLAF investigation report constitutes evidence in **ongoing national proceedings**, public access to the OLAF investigation report could undermine the purpose of the ongoing national proceedings [20]. The main reason why this is the case is



because the public disclosure of evidence from an on-going investigation could prejudice the use of that evidence in a future trial, especially if the investigation could lead to a criminal trial.

44. OLAF concluded its own investigation in October 2012, after which it sent its investigation report to the Commission and to the Maltese authorities.

45. OLAF has argued that its report contained information related to the identification of witnesses and to the treatment of information received from these witnesses. It stated that the public disclosure of the identity and information related to witnesses would undermine future OLAF investigations as it would discourage private persons from sending information to OLAF on possible financial irregularities. This would, OLAF insisted, deprive OLAF and the Commission of information and would undermine the essential element for the conduct of investigations aiming at protecting the financial and economic interests of the EU. The Ombudsman notes that while this reasoning might justify redacting certain specific parts from an investigation report (such as the names of witnesses or other information that might identify them) before disclosing the investigation report to the public, this reason cannot suffice to justify the non-disclosure of the entire report.

46. As regards the undermining of possible ongoing investigations by the Maltese authorities, it emerged, during the course of the Ombudsman's inquiries, that the Maltese authorities did start at least some criminal investigations on the basis of the OLAF investigation report. In sum, in June 2013, OLAF revealed [21] that the Maltese authorities had, in December 2012, detained and indicted at least one person on the basis of its investigation report. The person who was taken into custody was, at least in June 2013, facing a criminal trial in Malta. As such, there was clearly a criminal investigation, based on the OLAF investigation report, on-going on 31 January 2013, the date on which public access to the OLAF investigation report was refused.

47. The fact that there was an on-going criminal investigation in Malta from December 2012 until at least June 2013 justified not making the OLAF investigation report public in January 2013, since the public disclosure of evidence in that on-going criminal investigation could have prejudiced the use of that evidence in a future criminal trial. The Ombudsman will therefore close this case with a finding of no maladministration.

48. However, in the opening letter dated 2 May 2013, the Ombudsman asked OLAF to give **precise information** as regards **the existence** and **the nature of** the investigation by the Maltese authorities, and as regards why that investigation would be undermined by the release of the report. The Ombudsman also asked OLAF to inform him whether it had requested the views of the Maltese judicial authorities as regards the likely impact on their procedures, if any, of the public disclosure of the report.

49. The reason the Ombudsman asked OLAF, in his letter opening his inquiry, to answer these questions, is because it could not have been presumed, from the mere fact that OLAF sent an investigation report to the national authorities, that those authorities would act on that report. It could not have been excluded, for example, that the national authority would find that there are no grounds to follow up on a report or that they would simply ignore the report. It was thus



incumbent on OLAF to contact the Maltese authorities to verify whether there was an on-going investigation in January 2013 (or at least the immediate prospect that such an investigation would be undertaken) and to verify what impact the release of the report might have on that investigation.

**50.** OLAF stated, in its opinion sent to the Ombudsman in October 2013, that it had not consulted with the Maltese authorities before taking its decision on 31 January 2013. It justified this response by stating that approaching the judicial authorities without a specific reason could be perceived as unnecessary pressure on them.

**51.** However, the Ombudsman underlines that nothing prevented OLAF from simply consulting the Maltese authorities to ask them about the status of their investigation in January 2013, the specific and valid reason for doing so being that there was a request for public access to the OLAF investigation report, and that OLAF needed to verify the status of any Maltese investigation in order to determine if Article 4(2), third indent, of Regulation 1049/2001 applied to that request [22] .

**52.** Such an approach to the Maltese authorities, justified in that manner, could not have been perceived as placing any pressure on the Maltese authorities to act. The Ombudsman will therefore make the further remarks below.

**53.** The Ombudsman considers that, in light of her conclusion in paragraph 47 above, that the exception relating to on-going criminal procedures justified OLAF in refusing disclosure at the relevant time. It is, therefore unnecessary, in the context of the present inquiry to assess the two other exceptions invoked by OLAF, namely the protection of the privacy and integrity of the individual and the protection of commercial interests of natural or legal persons.

**54.** The Ombudsman draws attention to the fact that if a new request for public access were made in relation to the OLAF investigation report, OLAF's decision on that request must necessarily depend on the factual situation at the moment OLAF takes a decision on the request for public access. Relevant considerations for such a decision will, of course, include whether relevant investigations or court proceedings, in which the OLAF report would constitute admissible evidence, are still ongoing, in Malta or elsewhere. Other relevant considerations, which might justify redaction of the investigation report, may relate to the need to protect personal data and privacy of specific individuals, or to the interests described in paragraph 45 above.

**55.** The Ombudsman finally notes that she is aware, through press reports, that a version of the OLAF investigation report was leaked to the press in April 2013. The greater part of the report is therefore, now in the public domain. This fact, however, is not relevant to the present inquiry.

## C. Conclusion

On the basis of her inquiry into this complaint, the Ombudsman closes it with a finding of no



maladministration. She makes the following

**FURTHER REMARKS:**

**1. In the Ombudsman's view, when OLAF refuses access to documents because of ongoing national proceedings (invoking Article 4(2), third indent of Regulation 1049/2001), it should provide reasoning that allows the applicant to understand why the release of the documents would specifically and effectively undermine the ongoing national proceedings.**

**2. Except in obvious cases, OLAF should seek information and views from the national authorities before refusing access to documents because their disclosure would undermine ongoing national proceedings.**

The complainant and OLAF will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 16 December 2013

[1] The complainant also submitted complaint 257/2013/OV, which concerns its request for public access to Commission documents relating to the "resignation" of Commissioner Dalli.

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

[3] Former Commissioner Dalli lodged an action for annulment and an action for damages before the General Court on 24 December 2012 (case T-562/12 *Dalli v Commission*). The action for annulment concerns an alleged decision of the President of the Commission of 16 October 2012 requiring Commissioner Dalli to submit his resignation following OLAF's report. The action for damages seeks compensation for the moral and material damage allegedly suffered as a result of that decision. Details of these actions were published in the Official Journal of 1 February 2013.

[4] 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".

[5] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[6] Article 4(2), third indent, of Regulation 1049/2001 states that " *The institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure* ".



[7] Regulation 1073/99 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L 136, p. 1.

[8] Joined Cases T-391/03 and T-70/04 *Franchet and Byk* , [2006] ECR II-2023, paragraphs 121-123.

[9] Case T-50/00 *Dalmine Spa v Commission* [2004] ECR II-2395, paragraph 83.

[10] *Franchet and Byk* , cited above, paragraphs 108-118.

[11] Case C-404/10 P *Commission v Éditions Odile Jacob* ; Case C-477/10 P *Commission v Agrofert Holding* .

[12] Regulation 45/2001 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.

[13] Case C-362/08 P *Internationaler Hilfsfonds v Commission* [2010] ECR 2010 I-669, paragraph 57.

[14] Case T-237/05 *Éditions Odile Jacob v Commission* [2010] ECR II-2245, paragraph 161.

[15] Case T-237/94 *N v Commission* [1997] ECR-SC I-A-97, II-289, paragraph 81.

[16] Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, paragraphs 60, 63.

[17] Ombudsman's decision in case 876/2011/RT, paragraph 59.

[18] Case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH* [2010] ECR I-05885, paragraphs 55, 61-62; Case C-477/10 P *Commission v Agrofert Holding* , [2012] ECR I-0000, paragraph 59.

[19] Case T-111/11 *ClientEarth v Commission* , not yet reported, paragraph 67.

[20] The Ombudsman notes, in particular that Article 9(2) of Regulation 1073/99 states that reports drawn up by OLAF following an investigation " shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary , *in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors* ".

[21] The Ombudsman notes that speaking notes of OLAF's Director General, at the meeting of the European Parliament's Budgetary Control Committee of 18 June 2013, read (see page 2, second paragraph) as follows: " *Following the transmission of the OLAF investigation report to the Maltese Attorney General, the competent national authorities started their own criminal*



*investigation concerning three persons. A Maltese judge then indicted the person who had allegedly asked for the bribe, who was taken into custody and is now facing a criminal trial, after having been freed on bail. The Maltese authorities were not able to conclude the investigation on Mr Dalli in December, when the other person was indicted. Mr Dalli presented certificates attesting that he was not medically fit and thus could not be summoned. The criminal investigation on him has not been concluded yet. Recent statements made by the newly appointed Maltese Police Commissioner do not change these facts ."* 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]

[22] The Ombudsman points out that OLAF did consult the national judicial authorities in the context of another case where there were proceedings at the national level (joined cases 723/2005/OV and 795/2005/OV). This allowed OLAF to release some documents requested by the complainant.