



EUROPEAN ANTI-FRAUD OFFICE

The Director-General

Ms Emily O'Reilly
European Ombudsman

Registry@ombudsman.europa.eu

Brussels

Subject: Complaint 1442/2023/OAM

Case: OC/2022/0892

Dear Ms O'Reilly,

I refer to your letter dated 27 October 2023, in which you propose a solution concerning OLAF's refusal to provide public access to a document under Regulation (EC) No 1049/2001¹. The document in question is an email exchange between OLAF and the Spanish Anti-Fraud Coordination Service (AFCOS) in the context of case OC/2022/0892, that OLAF dismissed at the selection phase.

I refused the complainant's request for public access to this document on 27 July 2023², considering that a general presumption of non-accessibility³ applied under exceptions provided for in Article 4 of Regulation 1049/2001. In particular, to protect the purpose of investigations and the decision-making process after the decision has been taken, in the third indent of Article 4(2), and Article 4(3), second subparagraph, respectively, of Regulation 1049/2001.

In the Ombudsman's view, OLAF did not adequately justify its decision to refuse access to the document based on these exceptions. You propose that OLAF reviews its position with a view to granting the widest possible access to the document.

1. On the request for access to the document under Regulation 1049/2001

Application of the general presumption of confidentiality

The Ombudsman considers that the general presumption of non-accessibility to documents in OLAF's investigation file is time-limited and only applies as long as the investigation is

¹ 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.

² OCM(2023)22848

³ Judgments of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paragraphs 33 and the case-law cited.



ongoing or there are follow-up activities, when these take place within a reasonable period⁴. You argue that, given that the case OC/2022/0892 was dismissed at the selection phase and no follow-up activities are taking place, OLAF was not justified in applying the general presumption of confidentiality for the protection of the purpose of investigations.

According to case law, where a requested document falls within a particular area of EU law, the rules on access to documents in Regulation 1049/2001, cannot be applied and interpreted without taking into account the specific rules governing those documents. In this case, this is Regulation 883/2013⁵, which imposes on OLAF an obligation of confidentiality for all information gathered during investigations⁶.

Regulation 1049/2001 and Regulation 883/2013 do not contain a provision expressly giving one regulation primacy over the other. Thus, it is necessary to ensure that each of these regulations is applied in a manner compatible with that of the other and thus enables their consistent application⁷.

The General Court recognised the existence of a general presumption of confidentiality under which the disclosure to the public under Regulation 1049/2001 of documents related to OLAF investigations could fundamentally undermine the objectives of the investigative activities, as well as the decision making process of OLAF, both now and in the future⁸.

As regards the *final report*, the General Court has indeed noted a time-limitation to the application of the general presumption, clarifying that it remains covered by the exception relating to the protection of inspections, investigations and audits as long as investigations or their follow-up continue⁹.

However, a general presumption of non-accessibility of documents continues to apply after the closure of an investigation or its follow-up, as regards the *case file*, for the protection of OLAF's decision-making process and future OLAF investigations. In this regards, allowing public access to OLAF documents would be particularly detrimental to the ability of OLAF to fulfil its mission to fight against fraud in the public interest. This is because, it could jeopardise the full independence of future investigations and their objectives by revealing information about investigative strategy and working methods, undermining the effectiveness of OLAF in the performance of its tasks. It could also discourage individuals from sending information concerning possible fraud, thus depriving OLAF of useful information to initiate investigations aiming at protecting the financial interests of the Union¹⁰. This explanation was also provided to the complainant.

In this particular case, the document the complainant asked for is not a final report or a closing decision of a so-called selection (the procedure which precedes the opening of an investigation), but a document of the file of a dismissed selection case. Following the Ombudsman's reasoning, every document in the case file of a dismissed selection should be accessible to the public, unless protected by way of exceptions under Regulation 1049/2001, to be assessed on a case by case and document by document basis. However, the selection phase as described in article 5 of the OLAF Regulation, is an intrinsic part of OLAF's investigative activities and subject to the same standards of confidentiality as the

⁴ You cite judgment of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paragraphs 33; and of 1 September 2021, *Homoki v Commission*, T-517/19, EU:T:2021:529, paragraph 63.

⁵ 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), OJ L 248 18.9.2013, p. 1.

⁶ Article 10 of Regulation 883/2013.

⁷ Judgment of 1 September 2021, *Homoki v Commission*, T-517/19, EU:T:2021:529, paragraph 56; judgment of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraph 158 and the case-law cited.

⁸ Judgment of 26 May 2016, *IMG v Commission*, T-110/15, EU:T:2016:322, paragraphs 28-50; judgment of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, paragraphs 150 to 162.

⁹ Judgment of 1 September 2021, *Homoki v Commission*, T-517/19, EU:T:2021:529, paragraphs 60-63.

¹⁰ Judgment of 26 April 2016, *Strack v Commission*, T-221/08, ECLI:EU:T:2016:242, paragraph 157.

rest of OLAF's investigative work¹¹. Thus, deeming all documents in every case file that does not lead to an investigation accessible to the public, would be incompatible with the OLAF Regulation and contrary to the case law referred to above.

Moreover, providing public access to all documents in the case file would put at serious risk OLAF's work and its capacity to carry out its functions. This is because the mere possibility of OLAF disclosing documents of the case file, at any point in time, may discourage informants and potential witnesses to cooperate with OLAF. Such persons must be reassured that the information they provide to OLAF will be kept confidential¹² as the OLAF Regulation provides. This also applies to the cooperation in investigations with other public authorities of Member States, such as the Anti-Fraud Coordination Service. This explanation was also provided to the complainant.

In view of the above, I maintain that a general presumption of non-accessibility applies to the document in question to protect OLAF's decision-making process in the sense of the second subparagraph of Article 4(3) of Regulation 1049/2001 and future OLAF investigations, thereby protected under Article 4(2) third indent of Regulation 1049/2001.

Assessment of the requested document

Given that in the Ombudsman's view, the general presumption does not apply, you assess whether OLAF demonstrates convincingly that the disclosure of this document would harm the interests protected by the two exceptions OLAF relied upon, namely the protection of the purpose of investigations and the protection of the decision-making process. You note that OLAF's reasoning seems to be based on the nature of the document, namely, that it originates from the Spanish AFCOS, rather than on the particular information contained in the document.

It is OLAF's position that the requested document, as part of the case file, is covered by the general presumption of confidentiality. For this reason, in the exchanges with the complainant, OLAF did not carry out an assessment of the *information in* the document. OLAF did, however, give the complainant information on the nature of the document, to allow him to better understand the explanations and to enable him to rebut the general presumption of confidentiality, in accordance with the case law¹³.

The additional explanations as to the content of the document, given to the Ombudsman in the context of this inquiry, should not be considered as OLAF conducting an individual assessment of the content of the document in the context of the request for access to documents under Regulation 1049/2001.

2. On the merits of providing further information

OLAF has noted a number of press articles referring to its selection case OC/2022/0892 and exchanges with OLAF, which misrepresent the facts or misquote OLAF's correspondence. In view of this, and in order to fight misinformation, OLAF would like to provide further details on this selection case that can be shared with the complainant, if the Ombudsman considers it pertinent¹⁴.

On 11 November 2022¹⁵, OLAF received information that a multinational conglomerate was using a patented industrial model without the authorisation of the owner, in order to receive funds under the Recovery and Resilience Facility (RRF).

Despite numerous exchanges with the informant, OLAF did not obtain supporting documents to show that the multinational conglomerate had received RRF funds or had used the patented industrial model illegally.

¹¹ Article 10 of Regulation 883/2013.

¹² Judgment of 26 April 2016, *Strack v Commission*, T-221/08, EU:T:2016:242, para. 153.

¹³ Judgement of 28 May 2020, *Campbell v European Commission*, T-701/18, ECLI:EU:T:2020:224.

¹⁴ In such case, please do not provide the OCM reference numbers of the correspondence.

¹⁵ OCM(2022)31086

On 21 November 2022¹⁶, OLAF contacted the Spanish AFCOS requesting information regarding this matter, asking it to reply before the 20 December 2022. The Spanish AFCOS, in turn, requested that information from the Spanish competent authorities, which replied on 3 March 2023 only. The Spanish AFCOS therefore, did not get back to OLAF within the provided deadline.

The information request to the AFCOS was one of several selection investigative activities. Following these, on 12 January 2023, OLAF dismissed the selection case on the grounds of insufficient suspicion to open an administrative investigation. This was based on the fact that OLAF had not found any indication of irregularities detrimental to the EU budget within the statutory deadline of two months for opening an investigation¹⁷.

On 22 March 2023¹⁸, the Spanish AFCOS wrote to OLAF as regards this case. It informed OLAF that the project in question did not appear in the database of CoFFEE-MRR and thus, the project was not being financed by the RRF. This is the email the complainant has requested.

Given the circumstances of this case, OLAF has decided that it would serve to protect OLAF's interests best to provide the complainant with a copy of this email, which you will find enclosed to this letter. We have redacted from the document the personal data, an initial personal exchange and references to another case. Please note that, while you may share this document with the complainant, for the reasons above mentioned, it is not being provided under Regulation 1049/2001 and thus, should not be deemed to be public *erga omnes*.

I hope you find these explanations useful and the solution proposed reasonable.

I draw your attention to the transmission clause below.

Yours sincerely,

Signed Electronically

Annex: Email from the Spanish AFCOS of 22 March 2023 concerning case OC/2022/0892

Transmission clause

The transmission of personal data to you is performed under the regime of Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by Union Institutions, bodies, offices and agencies and of the free movement of such data and repealing Regulation (EC) 45/2001 and Decision N° 1247/2002/EC. Accordingly, as the Controller of the personal data hereby transmitted, you are responsible for ensuring that they are used only for the purpose for which they are transmitted. Processing in a way incompatible with that purpose, such as transferring it to another recipient where this is not necessary or legally required on important public interest grounds, is contrary to the conditions upon which the data has been transferred to you. Furthermore,

¹⁶ OCM(2022)31890

¹⁷ Article 5(4) Regulation 883/2013

¹⁸ OCM(2023)9203

according to Article 4(2) of Regulation 2018/1725, you are required as the Controller of the personal data concerned to ensure that all obligations of the Controller are complied with.