



Emily O'Reilly
European Ombudsman

Mr Giovanni Kessler
Director General
OLAF
European Anti-Fraud Office
European Commission
1049 Brussels
BELGIQUE

Strasbourg, 15/11/2013

Draft recommendation of the European Ombudsman in her inquiry into
complaint 1183/2012/MMN against OLAF

Dear Mr Kessler,

Please find enclosed my draft recommendation in the above case, made
in accordance with Article 3(6) of the Statute of the European Ombudsman.

My draft recommendation is as follows:

**OLAF should inform the complainant of the reasons for its decision to
close its investigation in the present case.**

In accordance with my Statute, OLAF shall send a detailed opinion
before 15 February 2014. The detailed opinion could consist of the acceptance of
my draft recommendation and a description of how it has been implemented.

A copy of my draft recommendation will be sent to the complainant.



Please also find enclosed a copy of the complainant's observations on OLAF's opinion.

Yours sincerely,

Emily O'Reilly

cc: Cabinet of Commissioner Semeta

Enclosures (sent by e-mail):

- Draft recommendation to OLAF
- Complainant's observations



Draft recommendation

of the European Ombudsman in her inquiry into complaint 1183/2012/MMN against OLAF

Made in accordance with Article 3(6) of the Statute of the European Ombudsman¹

The background to the complaint

1. The present case concerns a complaint lodged with the European Anti-Fraud Office ('OLAF') by a former employee of the Fundamental Rights Agency ('FRA') against the latter.
2. In June 2007, the complainant brought to the attention of OLAF certain irregularities allegedly committed within the FRA.
3. On 24 June 2009, OLAF informed the complainant that, following its investigation, it had concluded that no further action should be taken. However, OLAF added that it had addressed a number of issues to the management of the FRA.
4. On 24 September 2009, the complainant wrote to OLAF challenging its decision to close the investigation, and requested clarifications concerning the reasons for this decision.
5. On 3 May 2012, the complainant turned to the Ombudsman in relation to this matter (complaint 896/2012/MMN).
6. On 25 May 2012, the Ombudsman informed the complainant that, on the basis of the information he had provided, his complaint was time-barred since it appeared to have been lodged after the two years time-limit established in Article 2(4) of the Statute of the Ombudsman.
7. On the same date, the complainant sent a further letter to inform the Ombudsman that OLAF had not yet replied to his letter of 24 September 2009. This letter to the Ombudsman was registered as the present complaint.

¹ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.



8. On 7 June 2012, the Ombudsman invited OLAF to reply to the complainant's request for clarifications concerning its reasons to close the investigation against the FRA.

9. On 26 June 2012, OLAF provided the Ombudsman with a copy of the reply that it had sent to the complainant on 25 June 2012. This reply informed the complainant that:

"it is not OLAF's policy to explain or give reasons for its decision to close an investigation. I would only add that all such decisions are taken after careful reflection and discussion between investigators and their management."

10. On 9 July 2012, the complainant expressed his dissatisfaction with OLAF's reply.

The subject matter of the inquiry

11. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation

By failing to state the reasons for its decision to close the investigation into the alleged irregularities reported by the complainant, OLAF violated its duties flowing from EU law and the principles of good administration.

Claim

OLAF should provide the complainant with the reasons for its decision to close the investigation.

The inquiry

12. On 24 July 2012, the Ombudsman requested OLAF to provide an opinion into the above-mentioned allegation and claim.

13. In particular, the Ombudsman invited OLAF to address in its opinion the general obligation for the EU institutions to state the reasons for the measures which they adopt, as established by the Treaty on the Functioning of the EU and the case-law of the Court of Justice. Furthermore, the Ombudsman drew OLAF's attention to the fact that it is good administration for the EU institutions to state the grounds for their decisions (Article 18 of the European Code of Good Administrative Behaviour). Moreover, the Ombudsman invited OLAF to address the fact that the complainant acted as a whistleblower and claimed to have been directly affected by at least some of the alleged irregularities reported to OLAF.

14. On 15 October 2012, OLAF provided its opinion, which was forwarded to the complainant for his observations.

15. On 26 November 2012, the complainant submitted his observations.



The Ombudsman's analysis and conclusions

A. Allegation of failure to state the reasons for its decision to close the investigation

Arguments presented to the Ombudsman

16. In its opinion, OLAF stated that there are "*several reasons why OLAF prefers not to justify its decisions to dismiss cases in detail. They include a lack of rules concerning the duty to justify the act of not opening an investigation, the confidentiality of investigations, the independence of the Director-General of OLAF, the lack of legal effect of the act and the fact that transparency is ensured through specific procedures.*"

17. First, as regards the alleged lack of rules imposing an obligation to state reasons, OLAF argued that the European Code of Good Administrative Behaviour applies to "*relations with the public*" and does not apply to staff relations. Neither the Staff Regulations of Officials of the EU (the 'Staff Regulations') nor the Commission's Communication on whistleblowing² require OLAF to indicate the reasons for the opening or closing of an investigation to a whistleblower. According to OLAF, the case-law of the EU Courts confirms this insofar as it establishes that a whistleblower who alleges that irregularities have taken place cannot oblige OLAF to launch an investigation.³

18. Second, as far as the confidentiality of investigations is concerned, OLAF argued that Article 8(2) of Regulation 1073/1999 concerning investigations conducted by OLAF⁴ imposes a broad confidentiality obligation applicable to its investigations. This rule aims at preserving OLAF's fact-gathering mission and also at safeguarding the presumption of innocence. OLAF added that the successful performance of an investigation may require that the person, the subject of the investigation, is not made aware of it.⁵ Furthermore, the disclosure of information obtained in the course of investigations to persons other than those whose function requires that disclosure may be illegal and may give rise to liability on the part of the EU.⁶

19. Third, OLAF argued that explaining to a whistleblower the reasons for not opening an investigation would compromise the independence of OLAF's Director-General (Article 12(3) of Regulation 1073/1999).

20. Fourth, OLAF relied on the lack of legal effects of its relevant decisions. It noted that the obligation to state reasons exists primarily to enable an administrative decision to be subject to judicial review. According to the case-

² Communication from Vice-President Kinnock to the Commission, "*How to enhance effective application of the Whistleblowing rules and protection of Whistleblowers*", SEC(2004) 151/2, 6 February 2004.

³ Order of the President in Case T-4/05 *Commission* [2006] ECR SC-I-A-II-83 and SC-II-A-2-361.

⁴ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ 1999 L136/5 ('Regulation 1073/1999').

⁵ Case F-23/05 *Commission* [2007] ECR SC-I-A-1 121, SC-II-A-I-657, paragraph 161.

⁶ Case T-261/09P *Commission v* *[redacted]* judgment of 10 May 2010, not yet published, paragraph 63.



law,⁷ the transmission of recommendations by OLAF to a judicial authority and the decision to close an investigation are not subject to judicial review since they do not produce legally binding effects.

21. Fifth, OLAF argued that transparency is ensured through specific mechanisms in the case of OLAF. In particular, OLAF indicated that its decisions to open or to close an investigation are based on the Instructions to Staff on Investigative Procedures ('ISIP') which are publicly available (Articles 5 and 6).⁸ In this respect, the ISIP require that regard must be had to the reliability of the source and to the credibility of the allegations. Moreover, all the information gathered is taken into account in order to establish whether the case falls within the scope of the Investigation Policy Priorities, which are published together with OLAF's annual management plan.⁹

22. Finally, as regards the complainant's contention to have been directly affected by at least some of the alleged irregularities reported, OLAF indicated that in such a case a whistleblower should turn to his former employer, that is to say, the FRA in the complainant's case.

23. In his observations, the complainant submitted that it was unacceptable that an EU institution relied on the alleged absence of certain rules in order to refuse to behave appropriately. Moreover, as regards OLAF's argument that the Code of Good Administrative Behaviour was not applicable to the present case, the complainant noted that he was no longer a member of staff of the EU institutions. Furthermore, he considered that it would be "*absurd*" if the EU granted rights to citizens which it denies to its own staff.

The Ombudsman's assessment leading to a draft recommendation

24. Article 296 TFEU provides as follows (ex-Article 253 EC): "*Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.*" In accordance with well-established case-law, the duty to state reasons is designed to enable the persons concerned to ascertain the reasons for the measure and to enable the EU Courts having jurisdiction to exercise their powers of review.¹⁰ This applies to acts that have legal effects on a given person.

25. However, Article 296 TFEU must be considered to be only one emanation of a more general obligation for the EU institutions to state the reasons for the measures which they adopt. For instance, Advocate-General Léger has pointed out the following: "*It must be borne in mind that Art.253 EC lays down a general obligation to state reasons, which applies to all measures taken by the institutions.*"¹¹

26. In this context, regard should also be had to Article 41(2)(c) of the Charter of Fundamental Rights, which sets out the right to good administration, provides the following: "*This right includes [...] the obligation of the administration to give reasons for its decisions.*"

⁷ See, *inter alia*, order of the President in Case T-193/04R *Commission* [2004] ECR II-3575; on appeal, order of the President in Case C-521/04 P(R) *Commission* [2005] ECR I-3103.

⁸ See http://ec.europa.eu/anti_fraud/documents/about_us/instructions-to-staff-120201.pdf

⁹ In this respect, OLAF referred to the European Commission's intranet.

¹⁰ See, *inter alia*, Case C-511/11 P *Commission*, paragraph 139.

¹¹ See opinion of AG Léger in Case C-257/01 *Commission v Council* [2005] ECR I-345, paragraph 53.



27. For its part, Article 18(1) of the European Code of Good Administrative Behaviour, which is entitled *duty to state the grounds of decisions* and which sets out what principles of good administration require the EU institutions to do, establishes the following: "*Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*" In this respect, the Ombudsman notes that a decision rejecting a complaint adopted by an EU institution must be regarded as a decision adversely affecting the rights or interests of the complainant, within the meaning of the above-mentioned provision.

28. It is thus clear from the foregoing that the EU institutions are under a general obligation, either by virtue of law or in accordance with principles of good administration, to state reasons for all their decisions that affect or may affect a citizen. Accordingly, EU citizens have a right to be provided with the reasons for such decisions, irrespective of whether such decisions can be challenged before the courts. The Ombudsman notes that this finding would appear to be self-evident in a democratic society and in light of the need to make the EU institutions accountable to citizens. Indeed, it is of paramount importance for the EU institutions to provide citizens with the reasoning underlying their decisions in order to increase the transparency of and to strengthen the trust in their functioning.

29. In its reply to the complainant, OLAF indicated that it prefers not to provide reasons for its decision to close an investigation. In that regard, OLAF has put forward six arguments to justify its policy on this matter. The Ombudsman will analyse these in turn.

30. First, as regards the alleged lack of rules, the Ombudsman considers it sufficient to refer to his above finding that there is a general obligation for EU institutions to state reasons for their decisions (see points 24-28 above).

31. It is true that the European Code of Good Administrative Behaviour, which applies to "*relations with the public*" (Article 2(1), provides for an exception in its Article 3(2), according to which the Code does not apply to relations between officials and the institutions. However, this provision merely reflects the fact that the Code was intended to focus on what good administration means in the relations between the EU institutions on the one hand and citizens on the other. The fact that the Code does not specifically address the relationship between the EU institutions and their staff obviously does not mean that the principles of good administration would not need to be respected by the EU institutions in so far as EU staff is concerned. Besides, there is nothing to suggest that OLAF's refusal to state reasons in the present case was based on the fact that the complainant was at the time a staff member of the EU. Therefore, OLAF's first argument cannot be accepted.

32. Second, as regards confidentiality, the Ombudsman considers that the need to preserve the confidentiality of OLAF's investigations cannot be regarded as a valid justification for an outright refusal to provide reasons for a decision closing an investigation. In any event, giving reasons for such a decision does not necessarily require divulging confidential information, such information which could negatively affect the rights of third parties (including the presumption of innocence and the protection of their reputation) and which could give rise to the EU's non-contractual liability. In the Ombudsman's view, a fair balance needs to be struck between the various interests at stake by providing adequate reasons. There is nothing to suggest that such a balancing



exercise has been carried out by OLAF in the present case. Thus, OLAF's second argument cannot be accepted.

33. Third, as regards the issue of independence, the Ombudsman finds it difficult to understand how providing reasons for a decision to close an investigation could possibly compromise the independence of OLAF or its Director-General. In particular, stating reasons does not require OLAF to enter into 'negotiations' or discussions with a whistleblower. It only requires OLAF to inform the whistleblower of the reasons why OLAF has concluded that the investigation should be closed. If OLAF's argument were to be accepted, it would imply that the obligation to state reasons would compromise the independence of all the EU institutions which are subject to such an obligation.

34. Fourth, concerning the lack of legally binding effects of OLAF's decisions, the Ombudsman notes that the case-law cited by OLAF merely clarifies that it is not possible to bring an action for annulment against the decisions by OLAF to close an investigation or to transmit its reports to the EU institutions or to national authorities. However, that case-law does not suggest that OLAF should be entirely free as to whether or not it wishes to state reasons for such decisions. In fact, particularly in situations in which the possibilities of bringing an action before the EU Courts are limited or non-existent, providing reasons for a decision adopted by an EU institution becomes all the more important in order to ensure that the institutions are accountable to citizens.

35. Fifth, as regards the argument concerning transparency, the Ombudsman welcomes the fact that OLAF has decided to publish the ISIP and the Investigation Policy Priorities, on which its decisions are based. However, the publication of these documents cannot replace the obligation to state reasons in a specific case. Neither the ISIP nor the Investigation Policy Priorities provide any indications as to why, in a specific case, OLAF decided to close an investigation. Therefore, OLAF's fifth argument cannot be accepted.

36. Sixth, the Ombudsman notes with some surprise OLAF's argument that a whistleblower who claims to have been affected by the alleged irregularities reported to OLAF would be advised to raise the matter with his or her employer. After all, the rules on whistleblowing were introduced precisely so as to provide the possibility of informing a third party such as OLAF of alleged irregularities in the institution for which the complainant works. In any event, the Ombudsman considers that OLAF's present argument is without any bearing on the issue to be examined here, namely whether OLAF failed to provide reasons for its decision to close the investigation.

37. Moreover, the Ombudsman considers that whistleblowers should not be discouraged from reporting in good faith alleged irregularities to OLAF, even if ultimately there are valid reasons to close the investigation. In the Ombudsman's view, OLAF's refusal to provide reasons for its decision to close an investigation is likely to discourage whistleblowers acting in good faith from reporting alleged irregularities.

38. In light of the above, the Ombudsman considers that OLAF's refusal to state reasons for its decision to close the investigation amounted to an instance of maladministration. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.



B. The proposal draft recommendation

On the basis of her inquiries into this complaint, the Ombudsman makes the following draft recommendation to OLAF:

OLAF should inform the complainant of the reasons for its decision to close its investigation in the present case.

OLAF and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, OLAF shall send a detailed opinion by 15 February 2014. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly
Done in Strasbourg on 15/11/2013

MALLEA JIMENEZ Juan Manuel

From: EORegistry
Sent: 15 November 2013 11:07
To: [REDACTED]
Cc: [REDACTED]
Subject: Draft Recommendation on complaint 1183/2012/MMN
Attachments: 1183-2012-MMN-S2013-183830.pdf; 1183-2012-MMN-E2012-165376.pdf

Dear Ms Ullrich,

Please find enclosed, for rapid information, a copy of the Ombudsman's letter to Mr Giovanni Kessler, Director General (OLAF) concerning the above complaint.

Yours faithfully,

Juan Mallea

The Registry

15/11/2013