

Decision of the European Ombudsman on complaint 1034/2006/WP against the European Data Protection Supervisor

Decision

Case 1034/2006/WP - **Opened on** 08/05/2006 - **Decision on** 04/04/2008

Strasbourg, 4 April 2008

Dear Mr T.,

On 10 April 2006, you submitted a complaint to the European Ombudsman against the European Data Protection Supervisor ("EDPS") concerning the way in which he handled a complaint against the European Anti-Fraud Office ("OLAF").

On 8 May 2006, I forwarded the complaint to the EDPS. On 16 May 2006, the EDPS sent me a copy of a letter he had sent to you on the same day.

On 31 October 2006, the EDPS sent the original English version of his opinion and, on 20 November 2006, a translation of it into German. I forwarded the latter document to you on 27 November 2006 with an invitation to make observations, which you sent on 22 December 2006.

By letter of 11 July 2007, I asked the EDPS for further information concerning one aspect of your complaint, to be submitted by 30 September 2007. I informed you accordingly on the same day.

On 9 October 2007, the EDPS informed me that his reply required more time for internal consultation than expected and asked for an extension of the deadline until 31 October 2007. I granted this extension.

The EDPS sent the original English version of his reply on 5 November 2007 and a translation of it into German on 19 November 2007. I forwarded these documents to you on 12 and 21 November 2007 respectively with an invitation to make observations, which you sent on 29 November 2007.

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

THE COMPLAINT



Background

The complainant is a German journalist who used to work as the Brussels correspondent of the *Stern*, a German weekly newspaper. In two articles published in 2002, the newspaper covered a number of accusations concerning alleged irregularities that had been raised in a report by an EU official, Mr V.B., and the inquiries carried out by OLAF regarding these accusations. The articles were based on the report by Mr V.B. and on confidential OLAF documents that the newspaper had obtained. Subsequently, OLAF conducted an inquiry into the circumstances of the leak of the confidential documents, including allegations of bribery. On 19 March 2004, the Belgian prosecutor's office carried out a search of the complainant's apartment and office in Brussels, seizing a great number of documents. It subsequently emerged that these measures of inquiry had been based on information OLAF had forwarded to the Belgian and the German authorities.

Complaints 1840/2002/GG and 2485/2004/GG

In his complaint 1840/2002/GG (1) against OLAF, the complainant alleged that OLAF had, in a press release, wrongly made allegations of bribery that had to be understood as directed at him and his newspaper. He also alleged that OLAF had failed to answer his questions as to whether it had monitored his telephone or e-mail communications with OLAF officials and whether OLAF had thereby obtained any personal data relating to him. In his decision closing the case, the Ombudsman criticised OLAF for making allegations of bribery without a sufficient factual basis. As regards OLAF's alleged failure to answer the complainant's questions, the Ombudsman found no maladministration.

However, in his complaint 2485/2004/GG, the complainant presented new evidence which, according to him, proved that OLAF had tried to mislead the Ombudsman in his inquiry into complaint 1840/2002/GG. The Ombudsman came to the conclusion that OLAF had indeed provided incorrect and misleading information to him, including its statement that it possessed no personal data concerning the complainant (apart from his professional address and telephone number). On 12 May 2005, the Ombudsman addressed a special report to the European Parliament in this case (2).

The present complaint

In his present complaint to the Ombudsman, the complainant reported that, on 1 July 2005, he had lodged a complaint against OLAF with the EDPS. In that complaint, he had alleged that OLAF had (1) provided incorrect information as regards data concerning him that it had retained and had (2) retained and transmitted incorrect data concerning him. The first allegation related to statements made by OLAF officials that OLAF did not hold any of his personal data apart from his office address and telephone number. The second allegation related to information OLAF had transmitted to the Belgian and German authorities, namely, that the complainant was going to move to Washington, which, according to the complainant, had led to the search of his apartment and office in Brussels. According to the complainant, OLAF had known that he had not planned to move to Washington, but to Hamburg.

On 1 December 2005, the complainant received the decision on this complaint, signed by the Assistant EDPS. As regards his first allegation, the EDPS concluded that OLAF had failed to give adequate reasons for its position and had therefore not taken a correct approach concerning the complainant's rights. However, the EDPS noted that the Ombudsman had



already concluded in his special report on complaint 2485/2004/GG that OLAF's statements in this respect had been incorrect. According to the EDPS, any further intervention on his part would not have changed or added anything to the Ombudsman's analysis and statements, and would therefore not have been justified.

As to the "accuracy of transferred data", covering the complainant's second allegation, the EDPS stated the following:

" The alleged incorrect data relating to the complainant's move to Washington, and their interpretation as to the effects this might have for the investigations by the Belgian and German prosecutions, are part of the substantive and procedural issues related to the investigation of OLAF. The criteria to assess the accuracy of those data are far from factual and closely linked to evaluations of the merits and outcomes of that investigation, and should therefore be considered as outside the task of the EDPS in this case. "

Furthermore, according to the EDPS, the respective authorities would by now have assessed the truthfulness of the data. An intervention to assess and potentially to order the rectification of the data would therefore be inappropriate.

On 21 December 2005, the complainant wrote to the EDPS in order to protest against this decision. As regards his first allegation, he submitted that the Ombudsman's work could not replace the EDPS's work. Since the European legislator had set up a data protection supervisor, the latter could not declare himself incompetent in data protection matters. Furthermore, it was clear from OLAF's reaction to the Ombudsman's decision in case 2485/2004/GG that OLAF still refused to accept his criticism as regards data protection. Therefore, it was even less understandable that the EDPS considered it not to be necessary to criticise OLAF in this respect.

In relation to his second allegation, the complainant argued that the EDPS had not brought forward any intelligible argument to support his refusal to take action. According to him, one could only guess that the relevant passage in the decision was meant to express the view that the question of the correctness of OLAF's statement was closely linked to the question as to whether OLAF's other accusations against him were correct. However, this did not make sense. OLAF's statement as regards his change of residence could not logically depend on the correctness of other statements OLAF had made. At most, one could revert to OLAF's credibility in general. However, this credibility was, as could be seen from the Ombudsman's relevant decisions, very low. Therefore, the complainant argued that it would have been all the more necessary for the EDPS to examine his allegation. As to the EDPS's statement that the competent authorities would by now have examined the information transmitted by OLAF, the complainant took the view that, apart from the fact that this was purely speculative, it did not answer his allegation. Had personal data not been dealt with in good faith by OLAF, this was without doubt within the EDPS's competence. Furthermore, the transmission of incorrect information was a particularly grave offence, in relation to which the EDPS's intervention would have been in the European citizens' interest and in the interest of the credibility of the EU institutions.



The complainant also asked to be sent all correspondence that had taken place between the EDPS and OLAF or other bodies in relation to his case.

On 17 January 2006, the EDPS acknowledged receipt of the complainant's letter and stated that he would " *probably be in a position to inform [him] further by early February* ". However, the complainant stated that he had not heard from the EDPS by the time he turned to the Ombudsman in April 2006. According to him, the EDPS had also not reacted to a reminder sent by e-mail on 8 March 2006.

In his complaint to the Ombudsman, the complainant made the following allegations:

- The EDPS failed properly to deal with his complaint of 1 July 2005;
- He failed to deal with the substance of his letter of 21 December 2005;
- He failed to reply to his e-mail of 8 March 2006; and
- He dealt with his complaint and further correspondence in a non-transparent way.

The complainant claimed that the EDPS should duly deal with his complaint and further correspondence and take action on the basis of the applicable rules.

As regards the complainant's fourth allegation, the Ombudsman noted that the complainant had not specified in which way he considered the EDPS's dealing with the matter to have been non-transparent. However, it appeared from the context of his complaint that he referred to the questions as to whether OLAF had been asked for an opinion concerning his complaint and as to whether there had been any correspondence with other bodies as regards his case. The allegation did not appear to cover the complainant's claim to have access to such documents, which he did not make in his complaint to the Ombudsman. In his letter to the EDPS opening an inquiry into the present case, the Ombudsman informed the EDPS accordingly.

THE INQUIRY

The EDPS's opinion

In his opinion, the EDPS gave an overview of the case the complainant had brought before him, of his decision on the case and of the further correspondence conducted with the complainant. He stated that, on 8 May 2005, after receiving the complainant's reminder of 8 March 2006, he had sent a short letter to the complainant informing him that a draft reply to his letter of 21 December 2005 had been sent for translation. The final letter, in which the EDPS had reacted to the complainant's comments and objections, had been sent on 16 May 2006. In this letter, the EDPS had explained the status of his decision and the potential avenues of recourse and remedies available to the complainant. Furthermore, the EDPS had explained the main elements of the decision and the relevant legal framework for his activities.

The EDPS stated that the complainant had apparently assumed that his decision should not be regarded as a definitive one, given that it had been signed by the Assistant EDPS and not by the EDPS himself. However, the EDPS explained that, according to Article 42(1) second paragraph of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18



December 2000 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 (3) ("the Regulation"), the Assistant EDPS was empowered to act as if he were the EDPS and to express the EDPS's opinion. Therefore, the decision should be considered as a decision of the EDPS.

The EDPS pointed out that, in the event that the complainant had not agreed with his decision, he could have challenged it by asking the Court of First Instance to annul it according to Article 32(3) of the Regulation and Articles 225 and 230 of the EC Treaty. This should have been done, in principle, within two months after the receipt of the decision. However, the EDPS stated that, given that only his letter of 16 May 2006, and not the decision itself, had contained information on avenues of recourse and remedies, it would be fair to assume that the complainant could still have brought an action before the Court within two months after receiving that letter. However, since the complainant had not done so, he had allowed the decision of 1 December 2005 to become final.

According to the EDPS, the complainant had assumed that the EDPS was obliged to intervene in a specific case whenever he was competent to do so. However, he was of a different view and had clearly expressed this in his letter of 16 May 2006. According to Article 41(2) of the Regulation, the EDPS was responsible for monitoring and ensuring the application of the provisions of the Regulation and of any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data. According to Article 46(a) of the Regulation, the EDPS was to hear and investigate complaints, and inform the data subject of the outcome within a reasonable period. The EDPS emphasised that this provision did not mean that, when a preliminary evaluation established that he was competent to deal with a complaint and the complaint was admissible, he could be obliged to continue the investigation. Instead, this provision allowed the EDPS to decide whether there were sufficient grounds to continue the investigation and, if so, in which way. According to the EDPS, such a decision should be based on a preliminary evaluation of the merits of the case, in light of the available facts, the applicable provisions and other relevant circumstances. He submitted that a relevant consideration in this context could be that there were other and more appropriate means to ensure the application of the provisions of the Regulation, and that these other means deserved priority, in view of the general tasks of the EDPS.

As regards the first issue the complainant had raised, concerning the processing of his data, the EDPS stated that he had been of the view that the prior involvement of the Ombudsman, the scope of the latter's investigation and the relevant elements in his special report to the European Parliament made it very unlikely that any further intervention of the EDPS would have changed or added anything to the Ombudsman's findings, and that further investigation would therefore not have been justified. This also applied to measures such as a warning or admonition to the controller of the data, provided for in Article 47(d) of the Regulation, which the complainant had requested. The EDPS submitted that he had considered that he should rather give priority to the notifications for prior checking of OLAF's processing operations, pursuant to Article 27 of the Regulation, since these prior checking activities were likely to contribute to the structural improvement of compliance with the Regulation on a much larger scale. This



approach was reflected in the concluding part of the decision. In this context, the EDPS drew the Ombudsman's attention to an opinion on these matters that the EDPS had published in the meantime (4) .

The EDPS submitted that these considerations were also relevant in relation to the second issue raised by the complainant, namely, the transfer of incorrect data. However, the EDPS stated that his conclusion concerning this point was based on the view that "*the criteria to assess the accuracy of the relevant data - false information, in [the complainant's] view, sent to the prosecutors in Belgium and Germany to influence their investigations - should be considered as outside the task of the EDPS*". An intervention to assess and potentially to order the rectification of these data, under Article 47(e) of the Regulation, would be inappropriate. Such action went beyond a general evaluation of whether a particular investigation was justified and would have required an investigation, had it been appropriate and justified for this particular aspect of the case. The EDPS went on to state the following:

" Although [the complainant] did not seem to appreciate the arguments put forward in the decision on this matter, there is little point in using the Regulation only to overlap or basically interfere in activities in Belgium and Germany, if these would still be relevant. "

The EDPS also noted that the complainant had "*considered the arguments put forward in the decision as not convincing*". However, he argued that nothing had prevented the complainant from giving his views on this matter elsewhere, in the framework of the appropriate procedures, when called upon to do so.

On the basis of the above, the EDPS took the view that the complainant's first allegation, that the EDPS had failed properly to deal with his complaint, was unfounded.

As regards the complainant's second allegation, that the EDPS had failed to deal with the substance of the complainant's letter of 21 December 2005, the EDPS submitted that this allegation was also unfounded, since the substance of the complainant's letter had been dealt with at length in the EDPS's letter of 16 May 2006.

As regards the complainant's e-mail of 8 March 2006, the EDPS acknowledged that the reply to this e-mail had taken more time than was appropriate, since it was only dealt with in his letter of 16 May 2006. However, the EDPS emphasised that he had apologised for the delay in that letter. He had also stated clearly that the delay had in no way affected the substance of his reaction to the complainant's objections.

As regards the alleged lack of transparency in the EDPS's procedure, the EDPS explained that a copy of his decision of 1 December 2005 had been sent to the Director-General of OLAF, to the Data Protection Officer of OLAF, as well as to the Ombudsman for their information. The EDPS stated that there had been no other correspondence with other bodies on the case, given that his decision had been based on a preliminary evaluation of the available facts and of the merits of the case and had concluded that there would be no further action.



In conclusion, the EDPS rejected the complainant's allegations except for his third allegation in relation to the delayed reply to his e-mail of 8 March 2006. He stated that he was convinced that the complaint and other correspondence had been dealt with properly and that applicable rules and principles had been respected.

The complainant's observations

In his observations, the complainant noted that the EDPS had stated in his opinion that his complaint against incorrect information transmitted by OLAF concerning his change of residence was "*outside the task of the EDPS*". However, the complainant submitted that the EDPS had not brought forward any arguments, either legal or factual, to support this view.

The complainant also argued that the EDPS's statement that the complainant had found the EDPS's reasoning in this respect "*not convincing*" was incorrect. Given that the complainant did not know of any arguments, he was not in a position to judge whether such arguments were convincing or not. The complainant had rather criticised the fact that the EDPS had not brought forward an intelligible reason for not taking action in relation to this aspect of his complaint.

As to the EDPS's statement that there was "*little point*" in using the Regulation "*only to overlap or basically interfere in activities in Belgium and Germany*", the complainant submitted that this statement was very revealing in its vagueness, but did not make any sense at all. He emphasised that he had never mentioned any intention to influence activities in Belgium and Germany. He had rather asked the EDPS to investigate potential misbehaviour on the part of OLAF officials, under the Regulation, which could even be relevant in disciplinary terms. The complainant pointed out that the Regulation explicitly provided that the EDPS was also to examine the transmission of incorrect information. However, in his view, the EDPS had not given any reasons as to why he had not done so in his case or as to why he did not consider it useful.

As to the EDPS's view that the complainant had apparently assumed that the EDPS's decision was not to be regarded as a final one, the complainant submitted that he had never made such an argument.

The complainant concluded that none of his allegations had been settled. However, he stated that, in the interest of reaching an amicable settlement, he would be willing to withdraw his complaints against the EDPS, including his complaint 1576/2006/WP concerning the EDPS's presentation of his case in his Annual Report, if the EDPS were now to agree to investigate his allegation concerning the transmission of incorrect information by OLAF as regards his change of residence. The complainant argued that, since the EDPS himself apparently did not know why he had not investigated this issue, this suggestion should be acceptable to him.

Further inquiries *The Ombudsman's considerations*

Following a preliminary analysis of the case, the Ombudsman noted that, in relation to the complainant's submission that OLAF had retained and transmitted incorrect data concerning him, the Assistant EDPS's decision of 1 December 2005 contained the following statement:

"The criteria to assess the accuracy of those data are far from factual and closely linked to evaluations of the merits and outcomes of that investigation, and should therefore be



considered as outside the task of the EDPS in this case. "

In his opinion, the EDPS stated, in relation to the same issue, that he would have considered it inappropriate to intervene and that there was *" little point in using the Regulation only to overlap or basically interfere in activities in Belgium and Germany, if these would still be relevant "*.

In view of these statements, the Ombudsman was not entirely sure whether he fully understood the reasoning on which the EDPS's position as regards this aspect of the complaint was based. In particular, the Ombudsman was uncertain whether the EDPS considered that the aspect was outside his mandate, whether he considered that there were insufficient grounds for him to intervene or whether other considerations were relevant in his view.

Therefore, the Ombudsman asked the EDPS to clarify the grounds on which his position in relation to the issue was based.

The EDPS's reply

In his reply, the EDPS referred back to his explanations as to his role and the relevant considerations in deciding whether to start or to continue an investigation on the basis of Article 46(a) of the Regulation. According to him, it should be clear that this decision had some discretionary elements, which, however, required an adequate explanation in each particular case in which the decision was negative.

The EDPS also emphasised that the decision of 1 December 2005 was taken after an analysis of the case based on the facts as described by the complainant himself and was therefore not based on any special insight into the way in which the complainant and OLAF had previously interacted or had pursued the case. Since the EDPS's decision had been not to take any further action, this situation had not changed fundamentally since 2005.

Furthermore, the EDPS pointed out that his decision on the second part of the complainant's complaint should be seen in the context of the decision not to take any further action concerning the first part of his complaint. The EDPS stated that the decision of 1 December 2005 accepted that the EDPS was competent to hear *both* parts of the complaint, in so far as it raised issues within the scope of the Regulation, but concluded that no further action could be taken by the EDPS which would alter the situation in a fruitful way.

The EDPS then explained his position concerning the second part of the complaint as follows:

- An investigation into this part of the complaint would have involved an investigation into the facts of the case. It would have to be established which data concerning the complainant had been collected and retained by OLAF and which of these data had been transferred to third parties. According to the EDPS, this investigation *" would probably have been within [his] competence "*, but needed to be justified as useful in light of the following aspects.
- An investigation into this part of the complaint would also have involved an evaluation of these facts. It would have to be evaluated which of the retained or transferred data were incorrect and on what grounds, not excluding the possibility that some of the legal grounds for processing might have required further attention. According to the EDPS, this investigation *" would in principle also have been within [his] competence (...), but would inevitably be closely linked to*



evaluations of the merits and the outcomes of investigations by OLAF as well as of those by the Belgian and German authorities ". These evaluations would to a large extent have been outside the EDPS's competence and would therefore have limited the scope and the possible effect of his investigation.

- An intervention to assess the data and potentially to order their rectification and notification to third parties under Article 47(e) of the Regulation, as expressly requested by the complainant, would therefore also have been inappropriate, and even more so " *where such a rectification and notification would basically have interfered in ongoing legal process in the relevant Member States "*. As a consequence, the complainant could not reasonably have expected such an intervention when submitting his complaint to the EDPS.

- A decision not to take any further action as to the second part of the complaint did not limit the complainant's capacity to protect his legitimate interests since nothing prevented him from giving his views on the matter elsewhere, within the appropriate procedures. However, since the EDPS did not have any information as to the state of play of any of these procedures, this point was only mentioned to the extent that it was relevant.

- A decision not to take further action as to the second part of the complaint was therefore based on a complex of different considerations, which together amounted to the conclusion that any further investigation of the complaint would not have been justified.

Additionally, the EDPS emphasised that, in recent years, he had paid a lot of attention to the way in which the Regulation was being implemented by OLAF in various types of investigations. This approach was likely to result in more structural safeguards for a proper application of the Regulation, in line with the EDPS's overall priorities.

The complainant's observations

In his observations, the complainant recalled what information was at issue in the relevant part of his complaint to the EDPS. He pointed out that neither OLAF nor the Commission had contested publicly or during judicial proceedings that this information was incorrect. He had informed the EDPS that the OLAF officials involved in his case knew that that information was incorrect. The complainant maintained that, if OLAF staff had failed to handle his personal data in good faith, this clearly fell within the EDPS's competence according to Article 4(a) of the Regulation.

Furthermore, the complainant pointed out that this issue had not become irrelevant with time since the transmission of incorrect information, which OLAF knew to be incorrect, constituted a particularly serious offence, which was also to be pursued in disciplinary terms. Without OLAF's incorrect information, his rights would probably not have been infringed in such a serious way.

The complainant argued that the EDPS had again brought forward un intelligible arguments and had not referred to any legal basis for his decision.

The complainant welcomed the fact that the EDPS acknowledged that an adequate explanation for a refusal to take further action was required and that the second aspect of his complaint would, in principle, have been within his competence. However, he failed to understand why the EDPS had stated that this was " *probably "* the case.



Furthermore, the complainant pointed out that the EDPS had again stated that his investigation *" would inevitably be closely linked to evaluations of the merits and the outcomes of investigations by OLAF as well as of those by the Belgian and German authorities "*. The complainant argued that this interconnection was illogical and irrelevant, if not abusive, since he had not requested any evaluation of the said investigations. Moreover, the EDPS had not referred to any legal basis for his view that he could not deal with infringements in the processing of data if these data were connected to other data the processing of which he was not competent to investigate.

The complainant added that he also failed to understand why ordering the rectification and notification of data would have been *" inappropriate "* because it *" would basically have interfered in ongoing legal process in the relevant Member States "*. Neither OLAF nor the German or Belgian authorities had ever conducted any investigations concerning his move to Washington or related issues. Since there had never been such procedures, he had also, contrary to the EDPS's statement, never had the possibility to address the matter elsewhere.

The complainant maintained his view that the EDPS's refusal to deal with his complaint and his failure to give intelligible reasons for this refusal constituted maladministration. He claimed that the Ombudsman should criticise the EDPS in this respect and that he should ask him to deal with his complaint in as far as it related to incorrect information concerning his alleged move to Washington.

THE DECISION

1 Introductory remarks

1.1 The complainant, a German journalist, used to work as the Brussels correspondent of the *Stern*, a German weekly newspaper. Following the publication of two articles in the newspaper in 2002, which were based in part on confidential documents of the European Anti-Fraud Office ("OLAF"), the latter conducted an inquiry into the leak of the confidential documents, including allegations of bribery. In 2004, the Belgian prosecutor's office carried out a search of the complainant's apartment and office in Brussels, seizing a great number of documents. It subsequently emerged that these measures of inquiry had been based on information OLAF had forwarded to the Belgian and German authorities.

In reaction, the complainant submitted two complaints against OLAF to the Ombudsman. In his complaint 1840/2002/GG (5), the complainant alleged that OLAF had, in a press release, wrongly made allegations of bribery that had to be understood as directed at him and his newspaper. He also alleged that OLAF had failed to answer his questions as to whether it had monitored his telephone or e-mail communications with its officials and whether it had thereby obtained any personal data in relation to him. In his decision closing the case, the Ombudsman criticised OLAF for making allegations of bribery without a sufficient factual basis. As regards OLAF's alleged failure to answer the complainant's questions, the Ombudsman found no maladministration.

However, in his complaint 2485/2004/GG, the complainant presented new evidence which,



according to him, proved that OLAF had tried to mislead the Ombudsman in his inquiry into complaint 1840/2002/GG. The Ombudsman came to the conclusion that OLAF had indeed provided incorrect and misleading information to him, including its statement that it possessed no personal data concerning the complainant (apart from his professional address and telephone number). On 12 May 2005, the Ombudsman addressed a special report to the European Parliament in this case (6) .

On 1 July 2005, the complainant submitted a complaint against OLAF to the European Data Protection Supervisor ("EDPS"). He alleged that OLAF had (1) provided incorrect information as regards data concerning him that it had retained and had (2) retained and transmitted incorrect data concerning him. The first allegation related to statements made by OLAF officials that OLAF did not hold any of his personal data apart from his office address and telephone number. The second allegation related to information OLAF had transmitted to the Belgian and German authorities, namely, that the complainant was going to move to Washington, which, according to the complainant, had led to the search of his apartment and office in Brussels. According to the complainant, OLAF had known that he had not planned to move to Washington, but to Hamburg. On 1 December 2005, the Assistant EDPS took his decision. As regards the first allegation, he found that OLAF had not taken a correct approach concerning the complainant's rights. However, he noted that the Ombudsman had already concluded in his special report on complaint 2485/2004/GG that OLAF's statements in this respect had been incorrect. Since any further intervention on his part would not change or add anything to the Ombudsman's analysis and statements, it was not justified. As to the complainant's second allegation, the EDPS found that the criteria to assess the accuracy of the data concerned should be considered as outside his task and that it would be inappropriate for him to intervene in this matter. On 21 December 2005, the complainant wrote to the EDPS, expressing his objections to the decision. According to him, he did not receive a reply to this letter.

1.2 In his complaint to the Ombudsman, the complainant alleged that the EDPS (1) failed properly to deal with his complaint of 1 July 2005; (2) failed to deal with the substance of his letter of 21 December 2005; (3) failed to reply to an e-mail sent on 8 March 2006; and (4) dealt with his complaint and further correspondence in a non-transparent way. The complainant claimed that the EDPS should duly deal with his complaint and further correspondence and that he should take action on the basis of the applicable rules.

1.3 The Ombudsman carried out an inquiry into all of the complainant's allegations and claims. Following a preliminary analysis of the EDPS's opinion and the complainant's observations, he asked the EDPS for further information in relation to one aspect of the complainant's first allegation.

2 Handling of a complaint against OLAF

2.1 In support of his allegation that the EDPS had failed properly to deal with his complaint against OLAF, the complainant submitted that, as far as the first part of his complaint was concerned, the Ombudsman's work could not replace the EDPS's work. Since the European legislator had set up a data protection supervisor, the latter could not declare himself incompetent in data protection matters. Furthermore, it was clear that OLAF still refused to accept the Ombudsman's criticism, which made it even less understandable that the EDPS



considered that it would not be necessary to intervene. As regards the second part of his complaint, the complainant argued that the EDPS had not brought forward any intelligible argument for his refusal to take action. He argued that, if personal data had not been dealt with in good faith by OLAF, this was without doubt within the EDPS's competence.

2.2 In his opinion, the EDPS emphasised that he was not, as the complainant had assumed, obliged to intervene in a specific case whenever he was competent to do so. Article 46(a) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 (7) ("the Regulation") allowed him to decide whether, in case a preliminary evaluation had established that he was competent to deal with a complaint and that the complaint was admissible, there were sufficient grounds to continue the investigation. As regards the first part of the complaint, the EDPS maintained that the prior involvement of the Ombudsman had made it very unlikely that an intervention by him would have changed or added anything to the Ombudsman's findings and that further investigation would thus not have been justified. The EDPS submitted that he had considered that he should rather give priority to the notifications for prior checking of OLAF's processing operations, under Article 27 of the Regulation, since these prior checking activities were likely to contribute to the structural improvement of compliance with the Regulation on a much larger scale.

The EDPS submitted that these considerations were also relevant in relation to the second part of the complaint. However, he also stated that his conclusion concerning this point was based on the view that "*the criteria to assess the accuracy of the relevant data (...) should be considered as outside the task of the EDPS*". An intervention to assess and potentially to order the rectification of these data would be inappropriate. Furthermore, there was "*little point in using the Regulation only to overlap and basically interfere in activities in Belgium and Germany, if these would still be relevant*". The EDPS also submitted that, if the complainant were not satisfied with his decision, he could have turned to the Courts.

2.3 In his observations, the complainant took the view that the EDPS had still not brought forward any arguments to support his view that the second part of his complaint was outside his task. The complainant did not comment on the EDPS's position as regards the first part of his complaint.

2.4 As regards the second part of the complainant's complaint, the Ombudsman was not entirely sure whether he fully understood the reasoning on which the EDPS's position was based. In particular, the Ombudsman was uncertain whether the EDPS considered that this aspect was outside his mandate, whether he considered that there were insufficient grounds for him to intervene or whether other considerations were relevant in his view. Therefore, the Ombudsman asked the EDPS to clarify the grounds on which his position was based.

2.5 In his reply, the EDPS essentially stated that an investigation of the second part of the complaint would in principle have been within his competence, but that a complex of different considerations had led him to the conclusion that further investigation of this issue would not



have been justified. The EDPS recalled that his decision whether to start or to continue an investigation had some discretionary elements, which, however, required an adequate explanation in each particular case in which the decision was negative. He added that, in recent years, he had paid a lot of attention to the way in which the Regulation was being implemented by OLAF in various types of investigations. This approach was likely to result in more structural safeguards for a proper application of the Regulation, in line with the EDPS's overall priorities.

2.6 In his observations, the complainant argued that the EDPS had again brought forward unintelligible arguments and had not referred to any legal basis for his decision.

2.7 As to the first part of the complainant's complaint to the EDPS, the Ombudsman considers it useful to refer to point B of the Memorandum of Understanding between him and the EDPS (8) , signed on 30 November 2006, laying down that, in order to avoid unnecessary duplication of procedures, " *[n]either authority envisages opening an inquiry if the other authority is dealing, or has dealt, with what is essentially the same complaint, unless the complainant presents significant new evidence in a case where the other authority has already concluded its inquiry* ". The Ombudsman is of course aware of the fact that this Memorandum was signed after the EDPS took his decision on the complainant's case. However, he points out that the reason for drawing up the above declaration was that both he and the EDPS had considered that such a declaration would be appropriate, on the basis of their experience and in order to achieve the best use of Community resources and favour a consistent approach to legal and administrative aspects of data protection. Therefore, the Ombudsman takes the view that, also before the signing of the Memorandum of Understanding, the EDPS could reasonably have considered that he did not need to investigate cases in which the Ombudsman had already reached a decision.

2.8 In the present case, it appears that the first issue the complainant raised with the EDPS indeed overlaps with one aspect the Ombudsman dealt with in his inquiry into complaint 2485/2004/GG (9) . In his present complaint to the Ombudsman, the complainant has not contested this fact, but rather argued that the Ombudsman's prior involvement in this aspect of his case could not replace the EDPS's activity in this respect. However, and taking into account the EDPS's discretion in deciding whether and how to pursue a complaint further, the EDPS's argument that it appeared unlikely that his intervention would have changed or added anything to the Ombudsman's findings appears to be plausible.

2.9 As to the second part of the complainant's complaint to the EDPS, the Ombudsman is pleased to note that, in his reply to the Ombudsman's request for further information, the EDPS clarified his position by stating that the matter would in principle have been within his competence, but that a "complex of different considerations" had led him to the conclusion that further investigation would not have been justified.

2.10 However, the Ombudsman is not convinced by all of the arguments which, according to the EDPS, belonged to this "complex of different considerations". As the complainant pointed out, some of these considerations are indeed rather unclear. Even though the EDPS structured the considerations under five headings, the Ombudsman has only been able to identify two



arguments, namely, that (1) the evaluation of the data collected and transferred by OLAF would be closely linked to the evaluation of the merits of investigations conducted by OLAF and national authorities in the complainant's case, which in turn would have been mostly outside the EDPS's competence, and (2) the rectification and notification requested by the complainant would have interfered with legal proceedings at the national level. However, if the Ombudsman understands the EDPS correctly, the latter also still considers that (3) he should give priority to the notifications for prior checking of OLAF's processing operations, pursuant to Article 27 of the Regulation, since these prior checking activities were likely to contribute to the structural improvement of compliance with the Regulation on a much larger scale. In this context, the EDPS submitted that it should be clear that his decision as to whether to start or to continue an investigation on the basis of Article 46(a) of the Regulation involved a certain degree of discretion.

2.11 As to the first of these arguments, the Ombudsman notes that there is nothing to show that an evaluation of the data in question, namely, the information that the complainant was going to move to Washington, would have been linked to an evaluation of the merits of ongoing investigations. As the complainant correctly pointed out, there was never any investigation concerning his change of residence by either OLAF or any national authorities. As far as the Ombudsman is aware, the complainant's concerns in relation to a purely factual question could have been investigated without an evaluation of any other aspects of his conflict with OLAF.

2.12 As to the EDPS's second argument, the Ombudsman finds it difficult to see how the concrete measures requested by the complainant could have interfered with legal proceedings at the national level. However, the Ombudsman notes that, at the time the complainant turned to the EDPS, the proceedings launched at the national level in relation to the substance of the complainant's case had not yet been concluded. Given that OLAF's statement that the complainant was going to move to Washington might have influenced the way in which the national authorities investigated the complainant's case, it cannot be excluded that the EDPS's involvement would have had repercussions on these investigations. Therefore, and taking into account the EDPS's view that he has a certain discretion in deciding how to deal with complaints, the Ombudsman considers that the EDPS's second argument cannot be dismissed outright.

2.13 As to the EDPS's argument concerning the prioritising of certain types of investigations over others, the Ombudsman recalls that, as mentioned above, the EDPS submitted that he has a certain degree of discretion in dealing with complaints. Taking this view into account, the EDPS's position that he should focus on activities that have a larger structural impact could be justified. The Ombudsman also notes that, as the EDPS emphasised, the latter's decision not to pursue his inquiry into the complainant's case further did not affect the complainant's possibilities to raise his concerns in other contexts. The EDPS submitted that the complainant could have given his views on the matter " *within the appropriate procedures elsewhere* ". It appears likely that, by this statement, the EDPS was alluding to the case the complainant had brought before the Court of First Instance (10) and, perhaps, to his right to submit a complaint to the Ombudsman.



2.14 The Ombudsman recognises that, in light of Article 46(a) and (b) of Regulation 45/2001, the EDPS enjoys indeed a certain margin of discretion as to which complaints he should investigate and conduct inquiries into. The Ombudsman also notes that the complainant rightly considers that the EDPS should explain the reasons why, in a particular case, he does not consider it justified to open or to pursue an inquiry into a complaint. As concluded in points 2.12 and 2.13 above, the rationale for the EDPS's decision of 1 December 2005 has been put forward in a clearer way in the framework of the present inquiry and appears to be reasonable. In these circumstances, the Ombudsman takes the view that further inquiries on his part into this aspect of the complaint would not be justified.

2.15 However, the Ombudsman also considers that it would be appropriate and indeed very helpful to potential future complainants for the EDPS to announce in a general policy document what the general criteria or the guidelines are that he intends to apply when exercising his discretion in relation to hearing and investigating complaints presented to him. The Ombudsman will therefore make a further remark in this respect.

3 Alleged failure to deal with the substance of a letter

3.1 As regards the complainant's allegation that the EDPS failed to deal with the substance of a letter sent on 21 December 2005, the EDPS submitted that the substance of this letter had been dealt with at length in a reply sent on 16 May 2006.

3.2 The complainant has not made any observations in this respect.

3.3 The Ombudsman notes that the EDPS's letter of 16 May 2006, of which he received a copy, indeed appears to deal with the issues the complainant raised in his letter. Therefore, and given that the complainant has not contested the EDPS's submission, the Ombudsman considers that there is no need for him to pursue his inquiries into this aspect of the complaint further.

4 Alleged failure to reply

4.1 As regards the EDPS's alleged failure to reply to an e-mail sent on 8 March 2006, the EDPS acknowledged that it was true that the reply to this e-mail had taken more time than would have been appropriate, since it was only dealt with in his letter of 16 May 2006. However, the EDPS emphasised that, in that letter, he had apologised for the delay. He had also stated that the delay had not affected the substance of his reaction to the complainant's objections.

4.2 The complainant has not made any observations in relation to this aspect of his complaint.

4.3 The Ombudsman notes that the EDPS acknowledged that his reply had been delayed. He welcomes the fact that the EDPS apologised to the complainant for this delay. In view of these circumstances, and given that the complainant has not commented on this issue, the Ombudsman considers that he does not need to inquire further into this issue.

5 Allegedly non-transparent procedure

5.1 As regards the alleged lack of transparency in the EDPS's procedure, the EDPS explained that a copy of his decision in the complainant's case had been sent to the Director-General of OLAF, to the Data Protection Officer of OLAF, as well as to the Ombudsman for their information. The EDPS stated that there had been no other correspondence with other bodies in this case, given that his decision had been based on a preliminary evaluation of the available



facts and the merits of the case and that he had concluded that there would be no further action.

5.2 The complainant has not made any observations in relation to this aspect of the case.

5.3 The Ombudsman notes that the EDPS has provided clarifications concerning the procedure that led to the adoption of his decision in the complainant's case and concerning the correspondence he conducted in its context. The explanations provided by the EDPS appear to be plausible and have not been contested by the complainant. The Ombudsman therefore concludes that further inquiries into this aspect of the complaint would not be justified.

6 The complainant's claims

6.1 The complainant claimed that the EDPS should duly deal with his complaint and further correspondence and that he should take action on the basis of the applicable rules.

6.2 In view of the Ombudsman's conclusion that the complainant has not established his allegation that the EDPS failed properly to deal with his complaint, his claims cannot be sustained.

7 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, further inquiries into the complainant's allegations and claims would not be justified. The Ombudsman therefore closes the case.

The EDPS will also be informed of this decision.

FURTHER REMARK

Whilst recognising that, in light of Article 46(a) and (b) of Regulation 45/2001, the EDPS indeed enjoys a certain margin of discretion as to which complaints he should investigate and conduct inquiries into, the Ombudsman considers that it would be appropriate and indeed very helpful to potential future complainants, if the EDPS were to announce, in a general policy document, what the criteria or the guidelines are that he intends to apply when exercising his discretion in opening inquiries and investigating complaints presented to him. The Ombudsman would welcome it if the EDPS could inform him of the follow-up he intends to give to this further remark.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) The Ombudsman's decision on that case is available on his website (<http://www.ombudsman.europa.eu/decision/en/021840.htm> [Link]).



- (2) The Ombudsman's special report in this case is available on his website (<http://www.ombudsman.europa.eu/special/pdf/en/042485.pdf> [Link]).
- (3) OJ 2001 L 8, p. 1.
- (4) Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418).
- (5) See footnote 1.
- (6) See footnote 2.
- (7) See footnote 3.
- (8) OJ 2007 C 27, p. 21.
- (9) See footnote 2, in particular, paragraph 1.9 of the Ombudsman's special report in that case.
- (10) Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.