

CHRISTOPHER DOCKSEY
THE DIRECTOR

Mr Guido Strack

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Brussels, 29 April 2015
CD/ABu/EJT/cpl /D (2015) 0739 C 2015-0134
Please use edps@edps.europa.eu for all correspondence

Subject: Your confirmatory application of 8 April 2015 (our ref. 2015-0134)

Dear Mr Strack,

I refer to your confirmatory application for access to documents which was registered by the European Data Protection Supervisor (EDPS) on 8 April 2015 under case reference number 2015-0134.

You state that the aim of your confirmatory application is to *“fully maintain my initial application for access to documents of 11.02.2015 (your ref. C2015-0134)”*. Your initial application concerned *“access to all documents and records (internally) related to your inquiry or Case 2010-0240”*. The EDPS sent you a reply to your initial application on 27 March.

The case file referred to concerns a complaint lodged by a third party to the EDPS. It includes a total of 214 documents: 102 emails, 23 letters, 75 drafts and 14 internal documents.

Following a detailed examination of your confirmatory application, I regret to inform you that I have decided to deny access to all 214 documents in the case file pursuant to the exceptions laid down in Articles 4(1)(b) and 4(2) third indent of Regulation 1049/2001.

The reasons for this decision, including an analysis of and replies to the matters you raise in your application (such as third party consultation, partial access, public interest, etc), are as follows.

First, the documents you request in this case belong to a particularly sensitive and confidential complaint handled by the EDPS and his staff. According to the Treaty on the Functioning of the European Union (TFEU) the members, officials and other servants of the institutions are compelled not to disclose information of the kind covered by the *obligation of professional secrecy*¹. According to Regulation 45/2001, this obligation is specifically reinforced in the case of EDPS staff with regard to confidential information: “*The European Data Protection Supervisor and his or her staff shall (...) be subject to a duty of professional secrecy with regard to any confidential information (...) in the course of the performance of their official duties*”².

The documents requested belong to the investigation of a complaint initiated by a third party in a context of confidentiality aimed at guaranteeing the protection of the privacy and integrity of the complainant. It is in this framework - of guaranteeing the protection of the fundamental rights enshrined in Articles 7 and 8 of the EU Charter of Fundamental Rights – that the EDPS hears and investigates complaints. In order for these investigations to be effective and lead to the desired result of achieving a correct application of Regulation 45/2001, it is essential that the confidentiality of such investigations is preserved. Regulation 45/2001 reads that “*No-one shall suffer prejudice on account of a complaint lodged with the European Data Protection Supervisor alleging a breach of the provisions governing the processing of personal data*”. In the light of this legal obligation, the EDPS Rules of Procedure (RoP) provide that: “*Information about the complaint shall be published by the EDPS only in a form which does not allow the complainant or other data subjects involved to be identified*”³.

Second, supervisory bodies such as the EDPS, when carrying out their duties as supervisors in general – and in relation to investigation of complaints, in particular – must preserve their independence. In several rulings on this matter the Court has held, *inter alia*: “*the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence [...] The term “independence” normally means that the body concerned can act completely freely, without taking any instructions or being put under any pressure [...] Independence must be complete, which implies a decision-making power independent of any direct or indirect external influence on the supervisory authority [...] Any other external influence in whatever form, whether direct or indirect, could call into question the performance by those authorities of their task [...]*”⁴. The Court has stressed that such independent supervision is an essential element of the right to protection of personal data under Article 8(3) of the Charter. At the same time, in line with the principle of democracy enshrined in Article 6(1) of the EU Treaty, the legality of activities of the supervisory authorities must be under heightened scrutiny. Independent supervisory data protection authorities are required to comply with the law subject to the review of competent courts.

In light of the above, I consider that the disclosure of the documents in this specific closed case file would not only breach the *confidentiality* of the complaint and its investigation, as well as the EDPS duty of *professional secrecy with regard to confidential information*, but also an essential element of the right to privacy and protection of personal data of the

¹ Article 339 TFEU “*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*”

² Article 45 of Regulation 45/2001

³ Article 33(4) of EDPS Rules of Procedure (RoP)

⁴ Case C-518/07, Commission v Germany, paragraphs 18,19 and 25, Case C-288/12, Commission v Hungary (para 51), Case C-614/10, Commission v Austria, paragraphs 41 and 43

complainant. Moreover, as stated in the initial reply, disclosure of the documents requested would have an immediate dissuasive impact on future complainants.

In your confirmatory request you suggest that the agreement of the person concerned is an obligation according to Regulation 1049/2001. In this respect, Article 4(4) of the said Regulation provides that third party consultation is an obligation for the institution *“unless it is clear that the document shall or shall not be disclosed”*⁵. Following the Opinion of Advocate General Kokott in case C-127/13P⁶ I consider that consultation is not necessary in this specific case as it is clear that the information contained in the documents requested, which mostly consists of personal data, must be treated confidentially.

With regard to the requirement of partial access, the case law of the Court explains that this requirement is derived from the principle of proportionality⁷. In the present case, the result of applying partial access would be limited in relation to the administrative effort required, as the number of documents to be redacted would require a disproportionate administrative burden contrary to the principle of good administration⁸.

In addition, Regulation 45/2001 as interpreted by the Court requires *“the applicant to show that there is an overriding public interest to justify disclosure of the documents concerned”*⁹. In this respect, transparency is not in itself an overriding public interest. In the present case, rather, you have expressed a private interest in your confirmatory request by asking for the specific documents in the complaint that would allow you to understand the relation it has with your own complaint: *“in the alternative and without prejudice in this regard to my application (...) I ask you (...) to make available to me the documents which will enable me to understand their relation to procedure 2010-0240”*.

Finally, please note that pursuant to Article 8(1) of Regulation (EC) No 1049/2001 you are entitled to make a complaint to the European Ombudsman or institute proceedings before the Court of Justice of the European Union against the EDPS, under the conditions laid down in, respectively, Articles 228 and 263 of the Treaty on the Functioning of the European Union.

Yours sincerely,



Christopher DOCKSEY

⁵ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents

⁶ Case C-127/13P, Strack v European Commission, AG Opinion, paragraph 157

⁷ Case T-362/08, IFAW II v European Commission, paragraph 147

⁸ Case C-127/13P, Strack v European Commission, paragraph 27: *“It is true, as stated in paragraph 30 of the judgment in Council v Hautala (C-353/99P) that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration”*

⁹ Case C-127/13P, Strack v European Commission, para 129, LPN and Finland v Commission, C-514/11P and C-605/11P, paragraph 94