



LUXEMBOURG, 22.08.2013
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Vítor Caldeira

PRESIDENT
EUROPEAN COURT OF AUDITORS

Mr David Nicholson

By e-mail

Subject: Access to documents, your e-mail of 9 July 2013

Dear Mr Nicholson,

(a) Your request for reconsideration of 9 July 2013

By email dated 9 July 2013, you submitted a confirmatory application in accordance with Article 7 of Decision No 12/2005 of the Court of Auditors regarding public access to Court documents (“Decision No 12/2005”) in which you ask the Court of Auditors to reconsider its decision to refuse access to certain documents which you had requested by e-mail on 20 June 2013.

Your application of 20 June 2013 concerned contracts concluded between the European Commission and the European Union Agency for Fundamental Rights (FRA) with the Danish Institute for Human Rights. You also requested information and related documents in respect of the collaboration of the Court of Auditors with OLAF “on these cases” and the Audit Report on the FRA procurement procedure for “provision of legal services to FRA staff”.

I regret to inform you that the Court of Auditors confirms its refusal to disclose the documents requested, for the reasons given in our e-mail of 8 July 2013.

We explained, in our reply of 8 July 2013 to your e-mail of 20 June 2013, that the Court’s audit observations on the transactions examined by our auditors must remain confidential, as this is explicitly required under Article 4(2) of Decision No 12/2005 in conjunction with Articles 162(1) and 163(1) of Regulation No 966/2012 (Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 298, 26.10.2012, p. 1). Only the final observations of the Court, which have been subject to verification and discussion with the auditee and which are set out in the Court’s Annual and Special Reports, are to be made public.

In our e-mail of 8 July 2013, we provided you with the links to the electronic version of the audit reports which the Court of Auditors had prepared concerning FRA for the years 2010 and 2011 and explained that our annual reports on FRA are published in the Official Journal of the European Union.

With regard to documents used in the preparation of those observations, to which you refer in your e-mail of 9 July 2013, and the information and related documents on respect of collaboration of the Court of Auditors with OLAF, it should be noted they are covered by the exceptions set out in Article 4(2) and (3) of Decision No 12/2005.

In addition, we explained in our reply that in relation to collaboration between OLAF and the ECA that Recital 15 to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) provides:

" ..., for the sake of successful cooperation between the Office, the Member States and the relevant institutions, bodies, offices and agencies, the reciprocal exchange of information must be organised, subject to rules of confidentiality where information is subject to professional secrecy, ..." (emphasis added)

In your email of 9 July 2013, you argue that a refusal to release documents cannot be justified by the exceptions to access to documents provided in Article 4(2) and (2) of Decision No 12/2005 as there is an overriding public interest (Article 4(8) of Decision No 12/2005) in the disclosure of those documents. Since the results of the audit were published in the Official Journal, we do not consider that your observations in your email of 9 July 2013 regarding the suspicion of fraud, demonstrate that there is an overriding public interest, which would, in accordance with Article 4, paragraph 8 of Decision No 12/2005, allow the disclosure of the documents falling under the exceptions mentioned above.

It should also be noted that in case of suspicion or of discovery, in the course of an audit, of information relating to possible cases of fraud or corruption or any other illegal activity that, in accordance with Article 2 of Decision No 97-2004 of the Court of Auditors laying down arrangements for cooperation with OLAF on of access by the latter to audit information, the Court of Auditors is required to communicate that suspicion to OLAF.

We would like to inform you that in so far as your confirmatory request for access to documents is refused, you have the possibility to challenge that refusal, within two months of its notification, before the General Court of the European Union (Article 263 of the Treaty on the Functioning of the European Union) or to make a complaint to the European Ombudsman (Article 228 TFEU).

(b) Request for information on whether a particular transaction was audited

In your confirmatory application of 9 July 2013, in addition to your request for a review of the decision not to grant access to the documents requested on 20 June 2013, you seek "access to a piece of information" namely whether the Court of Auditors audited the contract to which you refer in your email.

With regard to information on whether or not the particular contract to which you refer in your email of 9 June 2013 was audited, we consider that the public disclosure of information concerning the auditing of individual transactions other than the information contained in our publications would run counter to international auditing standards concerning the confidential nature of audit matters. Article 2(2) of Decision No 12/2005 makes the right of access to Court of Auditors documents subject not only to the framework and limits of the provisions laid down in that Decision but also makes the right subject to international standards governing the confidentiality of audit information. In carrying out audits, the auditors of the Court must conduct themselves in accordance with the INTOSAI Code of ethics and must ensure that audits are conducted in such a way as to protect the confidentiality of information obtained in the audit process.

We draw your attention to the fact that, pursuant to Article 7 of Decision No. 12/2005, you may, within 15 working days of receiving its reply, ask the ECA to reconsider its position.

Yours sincerely,

Handwritten signature of J. P. McGuade in cursive script.

On behalf of the President

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