



Commission de Contrôle des Fichiers de l'O.I.P.C. - INTERPOL
Commission for the Control of INTERPOL's Files
Comisión de Control de los Ficheros de la OIPC-INTERPOL

لجنة الرقابة على محفوظات المنظمة الدولية للشرطة الجنائية (الإنتربول)

INTERPOL's Independent Authority for the Control and Protection of Personal Data

DECISION OF THE COMMISSION

REQUESTS CHAMBER

Request concerning [...]

(Ref. CCF/109/[...]/REV)

109th session

1 to 5 July 2019

Lyon, FRANCE



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

Vitalie PIRLOG, Chairperson
Petr GORODOV,
Sanna PALO,
Isaias TRINDADE,
Members,

Having deliberated in camera during its 109th session, on [...], delivered the following Decision.

I. PROCEDURE

1. During its [...] session, the Commission previously studied a request from [...] (the Applicant), and concluded that the data concerning him were compliant with INTERPOL's rules, subject to the removal of the data from the INTERPOL public website.
2. On [...], the General Secretariat implemented the Commission's recommendation and removed the extract of the Red Notice from the INTERPOL public website.
3. On [...], the Applicant applied for the revision of the Commission's Decision rendered at its [...] session. On [...], the Commission informed the Applicant that the conditions to assess his revision were met and proceeded in accordance with Article 34(1) of the CCF Statute, by consulting the National Central Bureau of INTERPOL (NCB) of [...] on the arguments set forth in the application. As part of its assessment, it also consulted the NCBs of [...], in accordance with Article 34(2) of the CCF Statute.
4. On [...], the NCB of [...] confirmed that the proceedings and arrest warrant concerning the Applicant were still valid, and provided answers to the questions raised by the Commission.
5. 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 [...] session.
6. At the time of the 108th session, the Commission decided that it needed to conduct further verifications with the NCB of [...] prior to making a final decision. A reply to these verifications was received in a timely manner, and therefore the Commission decided to postpone the study of the case for further considerations at its 109th session. Both parties were informed of the postponement and given another opportunity to provide additional submissions and documents in relation to their files.

II. FACTS

7. The Applicant is a national of [...].
8. He is the subject of a Red Notice issued at the request of the NCB of [...] for [...], on the basis of the arrest warrant issued against him by the [...] judicial authorities on [...].
9. The summary of the facts set forth in the red notice states: [...].
10. After his initial arrest in [...] on [...], the [...] confirmed his provisional arrest pending extradition to [...]. He was detained until [...], and released under house arrest. On [...], the Appeals Court of [...] ordered his release subject to alternative measures from house arrest.

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11. On [...], the [...] authorities received the request for extradition from [...] through diplomatic channels after initially arresting the Applicant on the basis of the Red Notice. The Applicant departed [...] before a decision on the extradition request was made.

III. THE APPLICANT'S REQUEST

12. In his most recent complaint, the Applicant submitted that:
- The data concerning him lacks evidentiary basis and no longer has a valid purpose.

IV. APPLICABLE LEGAL FRAMEWORK

13. Application for revision

- Article 42 of the CCF Statute provides that: “(1) *Applications for the revision of decisions of the Requests Chamber may be made only when they are based on the discovery of facts which could have led the Requests Chamber to a different conclusion if that fact had been known at the time at which the request was being processed.* (2) *Applications for revision must be made within six months after the discovery of the fact.*”

14. 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*”.

15. Field of competence of the Commission:

- Article 36 of INTERPOL's Constitution provides 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 10(a) of the Rules on the Control of Information establishes 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.

16. Extradition issues:

- Article 31 of INTERPOL's Constitution states that a member country shall do all within its power which is compatible with the legislation of its country to participate diligently in INTERPOL's activities.
- Article 82 of the RPD states that “*Red Notices are published (...) in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action.*”

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- Article 84(b) of the RPD further states that the requesting National Central Bureau who has asked for the publication of a Red Notice *“shall ensure (...) that extradition will be sought upon arrest of the person, in conformity with national laws and/or the applicable bilateral and multilateral treaties.”*

17. Effective participation of an individual to the acts he is accused of:

- Article 83.2(b,i) of the 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.”*
- The diffusion addressed by INTERPOL General Secretariat to the NCBs on 05/04/2012 reminded *“all member countries that for red notice requests and diffusions seeking the arrest of a person, it is important to provide sufficient facts that link the wanted individual to the charges against him/her. Providing such facts is crucial for facilitating international police cooperation.”*

18. Interest or seriousness for international police cooperation:

- Articles 5.3 and 35 of the RDP require that the data is of interest for the purposes of international police cooperation. This requirement is reminded all over the RPD.
- This notion is supplemented by the notion of “seriousness” of a crime, set up in articles 83.1(a) and 93.2(a,i) of the RDP.

19. Administrative issues:

- Article 83.1(a,i) of the new rules on the processing of data states that *“red notices may not be published for offences relating to private matters and for offences originating from a violation of laws or regulations of an administrative nature, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime”*.

V. FINDINGS

20. For an appropriate study of the case, the Commission first determined whether the arguments presented meet the necessary requirement for a revision and then examined the arguments eligible to revision in their order outlined at Section III above.

1) APPLICATION FOR REVISION

21. The Commission recalled that under Article 42 of the CCF Statute *“(1) Applications for the revision of decisions of the Requests Chamber may be made only when they are based on the discovery of facts which could have led the Requests Chamber to a different conclusion if that fact had been known at the time at which the request was being processed. (2) Applications for revision must be made within six months after the discovery of the fact.”*
22. The Commission evaluated the Applicant’s claims in view of Article 42 of its Statute. Under that article, the party seeking revision of one of the Commission’s decisions shall provide a fact which is newly discovered, could have led the Commission to a different conclusion if it had been known at the time at which the request was initially processed, and shall present it to the Commission within six months of its discovery.

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23. It first recalled the facts at stake, which are that the Applicant is suspected of embezzling company funds at a level of [...], by transferring a first sum of [...] to an account at [...] in [...]. Other transfers would have been conducted on [...],[...] and [...].¹ These transfers were sent out to the account of [...] located in [...].
24. The issue would have arisen after the Applicant had vacated rented premises paid for by his employer, [...], and offered to sell a [...] in the property to the landlord for a sum of [...], other sums allegedly misappropriated from the company.² The Applicant would have also secured an [...] policy for his private [...] by using his position and paid his premiums with company funds, at sums of [...] between [...] to [...].³ The Applicant then left the country.
25. Due to all these elements combined together, a formal complaint was prepared by the [...] to the police and a criminal case was opened. As a result, on [...], the Applicant became the subject of an INTERPOL [...] at the request of the [...] authorities. As part of his initial request, the Applicant had explained that the large sums transferred to [...] were related to his lawfully earned bonuses from the company. He submitted other arguments to contest his participation in stealing [...] and obtaining an [...] policy, but first noted that these [...] incidents concerned minimal sums of money related to a private dispute which have no interest for police cooperation.
26. In his most recent complaint, the Applicant provided further support for his contentions regarding the lack of evidentiary basis of the infraction and the lack of criminal character of the case, by indicating that he signed a settlement with [...] formalized in confirmation letters issued on [...] and sanctioned in [...] courts. [...], which is the victim company referred to in the Red Notice, therefore did not suffer any criminal conduct from the Applicant's actions, contrary to what is outlined in the summary of facts of the Red Notice as ultimately it is it which repaid the Applicant.
27. Prior to the session, the Commission established that these arguments are based on facts that were not known at the time the Commission concluded on the original complaint, during its [...] session, and that were submitted within the six months timeframe set forth at Article 42 of the Statute of the Commission.
28. Indeed, to determine whether an application for revision may be examined under Article 42, the Commission must also establish whether the discovered fact *"could have led the Requests Chamber to a different conclusion if that fact had been known at the time the request was being processed"*.
29. The Commission found that the fact the company reported as a victim in the Red Notice ([...]) has filed a letter to confirm that the Applicant has not outstanding debt against it may have led the Commission to a different decision had it been known at the time of the [...] session.
30. Furthermore, in light of the Commission's Decision of the [...] session which took note at the time that there was a pending extradition request with the [...] authorities, the Commission decided to analyse whether any progress and other information existed in relation to the efforts of the [...] authorities to extradite the Applicant.
31. Therefore, the Commissions found that conditions for revision were met.

¹ [...]

² [...]

³ [...]

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2) ANALYSIS

A. Extradition request

a) *The NCB of [...] (NCB source of data)*

32. In order to verify the continued relevance of the findings made by the Commission in the initial request of the Applicant concerning the steps taken to extradite the Applicant, the Commission asked the NCB of [...] whether they had attempted to extradite the Applicant from [...] and the NCB replied that its public prosecutors [...] and that the settlement on file does not change the endeavour to extradite the Applicant.
33. Furthermore, as to the failure to request the extradition from [...], the NCB indicated that the Applicant escaped from the police in [...] and therefore that they could not follow through with the extradition request.
34. [...]

b) *The NCB of [...]*

35. The NCB of [...] indicated that they arrested the Applicant on [...] based on the arrest warrant against the Applicant him. As part of the initial request of the Applicant, the NCB of [...] had confirmed that that the Applicant was provisionally released on [...] by the Court of Appeal of [...] and was asked to remain in [...] but left the countries.
36. The authorities received the extradition proceedings from [...] on [...] and the final decision was considered pending at the time of the [...] session.
37. No response was provided by the NCB of [...] as to the outcome and current status of this extradition request.

c) [...]

[...]

d) *Findings of the Commission*

38. The purpose of a Red Notice is not only to locate a person, but also to request his provisional arrest in view of extradition. The fact that the Applicant's location is known to the authorities of [...] does not undermine as such the lawfulness of the Red Notice.
39. However, INTERPOL's rules require that the requesting NCB takes appropriate step to achieve the purpose for which the red notice was issued, i.e. to seek the arrest in view of extradition of the individual concerned, or provides *reasonable grounds for the lack of action of its country*.
40. [...]
41. Furthermore, it noted that another extradition request was presented to the [...] authorities but the Applicant appears to have fled the country while being provisionally released.

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42. The Commission therefore found that the NCB demonstrated its intention to take the necessary measures to seek the extradition of the Applicant and to comply with its obligations set forth in INTERPOL's rules in relation to extradition matters.

B. Lack of clear description of criminal activities

a) *The Applicant*

43. The Applicant explained that he has reached an agreement with the party that accused him of stealing funds and provided a copy of the settlement entered with that company signed in [...]. He recalled that he was accused of theft [...].

44. He explained that he settled the matter upon the election of new management by the company and therefore the company no longer wished to press charges against him. In support of his position, the Applicant presented a letter from the director [...], whom confirmed that the company will not seek criminal charges against the Applicant. He therefore reiterated that the matter lacked of evidentiary basis and pertained to private dispute concerning the payment of bonuses.

45. Furthermore, in supplementary representations prior to the 108th session, the Applicant indicated that his lawyers in [...] have been unable to retrieve the police docket concerning him.

46. He also indicated that the Director of Intelligence Services [...], [...], had abused his position in seeking a Red Notice concerning him. In this regard, he submitted a local [...] newspaper article [...].

b) *The NCB of [...]*

47. In response to the Applicant's new argument, the NCB of [...] confirmed that the proceedings and arrest warrant concerning the Applicant were still valid and based on the charge of [...].

48. It also indicated that only [...] was responsible for the prosecution of criminal offences and to halt proceedings. It underlined that the individual whom signed the settlement, [...], was not part of the prosecution's list of witnesses and that should he wish to retract [...] from the criminal matter, a withdrawal statement would be necessary and would not automatically lead to the dismissal of the case. In this regard, the Applicant's lawyers would have already been informed that the settlement agreement had no bearing on the criminal proceedings, and that they could not take place in his absence.

49. Furthermore, the NCB of [...] underlined that the settlement agreement was conducted in [...], and in view of this had no bearing on the sovereign criminal matters of [...].

c) *Findings of the Commission*

50. In view of the new elements provided by the Applicant, the Commission first noted that the NCB source of data is under a continuous obligation to provide a clear link of the wanted individual to the charges against him and to ensure that the data contained in the notice remain accurate. It also considered that the settlement could affect its previous findings concerning the criminal versus administrative nature of the case.

51. In this regard, while the [...] authorities are free to keep on pursuing the case of the Applicant despite the existence of a settlement between the Applicant and the company referred to as the victim in the Red Notice, the Commission recalled that under Article 35 of the RPD, any data recorded in INTERPOL's files must be "*of interest for the purposes of international police cooperation*", and

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that this interest shall be assessed, inter alia, in relation to the international nature of the data and the extent to which the data may be used by NCBs other than the source.

52. Therefore, the Commission considered that the elements to review were the description of the Applicant's possible criminal activities, the accuracy of the data, and its seriousness for international police cooperation.
53. At this time, it is not disputed that [...] provided a formal settlement to the Applicant and formally indicated that they would not seek criminal charges against him any further.
54. In this regard, it first noted that the key contingency of the case lies in the fact that according to the complaint of the Director of [...] signed [...] collected by the [...] police, the Applicant wired large sums of money to [...] without authorization from the board of shareholders. The Applicant, on the other hand, indicated that these were his lawfully owed and authorized bonuses.
55. At the time of the [...] session, the Commission had noted this divergence of views between the Applicant and the alleged victim company, but decided that the NCB had provided sufficient elements of possible and effective participation and had recalled the limits of the Commission's role. The Commission reiterated that indeed, it was not the appropriate forum to debate the nature of the wired sums and considered that the description of the Applicants possible criminal activities, found sufficient at the [...] session in light of the Commission's mandate, still stood.
56. The Commission then moved on to considering that the settlement indicates that [...] is to pay the Applicant a sum of [...] to the account of [...] from the date of the signature. A letter of undertaking dated [...] is attached and reports that director [...] will not be seeking criminal charges against the Applicant, unless cooperation is requested by the prosecuting authorities.
57. However, this settlement indicated that it is provided without admitting any liability [...] and does not indicate why a sum of [...] is now being transferred to the Applicant. Therefore, the Commission could not conclude as suggested by the Applicant that this constituted a clear demonstration that the data would be inaccurate.
58. Furthermore, the Commission noted that the NCB of [...] indicated the authorities' intention to maintain the prosecution of the Applicant, despite the existence of a settlement, as this agreement was entered outside of their jurisdiction. It also underlined that the individual [...] was not on the witness list in [...] and should [...] withdraw its criminal complaint, this would have to be done formally before the [...] courts.
59. The Commission was satisfied by the explanations of the NCB of [...] and recognized that civil matters indeed do not have a systematic bearing on criminal matters, especially when they are rendered in another jurisdiction. At the same time, the Commission noted that the settlement's validity and the role of [...] as the current director of [...] was not challenged by the NCB of [...]. Therefore, it found that the core issue that remained was whether despite these circumstances, new elements had come to light that could challenge its former conclusions that the matter was not of an administrative nature, and if not, to establish whether the data remained relevant for international police cooperation.
60. As such, the Commission first analysed whether the finding made at the [...] session to the effect that the matter was of a criminal character should be reviewed. It recalled that Article 83.1 prohibits the publication of red notices for *"offences originating from a violation of laws or regulations (...) deriving from private disputes, unless the criminal activity is aimed at facilitating a serious crime (...)."*

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61. In this regard, the Commission noted that in his police complaint, the company representative was very firm that the cash payments made to the [...] bank account by the Applicant had not been authorized by the board of shareholders.
62. The Commission considered that it was not the appropriate forum to resolve whether the sums allegedly misappropriated were in fact duly owed bonuses, and that though the matter may derive from a private dispute, the criminal acts reproached to the Applicant still reflected the commission of serious crime, as the sums illegally transferred would surpass the equivalent of [...] euros.
63. It therefore could not establish that the matter pertained to a purely private dispute, in light of the submission of an illicit personal gain for the Applicant.
64. Therefore, the Commission then moved to evaluating whether the settlement now submitted by the Applicant could challenge its former conclusions regarding the seriousness and interest of the data for international police cooperation, it recalled the facts at stake, as exposed by the NCB's position in its decision rendered at the [...] session:

“The company bought a [...]. The [...] was installed at a house which was rented for [...] as an employee of the company. On vacating the property [...] sold the [...] at an amount of [...]. The money was paid into his account.

[...] owned a [...]. He used company funds to pay [...] (An Insurance Company) for [...]. The total amount for the insurance is [...].

He also used company funds to pay for his personal [...] insurance to the tune of [...].

[...] also misappropriated company funds by paying bonuses amounting to [...] under the pretext that they were his as an employee of the company whereas in actual fact he transferred the money to a [...] account as a consultation fee to attorneys in [...].

The total cost of the misappropriated funds is almost [...].”

65. The Commission first noted that although this distinction had not been drawn at the [...] session, the issue of the misappropriation of the [...] and of the insurance policy would probably not meet the threshold of seriousness and interest for police cooperation, in view of the relatively small sums ([...]) and most importantly the nature of the infractions which are at stake are of a debatable international nature and interest for international police cooperation.
66. However, it considered that the sum of [...] alleged as stolen without authorization was an unneglectable amount and warranted the consideration of the Commission, in view of the settlement now provided on file.
67. In this regard, it recalled the tenure of Article 35 of the RPD, concerning the interest of the data for the purposes of international police cooperation:

“Article 35 (1) In conformity with Article 5(3) of the present Rules, 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 of interest for the purposes of international police cooperation.

(2) Compliance with this condition for recording data shall be assessed in relation to:

(a) the purposes specific to international police cooperation which are laid down in Article 10(2) of the present Rules; and

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(b) the international nature of the data and, in particular, the extent to which the data may be used by National Central Bureaus, national entities or international entities other than the source.”

68. In addition, it recalled that according to the Commission’s practice, these rules shall be appreciated in light of other dispositions of the RPD, which call for:

- a) the “seriousness” of a crime, for the issuance of red notice,⁴
- b) the “relevance” of data,⁵
- c) and the “non excessive” character in relation to the purpose for which it is processed. ⁶

69. In order to appreciate these criteria, the Commission generally assesses the following elements:

- a) the acts for which the individual is subject to data in INTERPOL’s files (for example, the type of criminality or the elements characterizing his/her effective participation in the acts he/she is accused of),
- b) the general purpose for the processing of data (for example the arrest an individual in view of extradition, or his/her location),
- c) the possible actions against the person (for example, the sentence rendered).

70. In this specific case, the nature of the offence is to have defrauded the company [...], through the payment of sums transferred to [...]. However, the Commission noted that though the total sums reported amounted to a substantial financial prejudice ([...]) liable for a substantial penalty (up to seven years of imprisonment), there was a live controversy as to whether they in fact constituted the bonuses owed to the Applicant, as he argued, in view of the fact that he received [...] from the victim company as part of the settlement.

71. As to the purpose of the data, the Commission noted that the infraction of [...] by a [...] was a crime of an international nature. However, it considered that in view of the position taken by the victim party in the file that it would not further pursue the criminal charges against the Applicant, that certain countries may face difficulties in operating the extradition of the Applicant with the authorization of national courts or other relevant authorities.

72. However, at this time, in view of the minimal information available and limits outlined in this settlement, and the absence of a decision on extradition by another jurisdiction (the Applicant departed [...] without authorization prior to a decision being made), the Commission could not establish that the possibility of police cooperation to take place is seriously jeopardized.

73. As a result, the Commission found that certain doubts existed as to the seriousness of the data in light of INTERPOL’s rules, but could not establish that international police cooperation was seriously obstructed at this time, bearing in mind that a favorable ruling or agreement at the civil level does not quash criminal proceedings on its own especially when it provides no information on the

⁴ Article 83.1(a,i): Specific conditions for publication of red notices
“Red notices may be published only if the following cumulative criteria are met: (i) The offence concerned is a serious ordinary-law crime.”

⁵ Article 12: Quality: “Data processed in the INTERPOL Information System must be (...) relevant, not excessive in relation to their purpose (...) to allow them to be used by National Central Bureaus, national entities and international entities.”

⁶ Ibid.

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background facts related to it, and was entered in another jurisdiction than the country source of data in this file.

C. Remaining contentions

74. [...]

FOR THESE REASONS, THE COMMISSION

1. Established that the conditions for revision have been met.
2. Decides that the data challenged are compliant with INTERPOL's rules applicable to the processing of personal data

Vitalie Pîrlog
Chairman of the Commission
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