

Decision of the European Ombudsman on complaint 1438/2004/GG against the European Anti-Fraud Office

Decision

Case 1438/2004/GG - Opened on 03/06/2004 - Decision on 07/12/2004

Strasbourg, 7 December 2004

Dear Sir,

On 13 May 2004, you made a complaint to the European Ombudsman concerning the refusal by the European Anti-Fraud Office (OLAF) to grant you access to the Final Case Report on the investigation conducted by OLAF regarding irregularities in a Commission service.

On 3 June 2004, I forwarded the complaint to the Director-General of OLAF. OLAF sent its opinion (in English) on 19 August 2004. However, I only received this opinion on 10 September 2004. On 20 September 2004, OLAF sent me a translation of its opinion. I forwarded this translation to you on 27 September 2004 with an invitation to make observations by 31 October 2004, if you so wished. No observations appear to have been received from you.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainant, a Commission official who now works for another Directorate-General, used to be in charge of a service of the Commission. At a press conference, the complainant was accused of wrongdoing in relation to the running of the service.

The European Anti-Fraud Office (OLAF) subsequently opened an inquiry in the course of which the complainant was interviewed on two occasions, in July 2002 and in January 2003.

On 27 October 2003, OLAF informed the complainant that its investigation had been completed, that it was recommending follow-up action by the Commission services and that the Final Case Report had been forwarded to the Secretary-General of the Commission.

On 7 November 2003, the complainant asked the Secretary-General of the Commission for a copy of this report. In a letter dated 11 November 2003, the Commission informed the complainant that his request had been forwarded to OLAF and that he would receive an answer



within 15 working days, in accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.

On 3 December 2003, OLAF rejected the request for access. On 12 December 2003, the complainant asked OLAF to review its decision. In a letter of 15 January 2004, OLAF informed the complainant that it had to extend the period foreseen for answering the complainant's request by another 15 working days in accordance with Article 8 (2) of Regulation 1049/2001. On 6 February 2004, OLAF informed the complainant that his request for a review of OLAF's decision not to grant access to the relevant report had been rejected. OLAF pointed out that the report had been sent to the Commission's Investigation and Disciplinary Office ("IDOC") for further action and that the matter was currently being examined by IDOC. In OLAF's view, the disclosure of the report would undermine the protection of the purpose of an investigation. OLAF further explained that there appeared to be no overriding interest in disclosure and that no partial access could be granted.

OLAF's letter specified that this decision could be challenged by instituting court proceedings or by complaining to the Ombudsman.

On 20 April 2004, the complainant submitted a complaint based on Article 90 (2) of the Staff Regulations to the Commission. In its reply of 7 May 2004, the Commission pointed out that the refusal to grant access to the relevant document could be challenged (as OLAF had indicated in its letter of 6 February 2004) by bringing an action before the Court of First Instance or by complaining to the Ombudsman.

On 13 May 2004, the complainant submitted the present complaint to the Ombudsman.

The complainant argued that the report marked the end of a long campaign that had been conducted against him and that he should therefore be allowed to see this report. He further submitted that the investigation to which OLAF had referred was already closed, so that he was unable to influence this investigation in whatever way. The complainant also submitted that OLAF was part of the Commission and should not treat him as a complete outsider. In his view, the rule of law and the principle of fairness also demanded that he should be given access.

The complainant mentioned that according to information he had received from one of the directors in the Directorate-General ("DG") he was now working for, the Final Case Report appeared to have been made available to the hierarchy in this DG although the relevant persons had nothing to do with the events covered by OLAF's investigation.

In the complainant's view, there was in any event an overriding public interest in disclosure, since the principle of the rule of law and that of fairness demanded that he should be given access. The complainant referred to Articles 41 (2) and 42 of the Charter on Fundamental rights of the European Union in this context.

The complainant in substance alleged that the refusal to grant access to the Final Case Report was illegal. He claimed that he should be granted access to the relevant document.



THE INQUIRY

OLAF's opinion

In its opinion, OLAF made the following comments:

The refusal to grant access was justified on the basis of Article 4 (2), third indent of Regulation 1049/2001. OLAF's Final Case Report had been adopted on 24 September 2003 and forwarded to IDOC for follow-up action, in conformity with Article 9 (4) of 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 (OJ 1999 no. L 136, p. 1). Since then, IDOC had been evaluating the report, with the aim of deciding whether to institute disciplinary proceedings and, if so, on what grounds and with or without an additional inquiry. IDOC had also indicated to OLAF that the disclosure of the Report at this time would undermine the protection of IDOC's proceedings concerning not only the complainant but also other officials mentioned in the Report. A premature disclosure could also harm further proceedings with respect to certain issues raised in the Report which were linked to ongoing national procedures.

The complainant's view that his application for access to documents should be treated more favourably because he was a Commission official found no basis in Regulation 1049/2001.

OLAF had also complied with all the procedural requirements laid down by Regulation 1049/2001.

As regards the complainant's argument that a copy of the Report had been provided to a Director and a Head of Unit in the DG he was now working for, OLAF had, in accordance with the rules in force, sent a copy of its report to IDOC and to the Secretary-General of the Commission. These were the only two copies of the Report that OLAF had transmitted to the Commission.

In due course, the Appointing Authority would decide whether to institute disciplinary proceedings. Should it do so, those proceedings would be governed by Annex IX of the Staff Regulations. Article 3 of that Annex requires that the official be notified of "all evidence in the files". Thus, if OLAF's Final Case Report were to be relied upon as evidence in any future disciplinary proceedings, the complainant would have access to it at the appropriate moment during those proceedings.

If, on the other hand, no disciplinary proceedings were to be instituted, then the matter would be closed. At that point, the complainant would be able to obtain access to the Report by submitting a new request under Regulation 1049/2001.

OLAF concluded by expressing the view that it had handled this matter in an entirely appropriate manner.

The complainant's observations

No observations were received from the complainant.



THE DECISION

1 Introductory remarks

1.1 The present complaint concerns the rejection of a request for access to the Final Case Report drawn up by the European Anti-Fraud Office (OLAF) after an inquiry in the course of which the complainant had been interviewed on two occasions, in July 2002 and in January 2003. On 27 October 2003, OLAF informed the complainant that this Report had been forwarded for follow-up action to the competent Commission services.

1.2 The complainant's initial request for access was addressed to the Commission. On 11 November 2003, the Commission's Secretariat-General informed the complainant that this request would be dealt with in accordance with Regulation 1049/2001 and that it had been forwarded to OLAF. The Ombudsman considers that the Commission did not necessarily have to deal with the complainant's request on the basis of Regulation 1049/2001. The latter regulation provides for public access to documents held by the European Parliament, the Council or the Commission. However, the complainant had asked for access to a Final Case Report that directly concerned himself (and possibly other persons). It should be noted in this context that the Charter on Fundamental Rights of the European Union (1) distinguishes between a right of public access (see Article 42 of the Charter) and "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy" (Article 41 (2), second indent of the Charter). In his complaint, the complainant expressly referred to this provision. The Ombudsman notes, however, that the complainant did not object to his request being treated on the basis of Regulation 1049/2001 when he was informed that the Commission intended to use this regulation in November 2003. The Ombudsman considers that there is therefore no need to pursue this issue in the present context. The complainant could however lodge a new complaint against the Commission if he should consider that the latter has infringed his right of access to his own file.

1.3 On the premise that the present case has to be dealt with on the basis of Regulation 1049/2001, forwarding the request to OLAF appears to be in conformity with the provisions implementing Regulation 1049/2001 laid down (as far as the Commission is concerned) in Commission Decision No. 201/937 (EC, ECSC, Euratom) of 5 December 2001 (2) .

1.4 The present inquiry only concerns the complainant's request for access to the relevant document. In his complaint, the complainant mentioned that according to information he had received from one of the directors in the Directorate-General ("DG") he was now working for, the Final Case Report appeared to have been made available to the hierarchy in this DG although the relevant persons had nothing to do with the events covered by OLAF's investigation. This aspect of the case is not covered by the present inquiry. Should the complainant consider that the Commission has failed to comply with principles of good administration by making the Final Case Report available to persons who had nothing to do with the events covered by OLAF's investigation, he is however free to submit a new complaint (against the Commission) to the Ombudsman, after having made the appropriate prior approaches to the institution concerned.



2 Refusal to grant access to document

2.1 The complainant alleged that OLAF's failure to grant access to the Final Case Report constituted maladministration.

2.2 OLAF submitted that the refusal to grant access was justified on the basis of Article 4 (2), third indent of Regulation 1049/2001. It pointed out that its Final Case Report had been adopted on 24 September 2003 and forwarded to the Commission's Investigation and Disciplinary Office ("IDOC") for follow-up action, in conformity with Article 9 (4) of 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 (OJ 1999 no. L 136, p. 1). Since then, IDOC had been evaluating the report, with the aim of deciding whether to institute disciplinary proceedings and, if so, on what grounds and with or without an additional inquiry. According to OLAF, IDOC had also indicated to OLAF that the disclosure of the Report at this time would undermine the protection of IDOC's proceedings concerning not only the complainant but also other officials mentioned in the Report. A premature disclosure could also harm further proceedings with respect to certain issues raised in the Report which were linked to ongoing national procedures.

2.3 Article 4 (2), third indent of Regulation 1049/2001 provides that the disclosure of a document "shall" be refused where it would undermine the protection of "the purpose of inspections, investigations and audits", unless there was an overriding public interest in disclosure. The Ombudsman notes that the complainant has not disputed OLAF's submission that the Final Case Report is currently being examined by IDOC with the aim of deciding whether to institute disciplinary proceedings. In the light of the arguments submitted by OLAF, the Ombudsman considers that OLAF's view according to which disclosure of the Final Case Report would undermine the protection of a pending investigation appears to be reasonable.

2.4 The Ombudsman notes that the complainant argued that the principle of the rule of law and that of fairness demanded that he should be given access. He considers, however, that the complainant has not shown how this argument (which relates to his personal position) should be able to constitute an overriding *public* interest in disclosure. The Ombudsman further notes that OLAF has explained that access to the complainant will in any event be given in case the Commission should decide to open disciplinary proceedings, and that in case no such proceedings are started the complainant would be able to obtain access to the Report by submitting a new request under Regulation 1049/2001.

2.5 In these circumstances, the Ombudsman considers that OLAF's refusal to grant access to the relevant document on the basis of Regulation 1049/2001 does not constitute maladministration.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by OLAF. The Ombudsman therefore closes the case.

The Director-General of OLAF will also be informed of this decision.

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) OJ 2000 no. C 364, p. 1.1.

(2) OJ 2001 no. L 345, p. 94. Article 3 of the Annex to this Decision provides that requests for access concerning OLAF's activities are to be answered by OLAF.