

MORAIS BISMARQUE GASPAR Ana Gloria

From: OLAF-FMB-OMBUDSMAN (EC)
Sent: 17 February 2014 12:35
To: EORegistry; Euro-Ombudsman
Subject: Draft recommendation of the European Ombudsman in her inquiry into complaint 1183/2012/MMN against OLAF
Attachments: Letter to Ms O'Reilly.tif

Dear Mrs O'Reilly,

Please find herewith a letter and its annexes from our Director-General Mr Kessler for your information.
The original follows by regular mail.

Best regards,

EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)
Directorate C: Investigation Support
Unit C.4 – Legal Advice

Rue Joseph II, 30 • B-1000 Brussels (Belgium)
http://ec.europa.eu/anti_fraud

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EUROPEAN ANTI-FRAUD OFFICE

Thor 17. 02. 2014

N° 4249

The Director-General

Mrs Emily O'REILLY
European Ombudsman
1 Avenue du Président Robert
Schuman CS 30403
F-67001 Strasbourg Cedex

Brussels,
THOR/C4/JFS/im/(S)(2014)2947

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

Dear Mrs O'Reilly,

As requested in your letter dated 15 November 2013 related to the above-mentioned complaint, please find here below a detailed opinion about your draft recommendation.

The draft recommendation is formulated as follows:

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

As pointed out in my letter to you dated 15 October 2012 related to this complaint, Regulation (EC)1073/1999 of 25 May 1999 concerning investigations conducted by OLAF was in force when OLAF decided to close case on 24 June 2009.

Such Regulation was silent on a possible obligation of OLAF to inform its sources of information on the reasons for closing an investigation without recommendations. Neither the Staff Regulations nor the 2004 Communication of the Commission on whistleblowing required OLAF's Director General to communicate to the whistleblower the reasons underlining the decision to open or close an investigation.

With reference to point 31 in your letter, I wish here to refer once again to the case law mentioned under point (iv) of my previous letter, as well as to the exception laid down in article 3 (2) of the Code of Good Administrative Behaviour. Such exception reflects a clear intention to expressly exclude relations between EU Institutions and their staff from the scope of such Code. In our opinion, such exception cannot be interpreted in saying that the focus of the mentioned code is on the relations between the EU Institutions and the citizens since, in such case, and at a minimum, the code would have remained silent on this matter, whereas it clearly foresees the said exception.

It is therefore not self-evident that OLAF had such an obligation to inform the whistleblower of the reasons for closing the investigation without recommendations.

Furthermore, on the issues raised in point 34 of your analysis, I must draw your attention to the fact that OLAF decisions are fully accountable. To this extent, Regulation (EC)1073/1999 established of the OLAF Supervisory Committee in order to regularly



monitor the implementation by the Office of its investigative function. Such role has been reinforced by Article 15 (1) last paragraph of Regulation 883/20013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office, which specifically authorizes the Supervisory Committee to ask the Office for additional information on investigations, including reports and recommendations on closed investigations. OLAF is therefore accountable to citizens through the monitoring activity performed by its Supervisory Committee.

Lastly, concerning point 36 of your letter, OLAF never suggested and would never suggest that a whistleblower should denounce irregularities directly with those who are allegedly committing them. OLAF was and is well aware of its role and did grant the whistleblower with the protection he required and deserved, thus granting confidentiality at every stage of the procedure. However, OLAF cannot be held responsible for the action that the former employer has taken as retaliation against the whistleblower. In my previous letter I simply stated that the complainant should have contacted the Human Resources department of its former employer, or any other appropriate upper level (e.g. the Management Board) as foreseen by the applicable guidelines, because OLAF has no competence or means to take actions in order to counter the effect of such alleged retaliation (e.g. by moving him to another post).

For all the above reasons, OLAF believes that it cannot be held responsible of maladministration for having decided not to disclose the reasons for closing the investigation without further recommendations.

Bearing this in mind, since the entry into force (1st October 2013) of the Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office, and in the same spirit of the arguments that you present in point 37 of your analysis, OLAF had already decided to communicate from that date the reasons for closing an investigation to its whistleblowers.

To this extent, you will find hereby attached a copy of the workform (annex 1) that OLAF uses when informing a source of information of its decision to close an investigation or a coordination case, be it with or without recommendation for action to be taken. In the latter case, the form encompasses a brief description of the conclusions summarizing the reasons on which OLAF based its decision.

Furthermore, in line with the current procedure, I attach the letter (annex 2) which I have addressed to the complainant informing him, in his quality of whistleblower, of the grounds on which OLAF decided to close the case.

I thank you for affording OLAF the opportunity to state its position and I will be grateful if you could take into account the clarifications supplied with this letter.

In any event, should any further comment or clarification be required OLAF would be happy to provide it.

Yours sincerely,

A black rectangular box redacting the signature area.

Giovanni KESSLER

Annexes:

1. Workform n°50
2. OLAF's reply to the complainant



EUROPEAN ANTI-FRAUD OFFICE

[[szDirectorateShortname]] [[szDirectoratename]]
Unit [[szUnitHeader]]
Head of Unit

[Name NAME]
Function
Company
Street, Code Town
Country]

Brussels
[Initials]

Subject: **Notification of closure of [[szInvType]]**

OF No **[[szShortLabel]]** (Please include this number in all correspondence)

Dear [Title] [Surname],

This is to inform you that OLAF has completed its [[szInvType]] regarding [Description of the case]. Based on the findings of this [[szInvType]], OLAF decided to

[1. In case of closure of investigation with Recommendation(s), where the source is a natural or legal person:

close this investigation with Recommendation(s) to

[EU institution, body, office or agency, or competent Member State authority].]

OR

[2. In case of closure of investigation with Recommendation(s), where the source is a national authority:

close this investigation with Recommendation(s) to

[EU institution, body, office or agency, or competent Member State authority] to

a) initiate judicial proceedings in relation to the matters [brief description of Recommendation] or

b) undertake appropriate measures to ensure the recovery of [amounts to be recovered] or

c) initiate appropriate disciplinary proceedings in relation to [brief description of Recommendation]]

Therefore, OLAF is transmitting the Final Report drawn up following this investigation to [EU_InstitutionBodyOfficeAgency] for action.]

OR

[3. In case of closure of investigation without Recommendation(s):

close the investigation without Recommendations for actions to be taken,

[Brief description of the conclusions, e.g:

a) given that the investigation did not establish any evidence of fraud or irregularity

affecting the financial or other interests of the European Union;

b) given that the findings do not indicate the existence of serious fraud and/or

- the Member State is better placed to conduct further investigative activities in the case, and/or

- the amount of EU resources at risk is low and the resources required to conduct investigative activities is disproportionate to the expected outcome;

c) given that judicial proceedings in relation to the matters contained in the Final Report are not possible due to time barring.]]

OR

[4. In case of closure of coordination case (if applicable):

close the coordination case and transmit the Final Report to [Competent authority or EU institution, body, office or agency] for their consideration.]

Your attention is drawn to the privacy statement below.

Yours sincerely,

[Name NAME]

Privacy statement

Pursuant to Articles 11 and 12 of Regulation (EC) 45/2001 *on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*, please be informed that your personal data are stored in OLAF's electronic and paper files concerning this matter for the purposes of carrying out OLAF's investigative activity. The categories of your personal data being processed are identification data, professional data, and case involvement data. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations. Your data will be stored for a maximum of 15 years.

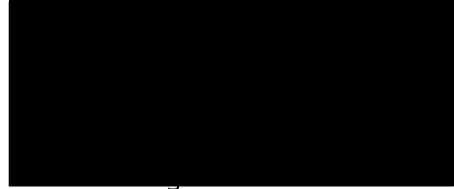
You have the right to access those data and to correct and complete them. On request and within three months from the receipt of your request, you may obtain information concerning your personal data which we have processed. Any such request should be addressed to the Controller (OLAF-FMB-data-protection@ec.europa.eu). You may lodge a complaint concerning the processing of your personal data with the European Data Protection Supervisor (edps@edps.europa.eu) at any time.

The complete privacy statements for this and all other OLAF personal data processing operations are available at http://ec.europa.eu/anti_fraud.



EUROPEAN ANTI-FRAUD OFFICE

The Director-General

Brussels
THOR/C4/JFS/im/Subject: **Your complaint to the Ombudsman**

Ref: OF/2007/0488

Dea 

In conformity with the terms of Regulation (EC)1073/1999 of 25 May 1999 concerning investigations conducted by OLAF, that foresaw no specific obligation in this respect, OLAF, in its letter to you dated 25 June 2012, did not disclose the reasons based on which it took its decision on 24 June 2009 to close the above mentioned case with no further action.

However, as you know, the Ombudsman transmitted to OLAF on 15.11.2013 a draft recommendation following the complaint you had lodged against OLAF related to that case, by which she invited the Office to inform you about the reasons based on which it had decided on 24 June 2009, to close that case with no further action.

Furthermore, on 1st October 2013 the Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office entered into force. I am pleased to inform you that based on that, the Office has begun to communicate to its whistleblower the reasons for closing an investigation.

Please be informed that after thorough investigations which included on-the-spot checks, interviews and seizure of documents, OLAF has closed the case OF/2007/0488 without judicial follow-up on the grounds that the investigation did not confirm the initial allegations of fraud against the concerned person.

I trust that the above information addresses and resolve your concerns.

Your attention is drawn to the privacy statement below.

Yours sincerely,

Giovanni KESSLER

Privacy statement

Pursuant to Articles 11 and 12 of Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, please be informed that your personal data are stored in OLAF's electronic and paper files concerning this matter for the purposes of carrying out OLAF's investigative and operational tasks. The categories of your personal data being processed are identification data, professional data, and case involvement data. Your data may be transferred to other EU institutions, bodies, offices and agencies, competent Member State and third country authorities and international organisations in order to ensure appropriate conduct and follow-up of the investigation. Your data will be stored for a maximum of 15 years. You have the right to access those data and to correct and complete them. On request and within three months from its receipt, you may obtain information concerning your personal data which we have processed. Any such request should be addressed to the Controller (OLAF-FMB Data Protection@ec.europa.eu). You may lodge a complaint concerning the processing of your personal data with the European Data Protection Supervisor (edps@edps.europa.eu) at any time.