



Request concerning [...]
(Ref. CCF/[...])

DECISION OF THE COMMISSION
(104th session, 24 to 27 April 2018)

[...], withdrawing based on Article 2.1(d) of the Operating rules of the Commission,

The Commission for the Control of INTERPOL's Files (the Commission), sitting as the Requests Chamber, composed of:

[...]
Members,

Having deliberated in camera during its 104th session, on [...] delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) lodged a complaint addressed to the Commission. Following the submission of all the required documents in accordance Rule 30 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed the applicant thereof on [...].
2. The Commission found that the information provided by the Applicant raised serious questions concerning the compliance of the data processed concerning him with Article 2 of INTERPOL's Constitution. Therefore, the Commission decided that access by INTERPOL Member countries to these data shall be blocked pending further study of the file. On [...], the General Secretariat provisionally blocked access by INTERPOL Member countries to the data challenged.
3. In accordance with Article 34(1) of the Statute of the Commission (CCF Statute), the National Central Bureau of INTERPOL (NCB) of [...] was consulted on the arguments set forth in the complaint.
4. Both the Applicant and the NCB source of the data challenged were informed of the fact that the Commission would study the case during its 104th session.
5. During the study of the Applicant's case, the Commission consulted the NCB of [...], in accordance with Article 34(1)/(2) of the CCF Statute, on arguments set forth in the complaint.

II. FACTS

6. The Applicant is a national of [...]. He is a businessman [...].
7. [...]
8. He is the subject of diffusion for his arrest in view of extradition, sent by the NCB of [...]
9. The summary of the facts, as recorded in the Diffusion, is the following: [...].

III. THE APPLICANT'S REQUEST

10. The Applicant requested the deletion of the data concerning him.
11. He contends in essence that:
 - a) the case is of a predominantly political character;
 - b) the prosecution lacks any evidentiary basis.

IV. APPLICABLE LEGAL FRAMEWORK

12. General provisions:

- Article 2(1) of INTERPOL's Constitution states that the Organisation should "ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights".
- Article 11(1) of the Rules on the Processing of Data (RPD) provides that "data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the NCB, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers".

13. Field of competence of the Commission:

- Article 36 of INTERPOL's Constitution states that the Commission shall ensure that the processing of personal data by the Organization is in compliance with the regulations the Organization establishes in this matter.
- Article 3(1)(a) and Article 33(3) of the Statute of the Commission establish that the powers of the Commission are limited to controlling whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements.

14. Effective participation of an individual in the acts he/she is accused of:

- Article 83.2(b,i) of the Rules on the Processing of Data (RPD) requires that "Red notices may be published only when sufficient judicial data has been provided. Sufficient judicial data will be considered to include at least summary of facts of the case, which shall provide a succinct and clear description of the criminal activities of the wanted person, including the time and location of the alleged criminal activity."

15. Matters of political character:

- Article 3 of INTERPOL's Constitution states that "[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political (...) character."
- Article 34 of the RPD states the following:
 - 34(2): "(...) prior to any recording of data in a police database, the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 3 of the Organization's Constitution".
 - 34(3): "To determine whether data comply with Article 3 of the Constitution, all relevant elements shall be examined, such as:
 - (a) nature of the offence, namely the charges and underlying facts;
 - (b) status of the persons concerned;
 - (c) identity of the source of the data;
 - (d) the position expressed by another National Central Bureau or another international entity;
 - (e) obligations under international law;
 - (f) implications for the neutrality of the Organization;
 - (g) the general context of the case."
- Resolution ref. AGN/20/RES/11 (1951) requires applying the predominance test (even if in the requesting country the facts amount to an offence against the ordinary law). It states that "(...) no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political (...) character is ever sent to the International Bureau or the NCBs, even if - in the requesting country - the facts amount to an offence against the ordinary law."

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- The INTERPOL Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL's Constitution in a variety of circumstances.

16. Communication of information:

- Article 31(3) of the Commission's Statute (CCF Statute) provides that: "*On request or at its own initiative, the Requests Chamber shall inform both the applicant and the source of data of the status of the request and any relevant developments. In addition, the Requests Chamber shall inform them of the date on which the request will be examined and the deadline for any additional submissions.*"
- Article 35(1) of the Commission's Statute provides that: "*Information connected with a request shall be accessible to the applicant and the source of the data, subject to the restrictions, conditions and procedures set out in this article.*"
- Article 35(3) of the Commission's Statute provides that: "*The communication of information may be restricted at the decision of the Requests Chamber, on its own initiative or at the request of the source of data, the General Secretariat or the applicant, for one or more of the following reasons:*
(a) *To protect public or national security or to prevent crime;*
(b) *To protect the confidentiality of an investigation or prosecution;*
(c) *To protect the rights and freedoms of the applicant or third parties;*"
- Article 35(4) of the Commission's Statute provides that: "*Any restriction on the disclosure of information must be justified and must specify whether some information, such as summaries, may be provided. The absence of justification alone will not lead to the disclosure of the content of the information but may be taken into consideration by the Requests Chamber in assessing and deciding on a request.*"
- Article 35(5) of the Commission's Statute provides that: "*Where deemed appropriate, and provided that this does not compromise the confidentiality of the case, the requests Chamber may direct the applicant to contact the competent authorities of the source(s) of data.*"

V. FINDINGS

17. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCBs concerned and INTERPOL's General Secretariat.
18. The Commission treats the Applicant's contentions in the order in which they are described in paragraph 11 above.
19. The Commission decided to study together under point A below the related issues of whether the charges are politically motivated and lack evidentiary basis, since they are interdependent and rely on the same factual allegations. It decided to review under point B the issue of the restriction of communication of information to the Applicant.

A. Political character of the proceedings

a) *The Applicant*

20. The Applicant explains that the purpose of the issuance of the diffusion was to prevent him from taking part in an auction [...] the governor of [...] Region, were planning to gain control of that company, which was lucrative.
21. There is a lack of evidence in the criminal proceedings initiated against him. His former business partners were arrested days before the auction took place and gave false testimonies against a prosecutor who was known for taking actions against corruption in the [...] field, in order to be released from detention. At the time, the Applicant was abroad on a business trip, and in view of his business partner's situation, decided not to return to [...].

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22. The Applicant also explains that he has no link whatsoever with the companies mentioned in the summary of facts, [...].

23. [...]

b) The NCB of [...] (NCB source of the data)

24. In its reply, the NCB [...] explained that the proceedings against the Applicant were still ongoing and that the arrest warrant was still valid. The Applicant was first notified of the proceedings via an SMS sent to a telephone registered in his name on [...]. On [...], a notice on a call for appear to an interrogation was sent to his last address of registration and residence. His duly mandated legal representative was subsequently informed [...]. The lawyer confirmed his receipt of the information.

25. Regarding the Applicant's claim that there are no elements of evidentiary basis, the NCB advised the Commission that the charge brought against the Applicant is confirmed by numerous evidence collected in the case in the form of testimonies of witness or of the Applicant's accomplices who have since been convicted, as well as [...]. All of the Applicant's accomplices in this case have admitted their guilt and gave complete confessions, and were not released from detention in exchange for their testimonies. The Applicant's defence council had full access to these testimonies.

26. They testified to the fact that the Applicant offered to steal money [...]. The Applicant developed a criminal plan for misleading the victim,¹ whom he persuaded [...] to the accounts of the dummy companies [...]. Once the funds were transferred on the company's accounts they were cashed out and [...] were handed over to the Applicant. To conceal the crime, the Applicant then persuaded representative of the victim of the fact that a fictitious person stole their money.

27. Testimonies also confirmed that since [...] the Applicant and his accomplices engaged in illegal banking activities without a proper license [...]. More specifically, they provided services in transfer and cashing out of funds to various legal entities and individuals, and for such services they collected a fixed interest as a compensation, which amount, for the period of their criminal activities, were not less [...].

28. The materials of the criminal case confirmed that the Applicant was linked with the companies [...].

29. The NCB also underlined that the arrest warrant against the Applicant in the form of detention was issued on [...], only after establishing that there was sufficient evidence confirming his participation in these criminal activities.

30. [...]

31. The criminal actions committed by the Applicant are not in any way related to [...].

32. [...] the Applicant are in no way connected with any employee of the Prosecutor's Office, [...].

c) The NCB of [...]

33. [...]

d) Findings of the Commission

34. With respect to the possibility that the matter is of a political character, the Organization applies the predominance test, i.e., it evaluates all relevant information and pertinent elements, as provided by the rules, to determine whether the offense is of a predominantly political character.

35. The rule reflected in RPD Article 34(3) requires analysis of the following factors, of which the following appear to be key in the present case:

- the nature of the offense, namely the charges and underlying facts;
- the status of the person concerned;
- the position expressed by another NCB or another international entity;
- the general context of the case.

¹ [...]

36. Under Articles 3(1)(a) and 33(3) of the Statute of the Commission, the function of the Commission is to review whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements in accordance with Article 36 of INTERPOL's Constitution. The Commission is not empowered to conduct an investigation, weigh evidence, or make a determination on the merits of a case. That is the function of the competent national authorities.
37. Instead, what is required is that sufficient facts have been provided that link the wanted individual to the charges against him, and a clear description of the criminal activities he is accused of. This has been provided in this case. Indeed, the NCB of [...] has put forth a reasonable explanation that the national authorities have enough proof of the Applicant's participation in these acts, and of their criminal nature.
38. As a result, for purposes of this review, the Commission finds that the elements provided by the NCB are sufficient to indicate the possible effective and personal participation of the Applicant to the criminal acts of which he was accused.
39. The Commission also examined the procedure followed for issuing the arrest warrant and observed from information reported in the arrest warrant that the Applicant was represented during the [...] Court hearing, where the measure of detention was decided by the Court. This arrest warrant forms the basis of the Diffusion. It is also mentioned that the lawyer had the opportunity to present his arguments during this hearing. The Commission also noted that the Applicant's lawyer was kept notified of the proceedings in accordance with [...] laws.
40. Therefore, the Commission finds that the NCB of [...] provided sufficient elements indicating that the arrest warrant based on which the Diffusion was issued is valid, and that it cannot refute that the prosecution is potentially valid.
41. The Commission established that the Applicant is not a politician or former politician. Despite his contentions, no concrete information concerning the fact that the proceedings were initiated against him to prevent his company from taking part in an auction procedure were provided. The documents provided by the Applicant regarding his assertion are based on general reports, rather than on any specific information regarding this particular prosecution. General criticisms of a country's political system or business markets by outside organizations that do not address the specific situation of an Applicant cannot suffice to establish an Article 3 Violation.
42. Accordingly, the information provided is not sufficient to establish that political elements could be predominant over the ordinary criminal law elements of the case, and that the processing of the data concerning the Applicant is contrary to Article 3 of the Constitution.

B. Restriction to communication of information

a) The Applicant

43. The Applicant asked for disclosure of the results of the Commission's examination of his case. He also asked to be informed of the implementation of the Commission's decision in this case.

b) The NCB of [...]

44. The NCB of [...] restricted the disclosure of any data to the Applicant.
45. To justify its refusal to disclose any information to the Applicant, the NCB of [...] initially explained that:
 - An INTERPOL Diffusion is an element of the INTERPOL signal system and shall be treated as internal documents registered in the Organization's database, which are subject to the INTERPOL Rules on the Processing of Data.
 - In accordance with Article 112 of the RPD all processed information is divided into three types (confidentiality level): "for official use", "restricted distribution" and "confidential". If the level is not explicitly indicated when processing information, it is recognized as designated "for official use". According to Article 59 of the RPD, data can be disclosed in accordance with the

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established procedure and only in emergency cases described in Article 26 (2) of the RPD, namely "when there is a real or immediate threat to people or property, and the data allows the National Central Bureau, national or international bodies preventing this threat."

- Article 60 of the RPD allows disclosing data which is registered in the database to third parties, but only with the prior consent of the source of such data.

b) Findings of the Commission

46. The Commission noted the NCB's request for strict confidentiality in this case, with reference to Articles 26(2), 59, 60 and 112 of the RPD. The RPD is the general framework for international police cooperation, and it is on that basis that NCBs source of data are consulted prior to any disclosure of information to an applicant.
47. However, in the framework of an application from an individual to the Commission, the Statute of the Commission for the Control of INTERPOL's Files applies. Therefore, in order to comply with Articles 35(3) and 35(4) of the CCF Statute, an NCB is requested to:
 - First to indicate the reason(s) for its refusal to disclose any information to the Applicant, among the following ones listed in Article 35(3) of the CCF Statute: a) To protect public or national security or to prevent crime; b) To protect the confidentiality of an investigation or prosecution; c) To protect the rights and freedoms of the applicant or third parties.
 - Second to justify its refusal in the specific case at hand,
 - Third to indicate, as provided for by Article 35(4) of the CCF Statute, whether a minimum amount of information can be disclosed to the applicant.
48. The Commission reaffirmed that, in analysing the justification of requested restrictions, it tries on the one hand to protect the interests of the parties, while preserving at the same time the essence of an adversarial procedure in order to provide an effective remedy. In doing so, the Commission takes into account, inter alia, the general context of the case, the other avenues available to the Applicant to obtain access to the information on the national level, the potential violation of other rules or international obligations, the possible risks for INTERPOL.
49. The Commission held that restrictions under Article 35(3) of the Statute are an exception to the general principle of communication of information, bearing consequences on the rights of the parties, and which must therefore be interpreted strictly. It concluded that such restrictions to the communication of information must be necessary and proportionate to their stated purpose, and that the Commission itself must be allowed unlimited access to the information concerned in order to make an effective determination. In addition, in order for a decision not to be based solely or decisively on non-disclosed information, counter-balancing measures must be undertaken to compensate, up to the extent possible, the interferences with the rights of the parties.
50. Here the NCB has neither indicated the reasons why it refuses to disclose information to the Applicant, nor justified why it would apply in this specific case. The Commission also underlined that despite several exchanges with the NCB of [...], the source of the data has not consented to any counter-balancing measures (such as the provision of a redacted summary or of a minimum set of information), which could have minimized the impact of the restrictions on the rights of the Applicant, as requested under Article 35(4) of the Statute.
51. The Commission concluded that the restrictions requested by the NCB of [...] were not properly justified, as the NCB did not demonstrate their relevance and proportionality in the context of this case. It established, further to Article 35(4), that such improper justification would not lead to the disclosure of the data on the basis of which the red notice was issued without the consent of the NCB of [...]. However, the Commission held that these restrictions were hindering the adversarial nature of the proceedings by preventing the Applicant from being able to present counter-arguments, and that the imbalance between the parties would lead, on the balance, to the Applicant's fundamental rights breach.

C. Remaining contentions

[...]

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FOR THESE REASONS, THE COMMISSION

Decides that the data challenged are not compliant with INTERPOL's rules applicable to the processing of personal data, and that they shall be deleted from INTERPOL's files if the NCB of [...] does not provide the appropriate reasons and justifications to its refusal to disclose any information to the Applicant, within one month of its information of the present decision.

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