

A case in defending the right to preserve the investigation files of the Anti-Fraud Office of the European Commission.¹

Prologue

This story shows how impactful and important is the collaboration of various stakeholders when it comes to determine ways for balancing the right to preserve with the needs to ensure protection of sensitive data.

The story begun for me in 2013, as a freshly appointed Document Management Officer (DMO) of the EU Anti-Fraud Office (OLAF), a Directorate General of the European Commission.

OLAF is the only EU body mandated to detect, investigate and stop fraud with EU funds.

OLAF fulfils its mission by carrying out independent investigations into fraud and corruption involving EU funds, so as to ensure that all EU taxpayers' money reaches projects that can create jobs and growth in Europe; contributing to strengthening citizens' trust in the EU Institutions by investigating serious misconduct by EU staff and members of the EU Institutions; and developing a sound EU anti-fraud policy.

All allegations received by OLAF undergo an initial assessment to determine whether the allegation falls within the remit of the Office and meets the criteria for opening an investigation. If a new allegation meets the criteria for opening an investigation a case is opened and investigated in the context of either an internal² or external investigation or a coordination case depending on whether the allegation concerns internal institution and bodies or outside the EU institution and bodies and the type of investigative contribution provided by the office.

As a European institution and as a European public administration, the Commission (and its Directorates) has an obligation to maintain its Institution's memory through the records of its past activities and to transfer to the Archives of the Commission the permanently valuable historical records through which future generations will understand and learn from its actions and decisions.

Records are arranged on the basis of a Commission file plan, which in combination with the Commission retention list (CRL) gives an overview of all the activities and files under the responsibility of the various Directorates and a good indication of which type of files the

¹ *Disclaimer: this paper describes the personal story of the writer that intervenes in her own capacity not representing the opinion or interest of the European Institutions. The information and views set out in this text are only those of the author and do not necessarily reflect the official opinion of her current or previous employer. The views expressed herein are those of the author and should not be attributed to the IMF, its Executive Board, or its management.*

² Internal investigations are administrative investigations within the European Union institutions and bodies; they include serious matters relating to the discharge of professional duties. External investigations are administrative investigations outside the European Union institutions and bodies. Cases are classified as external investigations where OLAF provides the majority of the investigative input. Coordination cases are cases where OLAF contributes to investigations carried out by national authorities or other Community departments by facilitating the gathering and exchange of information and contacts.

organizations value as well as what is core activity and what is not. The retention list is a regulatory document that establishes the retention periods for the different types of files and its application is mandatory for all services.³ Each Directorate General in principle contributed to this list.⁴

The document management rules of the Commission are part of the Rules of procedure of the Commission, thus binding for each Directorate General, and at the time of the event, of Internal Control Standard 11⁵. These rules specify why all services need to ensure that appropriate processes and procedures are in place so that the Directorates General document management is secure, efficient (in particular about retrieving appropriate information) and complies with applicable legislation.

The events

OLAF was acknowledged by the European Data Protection Supervisor (EDPS) opinions in 2007⁶ the duty to contribute to the design and development of the fight against fraud and any other illegal activity affecting the financial interests of the European Community. Regulation 2001/45⁷, which at the time laid down the rules for data protection in the EU institutions- as well as the duties of the EDPS, was interpreted to mean that any information referred to the Office had to be kept long enough to enable verification of available information thus permitting a potential case reopening but also accountability and transparency. It was interpreted also as requiring destruction of all investigative files after the following retention schedules: 20 years for cases closed with follow up; 10 years for cases closed without follow up and 5 years for non-cases⁸. This interpretation clearly reflected the aim to comply with requirements for the protection of personal data but neglecting other aspects that a records and archival management approach would have been more inclined to consider, i.e. the business and administrative requirements these documents were supporting as well as their historical

³ The first CRL version was adopted in July 2007, based on Article 6 of the provisions on document management and its implementing rules, after extensive discussions for each of the chapters with legal experts and document management officers in the various Directorate Generals. The 2012 revision of the CRL updates and complements the previous version.

⁴ At the time of the events I am describing, the Commission was about to start the implementation rules for the new archive regulation (opening to the public after 30 years) which include provisions on processing personal data for Historical Purposes, therefore OLAF's initiative to rethink its retentions was in that respect perfectly timed.

⁵ At the time of the events I am describing, these standards were valid although they have recently been replaced. Internal control standard 11 on Document Management stated that appropriate procedures and processes must be in place to guarantee safe and effective document management, in particular to ensure that the necessary information can be readily found.

⁶ https://edps.europa.eu/sites/edp/files/publication/07-07-11_olaf_monitoring_en.pdf and https://edps.europa.eu/sites/edp/files/publication/07-11-21_olaf_intelligence_en.pdf

⁷ This regulation is now being repealed by Regulation (EU) 2018/1725.

⁸ https://ec.europa.eu/info/sites/info/files/sec-2012-713_en.pdf

value. This tension between apparently conflicting needs had to be underlined and better reflected.

Pending a further decision, no actual destruction of documents had been carried out. Supported by this and by my supervisor, I managed to present my concerns to the top management which started an incredibly interesting and constructive internal debate.

My main concern was that OLAF was the only Directorate General producing and responsible for its specific type of records (fraud investigations). Since under Commission rules, each Directorate General is responsible to keep and protect the documents that fall under its competence and be able to guarantee the accessibility of these documents until their transfer to the Historical Archives for preservation, my point was that OLAF was also responsible to make sure these records were kept and transferred to the Historical Archives. I, in my capacity of DMO, suggested that OLAF should internally reflect also on their real needs in terms of preservation and eventually should launch a review of the CRL.

I worked internally within the EU Institutions to get to know better the points of view of OLAF investigators and jurists, as well as the Commission central service in charge; externally, I asked opinions and benchmarks from several colleagues in the records management and archives International community collecting several key points of view.

The protection of personal data needs to be taken seriously and it was the responsibility of the Office to put in place necessary safeguards to protect the individual's personal data. However, a decision related to retention of records was not be taken only on the basis of personal data protection principles. We needed to reflect on OLAF's investigative needs and administrative workflow requirements as well as the historical value of investigation documents, taking into account the Commission document management criteria⁹.

Retention periods in any organization I had worked before reflected the information and operational needs of the Institution and the disposition reflected the Institution wider long-term information requirement. **OLAF's files constituted the institutional memory of its investigations and of their execution.** If all investigation files were eliminated (based on the CRL applicable at the time), no trace would remain of OLAF's activities in the historical archives of the Commission. Eliminating all the core documents created by the Office and for which it was the sole owner within the Commission, could impair the capacity of the Commission and the Office to be accountable for the documents produced during its operations and to fulfil other obligations (for example recovery of money). Being investigation OLAF's core activity, the documents produced during an investigation were candidates for Permanent Preservation. My point was that our records should be transferred to the Historical Archives after the closure of the file and preserved over time.

The protection of individuals' right concerning their personal data would still be guaranteed even if we choose not to destroy our corporate memory: in fact the historical archives procedures were a guarantee for this and would not allow for any access to records request.

⁹ The Commission's document management implementing rules (II.4.3.1), stress that the institution needs to take into account the "administrative usefulness for the departments, the statutory and legal obligations and its potential historical value" of each file type

One very hot debate was on the consequences of elimination. In fact if OLAF would destroy all investigation files, based on the CRL applicable at the time) the *primary sources* to get insight into the core business of OLAF (its investigation records) would have been lost. No other services within the Commission held records documenting this same activity, so the destruction of these records would imply that all information about these activities would need to be derived from *secondary sources* (annual management plans, annual activity reports and publications). But allegations could be made again at any time: if OLAF's documents disproving the allegations had been destroyed, future questions on the allegations could not be effectively answered. It would have been possible to foresee that in a few years the only trace of those matters could be scattered (without context) in the public domain (e.g. press releases, public access to documents, OLAF reports) and if OLAF's position was no longer available, this would be putting the Institution at high reputational risk. Public opinion could even view the (untimely) destruction of files negatively and provide ammunition for alleged cover-ups, causing reputational harm to the Institution. On the contrary, one of the advantages of Permanent Preservation, would be the capacity to reply to public requests, complaints or legal actions.

Files transferred to the Historical Archives could exceptionally be excluded from public access, as foreseen in the Commission implementing rules.

Furthermore, data protection rules do not require the complete elimination of files. Article 4.1.b Regulation (EC) No 45/2001 states that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual.*"

The obvious functional value (records are created to ensure OLAF mission can be performed) as well as the historical value of OLAF records had to be balanced better with the need to protect the personal data contained in the files. This last one being a legitimate concern, but from the Commission's point of view with regards to Institution records one that should never be the only element to take into account when deciding upon the fate of its records. The Institution, as an organization accountable to the general public, need to establish an institutional memory that will help perform its mission and where appropriate make records available to the public, while at the same time taking the protection of personal data into account: these needs are reflected in the Commission rules on document management and archives.

Also further exceptions could be introduced by OLAF to the Implementing Rules on document management¹⁰ under the section on appraisal and transfer of files (II.5.2 g): "Such exceptions could include the uncovering of episodes of past maladministration, an extraordinary public interest in the information or in the documents concerned or other reasons that could make it

¹⁰ [Implementing Rules on document management](#)

necessary to (temporarily) preserve the files concerned.”

When it comes to its records and archives, the Commission essentially must comply with the Archives regulation (Council regulation 354/83 (amended by regulation 1700/2003) concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community). In 1983 the main message of this regulation was that we have an obligation to establish historical archives and to open them to the public, whereas with its amendments in 2003 the principles established with regards to personal data protection were also to be incorporated in this text. Art. 2 of the regulation includes the necessary elements to balance public interest against privacy concerns.

Epilogue

In 2015 I professionally separated from OLAF and I went on to other challenges.

Before I left, all the internal work necessary to change the previous CRL was done. It was agreed that the length of the administrative retention period would be the same for all categories of cases and set to 15 years after closure of the case or dismissal. At the end of the administrative period the decision was reverted from elimination into transfer to historical archives of the complete investigation file for permanent preservation. The decision was incorporating both the right to protect data and the right to preserve and was sent forward and finally approved with the new CRL issued in 2019¹¹. I am still in contact with many of the professionals who made the debate possible and I wish to thank them with gratitude for all what they did in support of a better decision. They have represented the European Commission at its best, an Institution capable to reflect and take decisions in the best interests of its citizens thanks to an array of professionals who openly discussed the matter and tried to analyze it taking into account its complexity and the often-conflicting multiple points of view. A conversation that sometimes does not happen enough or does not happen tout court. In recent years, the right to protect data has rightly risen, but especially in public administration it is often acted upon without extensive and holistic understanding of the implications this has and will have to the capacity of posterity to access and understand the facts and the events. The records management and archival community in my opinion did not lobby enough to make also their concerns listened and there is clearly an opportunity for us to do better.

¹¹ <https://ec.europa.eu/transparency/regdoc/rep/2/2019/EN/SEC-2019-900-10ANNEX-1-PART-1.PFD>