

Complaint to the European Ombudsman

Submitted on 31 January 2013



What is the decision or matter about which you complain? When did you become aware of it?

On 26 October 2012 Corporate Europe Observatory (CEO) requested access to “all documents related to Commissioner Dalli’s resignation over the issues covered in the OLAF investigation, including all minutes (and other notes) of meetings, all correspondence (including by email), both internal and external, and any other documents held by the Commission on these matters.”¹ The Commission has violated Regulation 1049/2001 by failing to disclose the most important of the requested documents.

More than three months after the unprecedented resignation – or maybe dismissal – of Maltese Commissioner for Health and Consumer Policy, John Dalli, the circumstances that led to his resignation are still shrouded in mystery. Tobacco company Swedish Match claims it had been asked for tens of millions of euros by an unregistered lobbyist, Silvio Zammit, linked to Dalli, in exchange for lifting the EU-wide ban on ‘snus’ in the context of the revision of the EU Tobacco Products Directive. Swedish Match filed a complaint with the Commission in May 2012, after which the Commission asked OLAF to investigate the claims. The resulting OLAF report has remained secret, and even Mr Dalli himself has not yet seen it. Mr Dalli has claimed his resignation was forced by Commission President Barroso, whereas Mr Barroso states that it was mutually agreed to be the best course of action.² The Commission has refused to answer a large number of questions posed by MEPs, media and NGOs, arguing that this would harm the investigations of the Maltese authorities. There is growing discontent with the Commission's handling of the case.

On 22 November the European Commission replied to our request, sending us two documents related to Commissioner Dalli’s resignation (both of which were already in the public domain) and five documents related to contacts between the Commission and Swedish Match (and the European Smokeless Tobacco Council (ESTOC), a platform of which Swedish Match is a member). None of these five documents, however, are directly related to Commissioner Dalli’s resignation over the issues covered in the OLAF investigation. On 23 November we submitted a confirmatory application,³ in which we appealed the Commission’s response on three different points:

- 1) the list of documents in the Commission’s response was not complete. The emails and notes related to Swedish Match and ESTOC included in the response were not directly related to Commissioner Dalli’s resignation. There was only one relevant document mentioned that clearly dates from before October 16, the day the Commission

1 Request made by Olivier Hoedeman via asktheeu.org website, see:

http://www.asktheeu.org/en/request/documents_related_to_commissione#incoming-895

2 “Dalligate: Smokescreen or smoking gun?“, Corporate Europe Observatory, October 2011;
<http://corporateeurope.org/news/dalligate-smokescreen-or-smoking-gun>

3 http://www.asktheeu.org/en/request/documents_related_to_commissione#outgoing-424

announced Mr Dalli's resignation (a letter from Commissioner Dalli to President Barroso, 27 July 2012). We argued that it would appear very likely that there are many more relevant documents of the kind mentioned in the request, in particular from the period before October 16th. We therefore requested another search of the Commission's files.

- 2) We appealed the Commission's decision to refuse access to the following documents: two letters from Commissioner Dalli to President Barroso, dated 27 July 2012 and 24 October 2012; the letter from President Barroso to Mr Dalli dated 23 October 2012; two notes for the file concerning meetings between President Barroso and Mr Dalli.
- 3) We pointed out that the OLAF report was also covered by our request. The Commission has since forwarded this part of the request to OLAF and we are currently waiting for OLAF's response to a confirmatory application.

On 16 January 2013 (almost two months later), the Commission sent its reply to our confirmatory application.⁴ The Commission repeated its rejection of access to the documents mentioned under point 2, but it also sent us three additional documents, including a hitherto unknown email exchange between Commission Secretary General Catherine Day and Fredrik Peyron, Swedish Match's General Counsel and Secretary to the Board of Directors. One of these emails was sent by Catherine Day on 16 October at 17.10, immediately after the meeting between Commission President Barroso and Commissioner Dalli, just before the Commission issued a press release announcing that Commissioner Dalli had stepped down. Obviously, this email correspondence should have been mentioned and disclosed in the Commission's first response (22 November) to our access-to-documents request. It appears that this document may have been withheld for reasons of political convenience, but such delay tactics are a violation of Regulation 1049/2001.

This potentially controversial email exchange dating from a sensitive moment in the Dalli affair should also have been mentioned in the Commission's answers to the 154 questions from the European Parliament's Budget Control Committee to OLAF and the Commission, but the Commission also didn't include the two emails in a list of contacts between Swedish Match and the Commission Secretariat.⁵

In her email Ms Day referred to a letter that Mr Peyron sent to the Commission on 14 May 2012 (probably the letter in which Swedish Match filed its complaint) and her own reply to that letter, sent on 30 May. These emails should also have been included in the Commission's response to our access request. The Commission did not include them in the list of documents identified as falling under the scope of our request, even after our confirmatory appeal. This manoeuvre enables the Commission to avoid having to explicitly refuse CEO

⁴ http://www.asktheeu.org/en/request/documents_related_to_commissione#incoming-895

⁵ See answer 12 on page 34/35 in Questionnaire with replies to the Committee on Budgetary Control of the European Parliament concerning the resignation of the former Commissioner John Dalli: <http://www.europarl.europa.eu/document/activities/cont/201212/20121211ATT57806/20121211ATT57806EN.pdf>

access to these documents, or having to justify their refusal on the basis of one of the exceptions that Regulation 1049/2001 allows to the general obligation to transparency.

The Commission's secrecy is particularly problematic as it has made prominent public statements, for instance at press conferences, in which it referred to releasing documents under 1049/2001 requests relating to the Dalli affair as proof that the Commission has been "extremely transparent" about the Dalli case and on the contacts between Commission officials and tobacco lobbyists.⁶

It is our impression that the Commission has been withholding key documents detailing contacts between Swedish Match and the Commission's Secretary General. The Commission's approach has been far from transparent, and in fact, rather deceptive. On the basis of this selective disclosure of documents, we have reason to doubt that all relevant documents covered by our request have been identified.

In our confirmatory application we argued extensively against the Commission's justification for refusing access to particular documents. The Commission had claimed that "even if they are not part of the OLAF investigation file, they are nevertheless directly linked to it in that these notes will be part of any follow-up actions the Commission may decide to undertake following the OLAF investigation and the subsequent national investigation which is currently on-going. In these circumstances, disclosure of these documents, at this stage, would interfere with the Commission's ability to conduct any follow-up actions and ultimately, the Commission's capacity to adopt final decisions in the general interest of the Union."

In our confirmatory application we explained that this argumentation is at odds with Regulation 1049/2001 for the following reasons:

- The Commission already took action based on the OLAF investigation (which is complete) and the case has been transferred to the Maltese authorities; it is entirely unclear what other follow-up actions the Commission is referring to. The Commission has repeatedly stated that it considers the Dalli case to be closed after it was referred to the Maltese authorities, there should be no obstacle to releasing these documents.
- Commissioner Dalli's resignation is clearly a finalised matter, as he has in the meantime been replaced by a new Commissioner for Health and Consumer Protection Commissioner: Tonio Borg.
- The release of these documents does not actually limit the Commission's ability to conduct follow-up actions.
- There is an overriding public interest in disclosure of the documents: the urgent need for clarification about what exactly has happened, including the reasons for Mr Dalli's resignation and the worrying scenarios of possible manipulation by tobacco industry lobbyists, in order to avoid further erosion of public trust in EU decision-making and Commission processes.

⁶ Commission under fire over tobacco lobbying, Dave Keating, European Voice, 10.01.2013.
<http://www.europeanvoice.com/article/imported/commission-under-fire-over-tobacco-lobbying/76107.aspx>

In the Commission's response of January 16th it states that "OLAF has concluded its investigation by transmitting its file to the Maltese authorities. The investigation on Mr Dalli's conduct in relation to the events leading to the complaint by Swedish Match is now being pursued by the competent Maltese authorities. The OLAF investigation is only the first stage of the investigation, which continues at national level. The findings of OLAF are now in the hands of the Maltese authorities which will eventually decide whether or not further action is required. Disclosing documents related to the OLAF investigation at this stage would interfere with the investigative proceedings currently carried out by the competent Maltese authorities." It continues by arguing that "the two notes requested will be part of any follow-up actions the Commission may decide to undertake following the OLAF investigation and the subsequent national investigation which is currently on-going. In these circumstances, disclosure of these documents, at this stage, would clearly undermine the purpose of such follow-up actions. Indeed, early disclosure of these documents would facilitate and encourage criticism which, either by express design or inevitable effect, would interfere with the Commission's ability to conduct any follow-up actions and ultimately, the Commission's capacity to adopt final decisions in the general interest of the Union, free from external influences. Consequently, the exception set out in Article 4(2) third indent of Regulation 1049/2001 clearly applies."

We find these arguments unconvincing. The Commission has itself stated that the documents are not part of the OLAF investigation file. Defining them as confidential because they are related to Mr Dalli's resignation is an excessive restriction of our rights under Regulation 1049/2001. We also note that this is an argument that was not used by the Commission in its first response.

We note that the Commission has failed to clarify what kind of follow-up actions it is referring to or how disclosure would actually limit its ability to conduct follow-up actions. It moreover remains a fact that the Commission has in public statements made clear that the case is closed. For example, in the press conference of 22 October 2012, the Commission spokesperson stated that "As far as we're concerned, this whole question of the resignation of Dalli is over, and occurred last Tuesday."⁷ Since Mr Dalli's resignation the Commission has not indicated any form of follow-up action, neither in its responses to questions from MEPs nor in its responses to letters from NGOs.⁸ "Subsequent national investigation" may or may not lead to criminal proceedings, and could take several years. It is in our opinion unacceptable that EU citizens are denied answers to basic questions around the Dalli case possibly for a period of several years. In any case, an unclear reference to possible follow-up actions is not a legitimate argument for refusing access to the documents.

We would like to reiterate that Article 3 enables the Commission to refuse access requests only if "disclosure of the document would *seriously* undermine the institution's decision-making process, unless there is an *overriding public interest* in disclosure." The Commission

⁷ EC Midday press briefing, 22/10/2012, see <http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=213720>

⁸ See for example ALTER-EU's letter of 5 November and Commission response 6 December 2012, <http://www.alter-eu.org/documents/2012/11/lessons-from-dalli-scandal-commission-answer>

has failed to show how disclosure would undermine the institution's decision-making process. There is moreover a very clear overriding public interest in disclosure.

The Commission argues that “Since the four documents requested deal exclusively with the issue of Mr Dalli’s exchanges with President Barroso regarding the events that led him to the decision to resign, no partial access, as provided for in Article 4(6) of Regulation 1049/2001 can be granted.” We would argue that the Commission should have gone through the documents and released parts of the documents.

In its response of January 16th, the Commission rejects our argument that there is an overriding public interest in disclosure of the documents in question as “there is an urgent need for clarification about what exactly has happened”. The Commission claims that “Full clarification of the facts and of the role played by different actors is precisely the purpose of the investigation currently being conducted by the Maltese judicial authorities. The public interest in making the content of these four documents public does not in my view outweigh the need to safeguard the integrity of the on-going judicial investigation.”

As mentioned above, the argument that disclosure of the four documents (which are not part of the OLAF investigation file) can be refused because of the investigations on Malta is an unjustified denial of our rights under Regulation 1049/2001. We would also like to stress that the documents not only contain information about the accusations against Mr Dalli, but also throw light on the Commission’s handling of the case. These are two related but separate reasons why disclosure of the documents is of great public interest. Combined with the Commission’s failure to properly answer basic questions about the Dalli case and how it was handled, we conclude that there is a strong overriding public interest in disclosure of the documents.

The Commission reiterates that “access to the two letters from Mr Dalli to President Barroso as well as to the two notes to the file was refused as they contain precise information on the exchanges between the President and Mr Dalli and in particular on the conduct of their meetings.” As mentioned above, our request is intended exactly to allow public scrutiny of both the content of the accusations against Mr Dalli and the way in which the Commission has handled this, including the circumstances that led to his resignation. There is a strong public interest in disclosure of “precise information on the exchanges between the President and Mr Dalli and in particular on the conduct of their meetings”.

The Commission also argues that “as regards the protection of Mr Dalli’s integrity. Article 4(1) (b) of Regulation 1049/2001 does not provide for a public interest test. Consequently, an overriding public interest in disclosing the four documents in question has not been demonstrated.” We would like to highlight that the Commission’s suggestion that they are acting to protect Mr Dalli’s integrity is very awkward. Mr Dalli has publicly expressed great anger about the Commission’s handling of the case and accused the Commission of lying and of forcing him to resign, while the Commission acknowledged that “legally speaking we have

no evidence of any illegal behaviour of Mr Dalli”.⁹ Moreover, Article 4 of Regulation 1049/2001 states that “as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable”. The Commission has not consulted with Mr Dalli about our request for access to these documents, although it should be noted that Mr Dalli has stated publicly that he would like the OLAF report to be made public (so it is likely that he would not object the disclosure of the documents we requested).¹⁰

What do you consider that the EU institution or body has done wrong?

The Commission has unduly refused access to documents, failed to provide clarity about which documents falling under the scope of request actually exist and used delay tactics. All of which constitute violations of Regulation 1049/2001, and a pattern of serious maladministration.

The Commission argues that “Concerning point 3 a), the Commission is not in possession of any exchanges between Mr Zammit and the tobacco industry.” This is a problematic misinterpretation of our request which clearly asks for documents “related to [...] the Commission’s discussions more generally on the matter of Mr Dalli and the contacts between Silvio Zammit and the tobacco industry”. The request was not for exchanges between Mr Zammit and the tobacco industry, but for Commission documents referring to these exchanges. These exchanges are at the heart of “Dalligate”, which is why we clarified that these should be covered by our request.

What, in your view, should the institution or body do to put things right?

The Commission should instantly disclose all the requested documents. Furthermore, the Commission’s secrecy, selective release of documents and failure to fulfil its obligations under 1049/2001 should have consequences for the Commission’s internal policies regarding access to documents as well as for the responsible officials. The Commission should also release a public statement acknowledging that their handling of the Dalli affair has been marked by undue secrecy and lack of willingness to provide the public with their democratic right of scrutiny over the Commission’s activities, particularly in light of a lobbying scandal with such deep repercussions for public trust in the EU institutions. The Commission should issue a retraction of its statement that because it has released some documents in response to 1049/2001 requests relating to the Dalli affair it has therefore been “extremely transparent”. It should commit to respecting the broadest possible interpretation of its obligations under

9 European Commission Midday press briefing, 22/10/2012, see <http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=213720>

10 Interview with Dalli in the Times of Malta, October 23, 2012, <http://www.timesofmalta.com/articles/view/20121023/local/my-decisions-on-tobacco-directive-had-been-leaked.442224>

1049/2001, rather than the narrowest. If this requires dedicating more resources to fulfilling its right to know obligations, then the Commission should commit to providing these.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes, we have submitted a confirmatory application to our initial access to documents request; in its response, the Commission mentions the means of redress that are available to us, including filing a complaint with the European Ombudsman.