

Besluit in zaak 859/2018/TE betreffende de weigering van het Europees Bureau voor fraudebestrijding om in de zaak “Ooievaarsnest” toegang tot het eindverslag te verlenen

Besluiten

Zaak 859/2018/TE - Geopend op 17/07/2018 - Besluit over 17/07/2018 - Betrokken instelling Het Europees Bureau voor Fraudebestrijding (Geen wanbeheer vastgesteld) |

De zaak betrof een verzoek om toegang tot documenten die in het bezit zijn van het Europees Bureau voor fraudebestrijding (OLAF). Het document in kwestie was het eindverslag van een onderzoek naar EU-subsidies die zijn ontvangen door het “Ooievaarsnest”, een landbouwbedrijf annex hotel in Tsjechië. OLAF weigerde het verslag openbaar te maken. Ter rechtvaardiging van zijn besluit verwees het Bureau naar EU-jurisprudentie waarin een “algemeen vermoeden” is vastgesteld dat de dossiers van OLAF vertrouwelijk moeten blijven zolang de OLAF-onderzoeken en eventuele follow-uponderzoeken gaande zijn.

De Ombudsman stelde vast dat het document in kwestie onder het algemene vermoeden van vertrouwelijkheid viel en dat de kwesties die uit het verslag voortvloeien nog steeds bij de nationale autoriteiten in behandeling zijn. Daarom weegt het duidelijke algemene belang van openbaarmaking op dit moment niet zwaarder dan het algemene belang van bescherming van het verslag om de nationale autoriteiten in staat te stellen actie op dit verslag te ondernemen. De Ombudsman heeft de zaak daarom afgesloten.

Background to the complaint

1. On 3 January 2018, the complainant requested public access to the “ *Report on EU subsidies for the Stork Nest* ” [1] of the European Anti-Fraud Office (OLAF), in accordance with the EU’s rules on public access to documents (hereafter ‘Regulation 1049/2001’ [2]).
2. On 25 January 2018, OLAF rejected the complainant’s request, which it interpreted to concern its final investigation report in case OF/2015/1348/B4. OLAF relied on the exception provided for in Regulation 1049/2001 by which access requests can be refused where there is a need to protect “ *the purpose of inspections, investigations and audits* ” [3] .
3. On 14 February 2018, the complainant asked OLAF to review its decision by submitting a



so-called 'confirmatory application'. He argued that there was an overriding public interest in the disclosure of the report, since the report had led to the resignation of the Czech government. The necessary factual clarity could best be achieved by the publication of OLAF's report. As a leaked Czech version of the report has already been published in its entirety by the Czech newspaper *Hospodářské Noviny* in January 2018, the complainant argued that the release of the report could not hinder the work of the Czech police and judiciary.

4. OLAF issued its decision on the complainant's review request on 26 April 2018. OLAF confirmed its earlier conclusion that access to the final investigation report cannot be granted. In doing so, OLAF relied on several provisions in Regulation 1049/2001.

5. Firstly, OLAF argued that the final investigation report falls under the general presumption of non-disclosure of documents on OLAF's case files, as established in case law of the General Court [4]. Since the report has been sent to national authorities and the Commission only in December 2017, "*the disclosure of the report could compromise the effective use of the information sent to the national authorities which have recently received the report and may consider follow-ups*". Therefore, the requested document would be "*exempt, in principle and in full, from disclosure to the public*", unless an overriding public interest justifies its disclosure.

6. Secondly, OLAF argued that the disclosure of the report would allow the public "*to gather important information of business relevance, which would be harmful for the entities that have delivered their data*" [5]. It would also discourage commercial entities from collaborating with OLAF in the future.

7. Finally, OLAF argued that the report would contain personal data as protected by Article 4(1)(b) of Regulation 1049/2001 and that the applicant had not demonstrated the necessity of a transfer of this personal data to him.

8. As regards the existence of an overriding public interest, OLAF stated that, "*given the preliminary nature of the anti-fraud investigations conducted by OLAF, [...] the interest in maintaining the confidential nature of its case documents prevails*". It further argued that the applicant had "*not substantiate [d] why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure*". OLAF therefore concluded that there were "*no sufficient elements that would show the existence of an overriding public interest*".

9. Dissatisfied with OLAF's decision, the complainant turned to the Ombudsman on 14 May 2018.

The inquiry

10. The Ombudsman opened an inquiry into the following aspect of the complaint:

OLAF wrongly rejected the complainant's request for review without assessing his arguments, in



particular relating to the existence of an overriding public interest.

Arguments presented to the Ombudsman

11. The complainant argues that OLAF rejected the request for review without properly analysing his arguments relating to the existence of an overriding public interest. He also claims that the leak of the final investigation report by the newspaper *Hospodářské Noviny* should have been taken into consideration in the assessment of his request. In fact, the leak would render OLAF's argument that the release of the report could hinder the follow-up activities of the national judiciary no longer valid. The same would apply to the protection of personal data, as this data would already be in the public domain.

The Ombudsman's assessment

12. Regulation 1049/2001 [6] allows EU institutions to refuse access to documents where their disclosure could undermine the purpose of inspections, investigations and audits. This exception applies unless there is an overriding public interest in disclosing the documents. In addition, where documents are subject to a particular area of EU law, any specific rules on access applicable to such documents have to be considered. In this case, Regulation 883/2013 [7] states that information transmitted or obtained in the course of OLAF's internal investigations, in whatever form, is subject to an obligation of professional secrecy.

13. The General Court has held that the provisions concerning confidentiality in Regulation 883/2013 justify a **general presumption of non-disclosure of documents related to OLAF's investigations**. The Court concluded that "*generalised access, on the basis of Regulation No 1049/2001, to documents in OLAF's file, while OLAF's investigation procedure is still ongoing, would, in principle, undermine the effective conduct of the investigation*" [8]. The same was true for OLAF investigations that had been recently closed with recommendations for follow-up, as the competent EU or national authorities needed time to decide, within a "*reasonable period*", on the actions they should take following OLAF's recommendations. The General Court reasoned that early disclosure could compromise the effective use of OLAF's findings by the relevant authorities [9].

14. The Court recognised, however, that OLAF should consider the merits of any arguments, put forward by the person seeking access, which sought to demonstrate that there was an **overriding public interest** in disclosing the documents concerned [10].

15. The Ombudsman therefore assessed whether the requested final investigation report of OLAF falls under the general presumption of non-disclosure and, if so, whether there was an overriding public interest in disclosure.

16. The requested final report was clearly covered by the general presumption of non-disclosure while the investigation was ongoing and for a "*reasonable period*" following its conclusion.



OLAF rejected the complainant's request for review in April 2018. Since OLAF had transmitted its final report and recommendations to the Commission and the Czech national authorities in December 2017, case law indicates that the reasonable period for the Commission and the Czech national authorities to consider their actions had not yet elapsed [11] . Furthermore, on the facts of this case, the Ombudsman understands that the national authorities have not yet completed their work on the matters arising from the report [12] .

17. The complainant argues that there is an overriding public interest that justifies disclosing the report.

18. According to case law of the Court of Justice, the person requesting non-legislative documents, such as those covered by a presumption of non-disclosure, needs to show that the principle of transparency is in some sense **especially pressing** and therefore capable of prevailing over the reasons justifying the refusal to disclose the documents [13] .

19. The suspicions relating to the 'Stork Nest' case contributed to the Czech government's loss of a vote of confidence in Parliament in January 2018. A new minority government, led by the Czech Prime Minister, was sworn in on 27 June 2018. It is reasonable to assume that there continues to be a public interest in clarifying the facts of the 'Stork Nest' case, which supports the case for release.

20. However, in the Ombudsman's view, the public interest in clarifying the facts of the 'Stork Nest' case does not outweigh the need to protect the follow-up to the OLAF report by the national authorities and by the Commission. The Ombudsman underlines that there is a significant public interest in ensuring that these follow-ups can be conducted properly. The Ombudsman considers that it is important to respect the need for confidentiality during the reasonable period so as to allow for that follow-up. In those circumstances, the Ombudsman considers it reasonable for OLAF to have concluded that there is no overriding public interest in disclosing the document at this stage.

21. The Ombudsman also notes that, in January 2018, the Ministry of Finance of the Czech Republic released a short summary of the conclusions of the OLAF report, revealing that OLAF had found irregularities in the subsidy payments received by the 'Stork Nest' [14] . This limited information is sufficient, at this stage, as regards keeping the public sufficiently informed of developments in this case.

22. The fact the national authorities are still considering their actions means that, despite the clear public interest in knowledge about what occurred in this case, that does not override the public interest in allowing the national authorities a proper opportunity to deal with the matter. The Ombudsman wishes to make clear, however, that this does **not** mean the denial of public access will be justified for an indefinite period.

23. Regarding the complainant's argument that a leaked version of the OLAF report has already been published, the General Court has held that " *the mere fact that part of a confidential OLAF file may have been disclosed unlawfully does not justify, in itself, any derogation, in favour of the*



person concerned, from the confidentiality rules governing the OLAF investigation file ” [15] .

24. Thus, in the current state of EU law, this means that the leak of the report in the Czech newspaper *Hospodářské Noviny* does not justify any derogation from the general presumption of non-disclosure. A leak does not, of itself, negate any legal grounds for continuing to deny public access.

25. Having established that the exception for protecting the purpose of inspections, investigations and audits applies, there is no need for the Ombudsman to consider the applicability of the other exceptions claimed by OLAF. The inquiry did not reveal any instance of maladministration by OLAF in refusing access to the requested documents.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the European Anti-Fraud Office in refusing access to the requested document.

The complainant and the European Anti-Fraud Office will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 17/07/2018

[1] The 'Stork Nest' is a farm and hotel complex in the Czech Republic that received EU subsidies in 2008.

[2] 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 L 145, 31.5.2001, p. 43–48 ('Regulation 1049/2001').

[3] Article 4(2) of Regulation 1049/2001.

[4] Cases T π 221/08, *Strack v Commission* [2016] ECLI:EU:T:2016:242 and T π 110/15, *IMG v Commission* [2016] ECLI:EU:T:2016:322.

[5] Article 4(2) first indent (protection of commercial interests) of Regulation 1049/2001.



[6] Article 4(2).

[7] 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 L 248, 18.9.2013, p. 1–22.

[8] Case T π 110/15, *IMG v Commission* [2016] ECLI:EU:T:2016:322, paras. 33.

[9] Case T π 110/15, *IMG v Commission* [2016] ECLI:EU:T:2016:322, para. 35.

[10] Case T π 110/15, *IMG v Commission* [2016] ECLI:EU:T:2016:322, para. 38; Case C-139/07, *Commission v Technische Glaswerke Ilmenau* [2010] ECLI:EU:C:2010:376, para. 62.

[11] In Joined Cases T-391/03 and T-70/04, *Franchet and Byk v Commission* [2006] ECLI:EU:T:2006:190, the General Court found that a period of seven months was still reasonable, paras. 121-124.

[12] The summary is available (link checked July 2018) on the official website of the Czech Ministry of Finance at:
<https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2018/ministerstvo-financi-zverejnuje-zavery-z-30660>
[Link].

[13] Joint Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission* [2013] ECLI:EU:C:2013:738, para. 93.

[14] The summary is available (link checked July 2018) on the official website of the Czech Ministry of Finance at:
<https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2018/ministerstvo-financi-zverejnuje-zavery-z-30660>
[Link].

[15] Case T π 110/15, *IMG v Commission* [2016] ECLI:EU:T:2016:322, para. 59.