

Decision of the European Ombudsman closing his inquiry into complaint 1748/2006/JMA against OLAF

Decision

Case 1748/2006/JMA - Opened on 12/07/2006 - Decision on 09/03/2009

In early 2006, the complainant, who had worked for a number of firms on various EU-funded projects, became aware that one of his former employers had received a letter from OLAF stating that he had committed serious irregularities and requesting information about him in this regard. Other employers for whom the complainant had worked also received similar letters from OLAF. As a result, the complainant wrote to OLAF on several occasions requesting information on the specific allegations against him, the estimated duration of the investigation and how its results would be communicated to all relevant parties. Since he considered that OLAF's reply was not satisfactory, he complained to the Ombudsman.

In reply to the Ombudsman's inquiry, OLAF explained that the letters it had sent to third parties in the context of its investigation only sought to obtain information and did not cast any suspicion on the complainant. It also stated that it was not in a position to provide any further details regarding its inquiry.

In his decision, the Ombudsman noted that, in order to carry out its inquiries effectively, OLAF may request information from third parties. However, on the basis of his review of the wording of the initial letters sent by OLAF, the Ombudsman considered that OLAF had not respected the principles of fairness and proportionality, as well as the principle of the presumption of innocence. He therefore addressed a critical remark to OLAF.

The Ombudsman also took the view that OLAF failed adequately to reason its refusal to give the complainant information on the specific allegations against him. He therefore made another critical remark. As regards the complainant's request for information on the estimated duration of its inquiry, the Ombudsman acknowledged that the complexity of a given inquiry may make it impossible for it to give an accurate or even estimated timetable. However, the Ombudsman considered that OLAF did not explain to the complainant in any detail why it was not possible to provide the requested information. Given these circumstances, the Ombudsman made a third critical remark. Finally, as regards the complainant's request for information on how the results of the investigation would be communicated to all relevant parties, OLAF reassured the complainant that it intended to communicate the results to the third parties in due course. The Ombudsman therefore considered that, once it completes its investigation, OLAF could use appropriate means to report its findings to the third parties contacted during its inquiry. He made



a further remark in this regard.

THE BACKGROUND TO THE COMPLAINT

1. The complainant is an international consultant who worked for a number of firms on various EU funded projects. In early 2006, one of his former employers informed him that he had received a letter from the European Anti-Fraud Office (OLAF). The letter, dated 31 March 2006, stated that the complainant had committed serious irregularities, when working as team leader of an EU funded project, and requested information about him. OLAF also sent similar letters to other of the complainant's former and current employers.

2. On 21 and 24 April 2006, the complainant wrote to OLAF requesting information on its inquiry and volunteering to provide any information it required in this regard. In his letter, he also asked OLAF to explain the reasons for carrying out an investigation against him and the specific irregularities he was accused of. On 2 June 2006, in reply to his requests, OLAF sent the complainant an e-mail acknowledging receipt of his correspondence and informing him that it was gathering information to verify whether or not he had made false declarations with the aim of obtaining EU funds irregularly. OLAF stated that it had provided third parties with the minimum amount of information on the complainant to enable them to provide evidence. OLAF added that, in its inquiries, it fully respects human rights and fundamental freedoms, in particular the principle of fairness. It added that it would invite the complainant to make his views known, once it had gathered all of the necessary information.

3. The complainant considered that OLAF's reply was not convincing. On 11 June 2006, he therefore submitted a complaint to the Ombudsman.

THE SUBJECT-MATTER OF THE INQUIRY

4. In his complaint to the Ombudsman, the complainant argued that OLAF could have approached him directly without having to inform several of his former and current employers. He stated that, in doing so, OLAF had cast serious doubts on his reputation. As a result, he argued that his chances of continuing in his current line of work had been seriously damaged. The complainant pointed out that the investigation had been going on for a year and did not have a foreseeable end. He considered that the inquiry had taken place under an unjustified veil of secrecy. Despite his requests for clarification, the complainant considered that OLAF had not provided him with clear answers to his questions or an explanation as to why it could not provide him with answers.

5. The complainant submitted the following allegations:

- OLAF formulated its letters to the complainant's employers so as to cast suspicion on the complainant rather than to obtain information.
- Despite his written requests, OLAF failed to give him information on the allegations against



him being investigated, the estimated duration of its inquiry (OF/2005/0403), and how the results of the investigation would be communicated to all relevant parties.

THE INQUIRY

6. On 12 July 2006, the Ombudsman opened an inquiry into the allegations put forward by the complainant. On 27 October 2006, OLAF submitted its opinion, which was sent to the complainant. On 10 December 2006, the complainant sent his observations on OLAF's opinion. He sent further information on 13, 19, 20 and 22 December 2006; 7 and 23 January 2007; 22 February 2007; 9 and 10 March 2007; 25 April 2007; and 18 July 2007.

7. On 30 July 2007, the Ombudsman asked OLAF for further information, which it submitted on 26 September 2007. In this regard, OLAF requested that part of the information it submitted to the Ombudsman be treated " *confidentially* " - and not to be passed to the complainant. On 19 October 2007, the Ombudsman rejected OLAF's request and asked it to provide a non-confidential version of its replies which could be forwarded to the complainant. On 4 December 2007, OLAF confirmed its previous position. On 10 December 2007, the Ombudsman forwarded the non-confidential part of OLAF's opinion to the complainant. The complainant sent his observations on 23 December 2007.

8. On 1 April 2008, a meeting between the Director of OLAF and the Ombudsman took place in order to discuss the general issue of the way OLAF was responding to the Ombudsman's inquiries against it. In light of that discussion, the Ombudsman decided to send a renewed request to OLAF to provide a non-confidential version of its reply to his request for further information. On 20 June 2008, OLAF sent a non-confidential version of its reply, which the Ombudsman forwarded to the complainant for observations. The complainant sent his observations on 28 July 2008 and additional information on 22 December 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remark

9. In its opinion of 27 October 2006, OLAF stated that it was unable to provide the Ombudsman with the information he requested on the allegations submitted by the complainant. It pointed out that, pursuant to Article 12(3) of Regulation 1073/99 [1] , its Director should not seek or take instructions from any institution or body in the performance of his duties concerning the opening and carrying out of investigations.

10. The Ombudsman wishes to point out that, by requesting that OLAF provide him with an opinion, he did not seek to " *instruct* " OLAF on the way it pursues its investigations. As in any other inquiry, the Ombudsman's actions are solely directed at establishing whether the actions of the institution concerned constitute maladministration. This is in accordance with the



Ombudsman's mandate under Article 195 of the Treaty, which requires the Ombudsman to investigate:

"[c]omplaints from any citizen of the Union ... concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role".

11. The Ombudsman points out that, in order to comply with his obligations under the Treaty, Article 3(2) of his Statute [2] requires all Community institutions and bodies to both supply him with any information he requests and give him access to the files concerned.

12. Furthermore, in the event the Ombudsman identifies a potential or actual instance of maladministration, he does not "*instruct*" the institution or body concerned to change its practices. Instead, he may make a *proposal for a friendly solution* or a *draft recommendation*, which seek to identify how the potential or actual instances of maladministration may be eliminated or corrected. Proposals for a friendly solution or a draft recommendation are not "*instructions*". The Ombudsman may also address critical remarks or further remarks to the institution or body concerned. It is then for the institution or body to decide how it should deal with such findings. Ultimately, if the Ombudsman considers that the issue of maladministration in question is of sufficient importance, and if the institution concerned refuses to accept the Ombudsman's recommendations, he may send a special report to the European Parliament.

A. Content of the letters sent by OLAF to the complainant's employers

Arguments presented to the Ombudsman

13. The complainant pointed out that, in most of the letters sent to his former and current employers, OLAF stated that he had committed serious irregularities as a team leader of a number of EU funded projects. This incriminatory language was, in the complainant's view, not justified and showed that OLAF had not pursued its inquiry with the necessary care.

14. In its opinion, OLAF explained that, in mid-2005, it received anonymous allegations regarding potential irregularities committed by the complainant as team leader of several EU funded projects. Subsequently, OLAF gathered evidence on this matter, which enabled it, on 15 November 2005, to open a formal investigation. As regards the wording of its letters to third parties, OLAF considered that these letters only sought to obtain information and did not cast any suspicion on the complainant. OLAF explained that, in order to carry out its inquiries effectively, it is authorised to request information from third parties. In such cases, it must advise them of the reasons for its request. It added that it may solicit discretion from third parties so as to ensure that the evidence will not be compromised.

15. OLAF referred to the wording of its reply to the complainant, dated 29 May 2006, in which it argued that it had replied to the allegations made to the Ombudsman. In that letter, OLAF



underlined that it was carrying out its inquiry against the complainant in full respect of human rights and fundamental freedoms, in particular regarding the principle of fairness. It further noted that it had provided third parties with the minimum amount of information needed to comply with OLAF's requests. In OLAF's view, the letters it sent to third parties respected the above principles.

16. In his observations, the complainant referred to the correspondence OLAF sent to his former employers. He listed five former employers and a dozen colleagues who had received such letters from OLAF, all of which were drafted using similar wording. In these letters, OLAF informed the addressees that the complainant had committed serious irregularities and requested supporting evidence in this regard. The complainant further noted that OLAF had created an unnecessary climate of mistrust, fear and suspicion against him. As a result of that conduct, OLAF had damaged his business interests, in breach of his basic human rights under the European Convention of Human Rights. In a further letter dated 26 October 2007, the complainant explained that, to his knowledge, OLAF was still sending letters to his employers, albeit without using incriminatory language.

17. In the non-confidential part of its second opinion, OLAF noted that it was within its competence to decide on the sort of information it needs in order to conduct an investigation. Consequently, OLAF argued that it disposes of a margin of discretion when it poses questions to the person concerned or to third parties. In this case, OLAF felt that the questions it had asked to third parties were relevant and necessary for the investigation and that it had no alternative to do so in order to collect evidence.

18. In its additional comments of 20 June 2008, OLAF explained that it was obliged to describe the context of its investigation to the companies it had addressed so as to allow them to provide information relevant for the investigation. Accordingly, contacting these companies was, in OLAF's view, an absolute necessity.

19. The complainant made no observations on OLAF's second opinion.

The Ombudsman's assessment

20. The Ombudsman agrees that, in order to carry out its inquiries effectively, OLAF may ask for information from third parties. While OLAF has a certain margin of discretion when deciding to make such requests, in accordance with the principles of fairness and proportionality, it should carefully assess the need to make each individual request.

21. Without prejudice to his evaluation of the specific communications used in the present case (see paragraphs 23 to 29 below), the Ombudsman agrees that it is not necessarily unfair or disproportionate for OLAF to seek information from the employers of a party under investigation.

22. While the fact that OLAF contacted the complainant's employers may be justified, it remains to be evaluated whether the *manner* in which they were contacted was appropriate.



23. As the Court of Justice has confirmed [3] , the principle of the presumption of innocence, enshrined in Article 6(2) of the European Convention of Human Rights, is not limited to a procedural guarantee in criminal matters. Its scope is wider and provides that no public authority can declare a person guilty of an offence [4] before his guilt has been established [5] . In such circumstances, a public authority's choice of words is important when making statements about a person before he/she has been found guilty of an offence.

24. While OLAF has a certain margin of discretion on whether it requests information from third parties, the Court of Justice has confirmed that OLAF has no discretion regarding its obligation to respect the principle of the presumption of innocence when making such requests [6] .

25. The Ombudsman thus concludes that OLAF must ensure that the manner in which it makes each request for information fully respects the presumption of innocence. The manner in which OLAF makes each request for information must also be fair and proportionate.

26. The Ombudsman notes that OLAF made the following introductory statement in the initial letters it sent to the complainant's employers:

" Elements suggest that [the complainant] committed serious irregularities in his position of team leader of the EU funded project [X]. "

27. The Ombudsman is of the view that the above statement clearly leads to the understanding that OLAF had *already* evaluated evidence about the complainant and had *already* reached certain conclusions as regards the complainant's responsibility for a number of serious irregularities. This wording was therefore likely to encourage recipients of the letters to assume that the complainant was guilty [7] . This was so, notwithstanding the fact that, at that time, OLAF's inquiry was still on-going and OLAF had not even given the complainant an opportunity to have his views heard.

28. While, as noted in paragraph 21 above, OLAF may be required to request information from third parties in order to pursue an investigation, it must do so with the necessary discretion and reserve, while seeking to strike a proper balance between the interests of the party under investigation and those of the Communities [8] . The Ombudsman considers that the incriminating language used by OLAF in the present case does not appear at all necessary or proportionate to OLAF's stated purpose of obtaining information about the complainant. OLAF could have made its requests for information using language that would not have given a misleading impression of the complainant. OLAF did not therefore act with due respect for the principles of fairness and impartiality, as required by Article 41(1) of the EU's Charter of Fundamental Rights and OLAF's own Manual of Operational Procedures [9] . Finally, and most importantly, it did not respect the principle of the presumption of innocence.

29. This failure to word appropriately the requests for information constitutes an instance of maladministration. Accordingly, the Ombudsman will make a critical remark below.



B. Allegation of OLAF's failure to give the complainant information regarding the inquiry

Arguments presented to the Ombudsman

30. According to the complainant, OLAF failed, despite his requests, to give him information on (i) the allegations against him, (ii) the estimated duration of its inquiry, and (iii) how it would communicate the results of the investigation to all relevant parties. He noted that, in reply to his correspondence, OLAF merely informed him that it was gathering information to check whether he had irregularly received EU funds and that, once it had completed this process, it would invite him to attend a formal interview. For the complainant, this veil of secrecy on OLAF's part was unjustified.

31. In its opinion, OLAF restated the arguments made in its replies to the complainant of 29 May 2006 and 19 October 2006. It noted that, as regards the disclosure of the allegations against the complainant, OLAF was not in a position to provide any further details, due to the applicable rules concerning confidentiality and professional secrecy aimed at protecting the investigation. OLAF also explained that the investigation was a high priority for it and would be completed as soon as its services had received and analysed all the necessary information, including evidence from the complainant and other witnesses. It noted that the investigations required OLAF to consult other Commission services and third parties, which might take considerable time. OLAF added that it intended to communicate the results of the investigations to third parties in due course.

32. In a further letter to the complainant dated 23 November 2006, OLAF restated the content of its opinion to the Ombudsman. It explained that its inquiry related to falsified written statements allegedly made by the complainant in the framework of EU funded projects.

33. In his observations, the complainant repeated his allegations and underlined that his questions to OLAF remained unanswered. He noted that, even though two OLAF officials were in charge of pursuing the inquiry, OLAF could neither indicate the time it would need to complete the investigation nor the nature of the statements made against him.

34. In the non-confidential part of its second opinion, OLAF repeated its previous arguments and added that its investigation was still in progress. It indicated that it would provide the results in due course.

35. In his observations to OLAF's second opinion, the complainant repeated his allegations and underlined his predicament, which was caused by the manner in which, for three years, OLAF had been carrying out its investigation.

The Ombudsman's assessment

36. The Ombudsman notes that the complainant's request for information involved three separate aspects of OLAF's inquiry: (i) the allegations against him; (ii) the estimated timing of



the inquiry; and (iii) the manner in which the results of the inquiry would be communicated to third parties.

Information concerning the allegations against the complainant

37. The request for information submitted by the complainant concerned the reasons why OLAF was carrying out an investigation against him and the specific irregularities it accused him of.

38. In its own Manual of Operational Procedures, OLAF states that its staff must respect the rights of persons directly implicated in a case. As regards external investigations, OLAF undertakes to:

" [i] nform the person subject to the investigation, as long as this would not be harmful to the investigation. OLAF investigators also inform the person concerned when the investigation has been closed as long as this would not be harmful to any further action. "

39. The general rule is therefore that OLAF must inform the person concerned as soon as possible about the existence of an investigation. As an exception to this general rule, OLAF may refrain from immediately informing the person concerned about an investigation if providing such information would harm that investigation or would prevent " *further action* ". It is for OLAF to justify the use of this exception by providing specific and sufficient arguments that this exception applies. Since the present complaint does not concern information about the existence of the investigation, but rather the reasons why OLAF was carrying it out and the specific irregularities the complainant was alleged to have committed, the Ombudsman will not examine why OLAF did not immediately inform the complainant about the investigation when it was opened in November 2005.

40. As regards OLAF's alleged failure to provide the complainant with information concerning the reasons why it was carrying out an investigation against him and the specific irregularities he was alleged to have committed, the Ombudsman considers that OLAF should provide such information on request *unless* providing such information would harm the investigation or prevent " *further action* ". It is for OLAF to justify the use of the exception by providing specific and sufficient arguments that the exception applies.

41. In reply to the complainant's request for information concerning the reasons why it was carrying out an investigation against him and the specific irregularities he was alleged to have committed, OLAF informed the complainant that it was seeking to verify whether or not he had made false declarations with the aim of obtaining EU funds irregularly. As such, the Ombudsman considers that OLAF did inform the complainant about the reasons it was carrying out an investigation.

42. OLAF did not, however, inform the complainant about the specific irregularities he had allegedly committed. In its opinion to the Ombudsman, OLAF stated that it was not in a position to provide any further details to the complainant, due to applicable rules concerning confidentiality and professional secrecy aimed at protecting the investigation. OLAF stated that



it would eventually invite the complainant to attend a formal interview.

43. In the Ombudsman's view, OLAF has not clearly explained how the provision of information concerning the alleged irregularities under investigation would have harmed the investigation or prevented " *further action* " by OLAF. Instead, OLAF has limited itself to referring in general to the rules on confidentiality and professional secrecy aimed at protecting the investigation. This failure adequately to reason its refusal to agree to the complainant's request for information constitutes an instance of maladministration. Accordingly, the Ombudsman will make a critical remark below.

Information on the timing of the inquiry

44. The Ombudsman underlines that this aspect of the allegation does not concern the length of time taken by OLAF to carry out its inquiry, but rather the institution's unwillingness to provide the complainant with information on the estimated time it would take to finalise its inquiry.

45. Article 22(1) of the European Code of Good Administrative Behaviour [10] establishes that:

" The official shall, when he has responsibility for the matter concerned, provide members of the public with the information that they request ... The official shall take care that the information communicated is clear and understandable. "

46. There are no specific and binding periods for the completion of investigations by OLAF. However, the obligation to conduct administrative procedures within a reasonable time is a general principle of Community law [11] . Therefore, the procedure before OLAF cannot be extended beyond a reasonable time. What constitutes a reasonable time must be assessed by reference to the circumstances of the case. However, a complex inquiry may require a significant period to complete.

47. As regards the provision of information in terms of a timetable concerning the completion of a complex inquiry, the Ombudsman acknowledges that the complexity of a given inquiry may make it impossible to provide an accurate or even estimated timetable. The Ombudsman notes that OLAF's inquiry involved questioning a large number of third parties. It further involved obtaining information about multiple projects which had been carried out over numerous years. It is therefore not obvious that OLAF should have been able to provide the complainant with an accurate or even an estimated timetable regarding the completion of the inquiry.

48. However, the Ombudsman considers that a citizen-friendly institution should make all possible efforts to assist citizens when they make reasonable requests. If it is not possible to provide such assistance, the institution should provide an appropriate explanation regarding why such assistance is impossible. In the present case, OLAF did not explain to the complainant in any detail why it was not possible to provide the requested information. Given these circumstances, the Ombudsman considers it necessary to make a critical remark.

Information to third parties



49. This aspect of the allegation concerns the manner in which the results of the inquiry would eventually be communicated to third parties.

50. As the Ombudsman has concluded in paragraphs 27 to 29 above, OLAF's language in most of the letters seeking information from the complainant's former employers implied that the complainant had committed certain irregularities. It was therefore especially important in this case for the complainant to seek reassurances from OLAF regarding how it would, in the future, contact these persons in order to communicate to them its eventual conclusions.

51. OLAF did reassure the complainant that it intended to communicate the results of the investigations to the third parties in due course. The Ombudsman is of the view that OLAF may not have been able, in 2006, to provide further details of its future communications to the third parties, given that, at that time, its investigation was at an early stage. However, the Ombudsman considers that, once it completes its investigation, OLAF could use appropriate means to report on its findings to the third parties contacted during its inquiry. In this regard, the Ombudsman considers it necessary to make a further remark.

C. Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks:

OLAF failed to word appropriately certain requests for information concerning the complainant. In doing so, it did not comply with the principle of fairness, the principle of impartiality and the principle of the presumption of innocence.

OLAF did not adequately justify its refusal to provide the complainant with information on the allegations against him and on the facts on which these were based.

OLAF failed to explain to the complainant in any detail why it was not possible to provide information concerning the time when the investigation would be completed.

It also appears necessary to make the following further remark:

Once it completes its investigation, OLAF could use appropriate means to report on its findings



to the third parties contacted during its inquiry.

Given that the instances of maladministration here identified relate to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The Ombudsman will inform the complainant and OLAF of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 9 March 2009

[1] 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 L 136, p. 1.

[2] OJ 1994 L 113, p. 15.

[3] See Case T-48/05 *Yves Franchet and Daniel Byk v Commission* ECR, judgment of 8 July 2008, not yet published in the ECR, paragraph 211.

[4] The Ombudsman notes that OLAF's investigation, although an administrative proceeding, concerns allegations of serious irregularities made against the complainant.

[5] See also European Court of Human Rights, *Y.B. and Others v Turkey*, nos. 48173/99 and 48319/99, Judgment of 28 October 2004, paragraph 43.

[6] See Case T-48/05 *Yves Franchet and Daniel Byk v Commission* ECR, judgment of 8 July 2008, not yet published in the ECR, paragraphs 212 and 218.

[7] See, by analogy, Case T-48/05 *Yves Franchet and Daniel Byk v Commission* ECR, paragraphs 308-310.

[8] See by analogy, Case T-48/05 *Yves Franchet and Daniel Byk v Commission* ECR, paragraph 311.

[9] " *Investigations and operations undertaken by OLAF ... must be undertaken with full respect for the rights of persons and fundamental freedoms, in particular the principle of fairness.* " OLAF's May 2007 Manual of Operational Procedures (http://ec.europa.eu/dgs/olaf/legal/doc/manual_short.pdf [Link]).

[10] <http://www.ombudsman.europa.eu/resources/code.faces> [Link]



[11] See Article 41(1) of the Charter of Fundamental Rights and Case T-394/03 *Angeletti v Commission* , judgment of 11 April 2006, not yet published in the ECR, paragraph 162.