
From:
Sent: 27 November 2008 16:13
To:
Subject: RE: Complaint 2008-622

exactly, as the complaint is being handled by the institution concerned, we cannot proceed otherwise than asking the Commission to inform us of the outcome from their side. In fact, the complainant asks for investigation of the legal basis but means there was no legal basis and complains about it.

From: e
Sent: 26 November 2008 16:52
To: f
Subject: Complaint 2008-622

Dear ,

Please find enclosed a memo on the 'Ms. .' complaint.

I am looking forward to your comments. Could you more specifically look at the sentence in bold under the heading 'admissibility', can it change the conclusion on the admissibility?

Thanks,

Legal Officer - Administrator
Office of the European Data Protection Supervisor (EDPS)

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Memo Complaint Ms. [2008-0622]

Complaint about an alleged illegitimate transfer of personal data to a third party in the context of an audit performed by the Commission

Background of the case

On 21 October 2008 the EDPS has received a complaint lodged by Mr. I and Ms. on behalf of is an independent scientific and management consultancy, which specialises in the administrative, scientific and marketing support for international, co-operative R&D projects.

Within the 6th Research Framework Programme was used to manage several projects for the EC. In the context of an external audit performed from 2008 to 2008 by the Commission ((Head of Unit INFISO), (INFISO), (RTD) and (INFISO)) s business premises were visited and four employees were interviewed.

On 14 August 2008 the Commission sent a draft audit report (Annex I to the complaint) to . The Commission claimed that ' wrongly received payments worth 500.350,88 Euro. In the report, the Commission suggested that ' was not chosen on the sole basis of economic considerations by its partner in certain projects, namely . The Commission presumed that the selection was influenced by the fact that Mr. , working for the and acting as EC coordinator, was married to Ms. , who worked for .

On 31 October 2008 the EDPS informed the applicant that, since I is a legal entity, the EDPS could not treat the complaint according to the regular complaint procedure. The EDPS pointed out however that the person concerned (Ms) could still lodge a complaint with the EDPS.

On 23 November 2008 the EDPS received an e-mail from Ms. . in which she indicated that Mr. I and Ms. were from then on acting on her behalf. This was formally confirmed on *** November 2008 when the EDPS received a written authorisation. Upon request of Ms. the complaint was dealt with confidentially. She more specifically requested that would not be informed about her complaint. The EDPS promised to indicate this in his communication with the European Commission and to ask the European Commission to obtain the EDPS' prior authorisation should the Commission consider the involvement of necessary. If this would happen, Ms. would be consulted and subsequently be able to withdraw the complaint or authorise further investigation. In the same e-mail Ms. agreed to the inclusion of the Data Protection Officer of the Commission in the EDPS' correspondence with the Commission. The applicant furthermore informed the EDPS that the original complaint was also sent to the Commission (to Mr. but that other authorities (such as the Ombudsman or the CFI) were not involved.

The complaint

Ms. alleges that, without her consent, confidential data about her (namely the Framework-contract closed between her and as well as the interview she had with Mr. during the audit) was transferred by Commission officials to a third party, namely the head of internal audits at .

[In welke vorm is het interview opgestuurd?]

In the initial complaint reference is made to Annex II of the Basic Contract between the EC and , in which it is stated that "(...) any audit should be carried out on a confidential basis". The applicant furthermore points at Article 8(1) of Council Regulation 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities:

Information communicated or acquired in any form under this Regulation shall be covered by professional secrecy and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.

Such information may not be communicated to persons other than those within the Community institutions or in the Member States whose functions require them to know it nor may it be used by Community institutions for purposes other than to ensure effective protection of the Communities' financial interests in all Member States. Where a Member State intends to use for other purposes information obtained by officials participating under its authority as observers, in accordance with Article 6 (2), in on-the-spot checks and inspections, it shall seek the agreement of the Member State where that information was obtained.

No reference was made to Regulation 45/2001.

In the e-mail d.d. 23 November 2008 Ms. asked the EDPS more specifically to investigate the legal basis for taking copies of the contracts between her and and the subsequent transfer to .

Admissibility

- The complainant is entitled to lodge a complaint: Ms. is a natural person, not employed with a Community institution or body, and she complains about processing of data relating to her.
- The EDPS is competent to hear and investigate the complaint: the alleged transfer to a third party was performed by Commission officials and could be contrary to the provisions of Regulation 45/2001, having special regard to Article 8.
- The complaint is meaningful.
- **Prior administrative action undertaken by the applicant. The complaint was sent to the EDPS as well as the Commission.**
- The complaint is not submitted to judicial bodies or to the European Ombudsman.

Conclusion: the complaint is admissible.

Next steps

- Inform the applicant about the decision on the admissibility and ask her to submit, if possible, evidence of the alleged transfer.

- Send a copy of the complaint to [redacted] cc. DPO) and ask for his comments on the complaint. The specific data protection provisions which are at stake here will be set out since they are lacking in the complaint. In this letter reference will be made to the confidentiality of the complaint and the specific request of Ms.