

Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Anti-Fraud Office in complaint 2485/2004/GG

Special Report

Case 2485/2004/(PB)GG - Opened on 06/09/2004 - Recommendation on 02/02/2005 -

Special report on 06/09/2004 - Decision on 24/05/2005

(Made in accordance with Article 3 (7) of the Statute of the European Ombudsman [1])

Introduction

The Ombudsman considers that the present case raises an important issue of principle, affecting the trust of citizens in the EU institutions and bodies. Citizens should be able to have confidence in the accuracy and completeness of the Ombudsman's inquiries. If an institution or body has provided inaccurate and misleading information to the Ombudsman, therefore, it should be prepared publicly to acknowledge the fact in order to set the record straight. In the present case, OLAF has refused a draft recommendation from the Ombudsman that it should acknowledge that it made incorrect and misleading statements in its submissions to the Ombudsman. The Ombudsman therefore considers that the matter should be put before the European Parliament.

The complaint

Background

Until 2004, the complainant, a German journalist, was the Brussels correspondent of the *Stern*, a German weekly newspaper. In two articles published on 28 February and 7 March 2002, the newspaper covered a number of accusations concerning alleged irregularities that had been raised in a report by an EU official, Mr Paul van Buitenen, and the inquiries carried out by the European Anti-Fraud Office (OLAF) regarding these accusations. The articles were based on the report by Mr van Buitenen and on confidential OLAF documents that the newspaper had



obtained. According to the complainant, no other newspaper had obtained copies of these documents at that time.

On 27 March 2002, OLAF published a press release in which it pointed out that "a journalist" had obtained a number of documents relating to its inquiry into the points that had been raised by Mr van Buitenen and that OLAF had therefore decided, on the basis of Regulation (EC) no. 1073/1999 [2] , to open an internal inquiry regarding the suspected disclosure of confidential data. According to the press release, this internal inquiry would also cover the allegation that the relevant documents had been obtained "by paying a civil servant". [3] In its edition of 4 April 2002, the newspaper *European Voice* quoted an OLAF spokesman as having said that OLAF "had been given *prima facie* evidence that a payment may have occurred".

The complainant and his newspaper considered that although no name had been mentioned in OLAF's press release, the accusation of bribery contained therein had to be understood as directed at them. According to the complainant, this accusation was unfounded. The complainant further considered that OLAF's case was based on nothing but rumours.

In this context, the complainant referred to an internal e-mail circulated within OLAF by Mr B. (OLAF's spokesman) on 11 April 2002. In this e-mail, Mr B. had pointed out that the only facts that were certain at that time were that a confidential OLAF document had been leaked to the press and that there were rumours according to which this document had been even paid for, with even an indication of the price paid: "qu'il y avait des 'rumeurs' qui circulaient autour de l'OLAF et autour de la Commission européenne selon lesquelles ces documents auraient même été 'payés' (avec même l'indication d'un montant...)".

In a letter dated 29 July 2002, the complainant asked OLAF to withdraw its press release of 27 March 2002 or to inform the public that it had no grounds of suspicion against himself and the newspaper. In addition to that, the complainant pointed out that, from an answer given by the Commission in reply to a written question by a member of the European Parliament, it appeared possible that OLAF had monitored or allowed to be monitored the e-mails and telephone calls of its staff in order to find out the possible sources the newspaper had used. He therefore asked OLAF to confirm that it had at no time monitored his telephone or e-mail communications with OLAF staff. The complainant finally asked, in case such monitoring had taken place, what personal data relating to himself OLAF had thus obtained.

In its reply of 22 August 2002, OLAF pointed out that it had mentioned neither the complainant nor his newspaper in its press release and that no further press release in this matter was envisaged at the time of writing. It furthermore stressed that OLAF always ensured that its methods of inquiry were in conformity with the law and added that

"our office does not possess any personal data concerning you, apart from your professional address, telephone number etc."

Complaint 1840/2002/GG



On 22 October 2002, the complainant turned to the Ombudsman (complaint 1840/2002/GG). In his complaint, he essentially made the following allegations:

(1) OLAF had acted wrongly by making public, in its press release of 27 March 2002 and in comments to *European Voice*, allegations of bribery that had to be understood as directed at the complainant and his newspaper.

(2) OLAF had failed to provide an answer to all the questions submitted in the complainant's letter of 29 July 2002.

The complainant claimed that OLAF should withdraw the allegations of bribery, preferably in the same way as they had been raised, i.e. by a press release and a separate communication to *European Voice*. He further claimed that OLAF should provide a complete answer to the questions in his letter of 29 July 2002.

OLAF's opinion

In its opinion sent on 10 December 2002, OLAF rejected the complainant's accusations, making inter alia the following comments:

"OLAF has never speculated which journalist(s) or which media organisation(s) might have paid OLAF or other EU officials for confidential documents. OLAF notes that [the complainant] has not provided any substantiating evidence of his claim that he alone in the media possessed the documents in question at the time the OLAF investigation was opened. On the contrary, there is evidence that other media had obtained the same evidence. OLAF rejects [the complainant's] allegation that the suggestions that payment may have been made are to be understood as directed against himself and his employers. To OLAF's knowledge, the only press speculation on such lines has been provoked by the *Stern's* own statements on the subject."

As regards the letter of 29 July 2002, OLAF took the view that it was not at liberty to discuss the investigation methods being used with respect to an ongoing investigation, in particular the possible use of surveillance techniques related to e-mail and telephone communications. It further stated:

"As [the complainant] acknowledges, OLAF has answered his questions about its holding of personal data related to himself."

OLAF's reply to the request for further information

After having received and examined the complainant's observations, the Ombudsman asked OLAF (1) to explain, particularly in the light of the evidence submitted by the complainant in his observations, why it considered that other persons were or could have been meant by the reference to "a" journalist in its press release of 27 March 2002 and (2) to comment on the complainant's argument that OLAF's case was only based on rumours.



In its reply of 24 March 2003, OLAF provided the following explanations:

"The reason that the reference to 'a' journalist is neutral and does not implicate any specific individual is that, in fact, other journalists had published articles before OLAF's 27 March 2002 press release based on the same internal document that was referred to by the complainant in his article on 28 February 2002. For instance, on 3 March 2002, *Le Monde* published an article entitled 'Four investigations opened into irregularities in the Brussels' Commission', which referred to OLAF internal documents (including the document in question). It reported on an investigation into three former OLAF/OLAF officials. On 22 March 2002, the Belga news-agency reported on OLAF investigations into the Commission's building policy, referring to OLAF internal documents (including the document in question). On 26 March 2002, the same Belga news-agency reported that the Chairperson of the Budgetary Control Committee of the European Parliament (COCOBU), Mrs. Diemut Theato, had complained that it was not 'acceptable that *members of the press* had a confidential OLAF report on the latest revelations of Paul Van Buitenen and we don't' (emphasis added). Accordingly, based on just these publications, the reference to 'a' journalist could have meant either the complainant, the journalists who had written these articles, or other journalists referred to by Mrs. Theato. Indeed the reference could also be to any other journalist, since OLAF did not state that the investigation was linked to any specific material which had already been published."

OLAF also made the following statement:

"The e-mail of Mr [B.] of 11 April 2002 to OLAF staff sets forth two facts:

- * Journalists were in possession of internal information from the Office that they had not obtained through official channels, and

- * "Rumours" were circulating in the Office and in the Commission in general that these documents may have been paid for (even with an indication of the amount).

(...) With respect to the second [of the above-mentioned facts], OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents. No specific journalist or person was implicated for having made such a payment. On the basis of these facts, OLAF opened an internal investigation to determine whether this information could be substantiated."

The Ombudsman's decision on complaint 1840/2002/GG

On the basis of the evidence in his possession, the Ombudsman came to the conclusion that the relevant press release had to be understood as referring to the complainant and that OLAF had not put forward any evidence to support the accusation it had made therein. The Ombudsman therefore addressed a draft recommendation to OLAF according to which OLAF should consider withdrawing the allegations of bribery that had been published and that were likely to be understood as directed at the complainant.



In its detailed opinion, OLAF informed the Ombudsman that it had accepted the draft recommendation and published a new press release on 30 September 2003. However, this press release contained the following wording: "OLAF's enquiries have not yet been completed, but to date, OLAF has not obtained proof that such a payment was made."

The Ombudsman considered that OLAF had thus not properly implemented his draft recommendation. In his decision of 20 November 2003 closing the case, he made the following critical remark: "By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration."

Subsequent developments

On 19 March 2004, the Belgian prosecutor's office carried out a search of the complainant's office and house in Brussels, seizing a great number of documents. It subsequently emerged that these measures of inquiry had been based on information that OLAF had forwarded to the Belgian and the German authorities on 11 February 2004. [4]

The present complaint

In his present complaint to the Ombudsman, the complainant noted that he had obtained copies of the dossier submitted to the Belgian and the German authorities by OLAF on 11 February 2004.

According to the complainant, it emerged from the relevant documents that the inquiry started by OLAF in 2002 had been based on allegations made by a journalist, Mr G., in March 2002. The complainant thus considered that OLAF's submission to the Ombudsman in case 1840/2002/GG according to which "no specific journalist or person was implicated for having made such payment" was a manifestly false statement and that by making this statement OLAF had tried to mislead the Ombudsman. He further submitted that it was clear that OLAF had already in March 2002 been in the possession of (incorrect) personal data relating to him. The complainant considered that OLAF's statement to the contrary in its letter of 22 August 2002 to which it had referred in its opinion on complaint 1840/2002/GG had thus been wrong. He further noted that in its submissions to the Belgian and the German authorities of 11 February 2004, OLAF had argued that the complainant had been the only journalist to have had possession of the confidential OLAF document. The complainant submitted that OLAF thus defended the view it had vigorously denied in its opinion on complaint 1840/2002/GG and that the statements that OLAF had made in this case had therefore been misleading. As regards OLAF's statement, in its letter to the Ombudsman of 24 March 2003, that it "had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents", the complainant referred to a statement made by Mr B. [5], an OLAF official, before the European Parliament's Budgetary Control Committee on 7 April 2004. According to this statement, Mr B. had "no idea" as to the origin of the allegation that information had been received from MEPs; Mr B. had mentioned the possibility that this could have been a "rumour". In the complainant's view, Mr B's assumption did not appear unfounded



and OLAF had thus misled the Ombudsman by referring to rumours as facts.

The complainant thus alleged that OLAF had provided incorrect information in the context of inquiry 1840/2002/GG that was prone to mislead the European Ombudsman and to manipulate the inquiry. He therefore requested the Ombudsman to resume his inquiry and to consider the need to submit a special report to the European Parliament.

The complainant's letter of 9 September 2004

On 9 September 2004, the complainant forwarded to the Ombudsman copies of the notes that OLAF sent to the prosecutors in Belgium and Germany on 11 February 2004. [6]

In these notes, OLAF made the following statements that are relevant for the present case:

- There was no reasonable doubt that the complainant had been in possession of the relevant documents when he wrote the two articles that were published by the *Stern* on 28 February and 7 March 2002.
- On 22 March 2002, Mr I., a director in OLAF, had received information according to which the complainant had paid EUR 8 000 to somebody in OLAF for a number of documents in relation to the van Buitenen affair. Mr I. recorded this in a note drawn up the same day. The source of this information was Mr G., a German journalist.
- Also on 22 March 2002, Mr B., OLAF's press spokesman, met Mr G. According to the note on this conversation drawn up by Mr B. the same day, Mr G. had told him that he had been informed by a friend and colleague at the *Stern* that the complainant had paid someone at OLAF for some documents.
- The information thus received had been used, in an anonymised way, in the press release of 27 March 2002.

The inquiry

OLAF's opinion

In its opinion, OLAF made the following comments:

As regards OLAF's statements concerning the press release of 27 March 2002

As regards the statements concerning the press release of 27 March 2002 that OLAF had made in its submissions in case 1840/2002/GG, these statements accurately explained why the reference to "a journalist" could have meant any of several journalists who had published articles indicating that they were in possession of the confidential documents in question. In



contrast, the letters of 11 February 2004 to the national prosecutors set forth all the information obtained by OLAF during its internal investigation of the leak that related to "matters liable to result in criminal proceedings", as required by Article 10 (2) of Regulation 1073/99. That information included various elements leading to the conclusion that the complainant had obtained a copy of the relevant documents and that the *Stern* may have paid a sum of money to members of staff of the European institutions. The letters did not, however, state that the complainant had clearly been the only person who had had possession of the relevant documents.

The fact that detailed information on the findings of the investigation had been revealed to the national prosecutors in the letters of 11 February 2004 had no bearing on the accuracy of OLAF's statements to the Ombudsman regarding the press release of 27 March 2002. OLAF had never revealed to the public the information that it had provided to the national prosecutors in those letters. Accordingly, there was nothing misleading about OLAF's statements to the Ombudsman regarding the said press release.

As regards OLAF's letter of 22 August 2002

The complainant's letter of 29 July 2002 had requested confirmation as to whether OLAF had, at any time, employed surveillance techniques to listen to telephone conversations or read e-mail messages between him and members of OLAF staff, and, if so, what personal data about him had been gathered through the use of such techniques. Mr I., the author of OLAF's reply of 22 August 2002, had declined to provide the complainant with any more details of investigation techniques than had already been provided in OLAF's answer to Parliamentary Question E1504/02, as doing so might have harmed the effectiveness of the ongoing investigation. Mr. I. had not considered that OLAF's knowledge of allegations about the complainant, as set forth in the letters of 11 February 2004, constituted personal data because he believed (1) that it was not held by OLAF for the purpose of processing and (2) that it was not assembled to constitute a dossier on the complainant and therefore did not "form part of a filing system" in accordance with Article 3 of Regulation 45/2001 (OJ 2001 no. L 8, p. 1). In any event, the allegations concerning the complainant had not been gathered using the surveillance techniques which had been the subject of the complainant's inquiry.

OLAF's opinion on complaint 1840/2002/GG had only stated that "OLAF has answered [the complainant's] question about its holding of personal data related to himself". This had been OLAF's only statement on this subject. This statement had been made in the context of the complainant's allegation that OLAF had failed to provide an answer to all the questions submitted in his letter of 29 July 2002, and thus it too had been specifically focussed on the use of surveillance techniques.

As regards OLAF's statements concerning Mr B.'s e-mail of 11 April 2002

OLAF's statement that "[n]o specific journalist or person was implicated for having made such a payment" had been made in response to the Ombudsman's invitation to comment on the contents of Mr B.'s e-mail of 11 April 2002. In OLAF's reply, the e-mail had been quoted in its



entirety, followed by a paragraph with comments explaining the two statements in the e-mail. In that e-mail, no names had been mentioned in connection with a possible payment. OLAF's statement to the Ombudsman had thus stated the obvious, i.e. that no name had been mentioned in the e-mail in connection with the possible payment. Thus, it had not been a misleading statement.

As regards OLAF's statement that it had received information from reliable sources, including members of the European Parliament

Again, this statement had been made in explanation of the statement in Mr B.'s internal e-mail of 11 April 2002 that "rumours were circulating in the Office and in the Commission in general that these documents may have been paid for". OLAF's letter to the Ombudsman of 24 March 2003 had explained that "OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents." OLAF could only re-iterate that this had in fact been the case.

Conclusion

On the basis of the above explanations, OLAF submitted that its statements to the Ombudsman in case 1840/2002/GG had been fully accurate and not misleading.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

Mr I. had provided incorrect information to him. This fact was only indirectly covered by his complaint to the Ombudsman. OLAF had not denied that Mr I. had provided objectively wrong information in his letter of 22 August 2002. In this letter, Mr I. had referred to his (the complainant's) official address and telephone number. It was obvious that OLAF had not obtained the latter by using any surveillance techniques. Mr I.'s statement thus clearly had to be understood in the sense that OLAF had no further information on him on record, from whatever source. This statement had thus been untruthful both from an objective as from a subjective point of view. By referring to Mr I.'s letter of 22 August 2002 in its opinion to the Ombudsman, OLAF had misled the Ombudsman and obviously tried to create the impression that OLAF was not conducting any inquiries concerning him.

OLAF's statement that "[n]o specific journalist or person was implicated for having made such a payment" had clearly been made in the context of the "reliable sources, including members of the European Parliament", that OLAF had referred to in its letter of 24 March 2003. The only possible meaning of the relevant passage was that OLAF had opened its inquiry on the basis of statements by witnesses who had not mentioned a particular person as being suspected.

OLAF had not provided any evidence to support its claim that it had been in possession of



statements by members of the European Parliament according to which journalists might have paid for the relevant documents. No effort had been made by OLAF to explain why Mr B., the OLAF official in charge of the case, had told Parliament's Budgetary Control Committee that he had no knowledge of any such statements. Nor had OLAF explained why these statements had not been mentioned in the letters to the national prosecutors. In the absence of any evidence to the contrary, it had thus to be concluded that OLAF had presented rumours as facts and had thereby misled the Ombudsman.

The complainant submitted a copy of the note dated 22 March 2002 that Mr I. had prepared for the attention of OLAF's Director.

The Ombudsman's draft recommendation

The draft recommendation

On 2 February 2005, the Ombudsman addressed the following draft recommendation to OLAF, in accordance with Article 3 (6) of the Statute of the European Ombudsman:

"OLAF should acknowledge that it made incorrect and misleading statements in its submissions to the Ombudsman in the context of the latter's inquiry into complaint 1840/2002/GG."

The European Ombudsman gave reasons for the draft recommendation as follows:

1.1 The complainant, a German journalist working for the *Stern*, had obtained copies of confidential documents of the European Anti-Fraud Office ("OLAF") and used these documents in two articles published on 28 February and 7 March 2002. On 27 March 2002, OLAF published a press release in which it pointed out that "a journalist" had obtained a number of confidential OLAF documents and that OLAF had therefore decided to open an internal inquiry regarding the suspected disclosure of confidential data. According to the press release, this internal inquiry would also cover the allegation that the relevant documents had been obtained "by paying a civil servant". [7] The complainant and his newspaper considered that although no name had been mentioned in OLAF's press release, the accusation of bribery contained therein had to be understood as directed at them. According to the complainant, this accusation was unfounded.

Given that OLAF refused to withdraw the said press release, the complainant lodged a complaint with the Ombudsman (complaint 1840/2002/GG). On 10 December 2002, OLAF submitted its opinion on the complaint to the Ombudsman. On 24 March 2003, it replied to a request for further information made by the Ombudsman.

On the basis of the evidence in his possession, the Ombudsman came to the conclusion that the relevant press release had to be understood as referring to the complainant and that OLAF had not put forward any evidence to support the accusation it had made therein. The



Ombudsman therefore addressed a draft recommendation to OLAF inviting it to withdraw the allegations of bribery that it had made.

Considering that OLAF had not properly implemented his draft recommendation, the Ombudsman closed the case by decision of 20 November 2003 in which he made the following critical remark: "By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration."

On 19 March 2004, the Belgian prosecutor's office carried out a search of the complainant's office and house in Brussels, seizing a great number of documents. It subsequently emerged that these measures of inquiry had been triggered by information that OLAF had forwarded to the Belgian and the German authorities on 11 February 2004 [8] .

1.2 In August 2004, the complainant turned to the Ombudsman again and lodged the present complaint. The complainant pointed out that he had obtained copies of the letters sent to the Belgian and the German authorities by OLAF on 11 February 2004. On the basis of the information contained in these letters, the complainant alleged that OLAF had provided incorrect information in the context of inquiry 1840/2002/GG that was prone to mislead the European Ombudsman and to manipulate the inquiry.

1.3 In its opinion on the present complaint, OLAF submitted that its statements to the Ombudsman in case 1840/2002/GG had been fully accurate and not misleading.

1.4 Article 195 of the EC Treaty entrusts the European Ombudsman with the task of conducting inquiries into possible instances of maladministration in the activities of the Community institutions and bodies. Article 2 (2) of Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties 2004 [9] (the "Ombudsman's Statute") directs the Ombudsman to inform the institution or body concerned as soon as a complaint is referred to him. According to Article 3 (1) of the Ombudsman's Statute, the institution or body concerned "may submit any useful comment to him". Article 3 (2), first sub-paragraph of the Ombudsman's Statute provides as follows: "The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy."

1.5 In view of these provisions, the Ombudsman takes the view that it would not be consistent with the obligation imposed by Article 3 (2), first sub-paragraph of the Ombudsman's Statute for a Community institution or body to supply inaccurate or misleading information to the Ombudsman during the course of an inquiry.

1.6 The Ombudsman notes that OLAF has understood the complainant as referring to four statements or sets of statements that in the latter's view were wrong or misleading. This interpretation of the complaint appears to be reasonable, and the Ombudsman will therefore examine the four statements or groups of statements identified by OLAF.



1.7 The *first* group of statements that were made by OLAF in the context of the Ombudsman's inquiry into complaint 1840/2002/GG and to which the complainant takes exception concerns the press release of 27 March 2002. This press release had referred to "a journalist" without mentioning any names. In its opinion of 10 December 2002 on complaint 1840/2002/GG and in its reply of 24 March 2003 to the Ombudsman's request for further information, OLAF submitted a number of arguments in order to show that the reference to "a journalist" could have meant any of several journalists who had published articles indicating that they were in possession of the confidential documents in question. In its letter of 24 March 2003, OLAF further suggested that "the reference could also be to any other journalist, since OLAF did not state that the investigation was linked to any specific material which had already been published".

The Ombudsman agrees that the interpretations proposed by OLAF in its letters of 10 December 2002 and 24 March 2003 are compatible with the wording of the press release of 27 March 2002. However, the Ombudsman notes that it clearly emerges from the letters that OLAF addressed to the prosecutors in Belgium and Germany on 11 February 2004 (1) that OLAF had concluded from the two articles published by the *Stern* on 28 February and 7 March 2002 that the complainant was in possession of the relevant documents, (2) that OLAF had received, on 22 March 2002, information according to which the complainant (whose name is mentioned in the notes drawn up that day) had paid EUR 8 000 to somebody in OLAF for a number of confidential documents and (3) that the information thus received had been used, in an anonymised way, in the press release of 27 March 2002. In the Ombudsman's view, it is thus clear that OLAF had the complainant, and the complainant alone, in mind when it published its press release of 27 March 2002 with its reference to "a journalist". The Ombudsman considers that although it was legitimate for OLAF to explain its view of the objective meaning of the press release, it was misleading for it not also to have explained to the Ombudsman that indeed the complainant was the journalist it had in mind.

1.8 The *second* statement criticised by the complainant concerns OLAF's submission, in its opinion on complaint 1840/2002/GG, that it had "answered his [the complainant's] questions about its holding of personal data related to himself". As OLAF has confirmed in its opinion on the present complaint, this statement is to be understood as meaning that OLAF had replied to the complainant's questions in its letter to the complainant of 22 August 2002. In this letter, OLAF had stressed that "our office does not possess any personal data concerning you, apart from your professional address, telephone number etc.". In his observations on OLAF's opinion, the complainant has made it clear that it is this last statement that he considers to be untruthful. It is true that the statement of 22 August 2002 as such was not made in the context of the Ombudsman's inquiry into complaint 1840/2002/GG (which was only opened subsequently). It should be noted, however, that OLAF referred to this statement in its opinion on 1840/2002/GG as constituting the answer to the complainant's question on that point. In these circumstances, the Ombudsman concludes that OLAF's opinion of 10 December 2002 must be understood as saying (1) that the complainant's question relating to personal data in OLAF's possession had been answered in the letter of 22 August 2002 and (2) that this answer was correct. The Ombudsman therefore considers that the question as to whether OLAF's opinion on complaint 1840/2002/GG was incorrect or misleading on that point depends on whether the letter of 22



August 2002 itself was incorrect or misleading.

The letter of 22 August 2002 replies to the complainant's letter of 29 July 2002. In this letter, the complainant had asked OLAF whether it had used any surveillance techniques concerning communication by telephone or e-mail and whether OLAF had thereby obtained any personal data in relation to himself. The Ombudsman considers that OLAF could thus have limited itself, in its reply, to saying that it did not possess any such personal data that would have been obtained by using special surveillance techniques (provided, of course, that this was indeed the case). However, OLAF did not make any such qualifications in its reply of 22 August 2002. This reply simply stated that OLAF always endeavoured to ensure that its methods of inquiry were in conformity with the law and that OLAF did not "possess any personal data concerning you, apart from your professional address, telephone number etc."

However, this last part of the statement was clearly wrong. It emerges from the letters that OLAF sent to the prosecutors in Belgium and Germany on 11 February 2004 that OLAF had indeed received, on 22 March 2002, information concerning the complainant and linked to the disclosure of the relevant OLAF documents. According to these letters, Mr G., a German journalist, had alleged that the complainant had paid a sum of money for confidential OLAF documents. The Ombudsman considers that it is clear that this information (regardless of whether it was accurate or not) constitutes personal data within the meaning 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. [10] Article 2 (a) of the Regulation defines personal data as "any information relating to an identified or identifiable natural person". Mr G.'s statement accusing the complainant of bribery fulfils this condition. OLAF argued in this context that Mr I., the author of its letter of 22 August 2002, had considered that OLAF's knowledge of allegations about the complainant did not constitute personal data because he believed (1) that it was not held by OLAF for the purpose of processing and (2) that it was not assembled to constitute a dossier on the complainant and therefore did not "form part of a filing system" in accordance with Article 3 of Regulation 45/2001. The Ombudsman does not find these arguments convincing. Even if the relevant information had not been held for the purpose of processing or did not form part of a filing system (something which the complainant, not without justification, calls into doubt), this would not alter the fact that the relevant information constituted personal data related to the complainant. Nor does the Ombudsman find it relevant in the present context that Mr I. may subjectively have thought that the relevant information did not constitute personal data. It should moreover be considered that by the time OLAF referred to this statement in its opinion on complaint 1840/2002/GG, it had had sufficient time to reconsider all the factual and legal issues involved.

The Ombudsman therefore concludes that OLAF's statement, in its letter of 22 August 2002 to which it referred in its opinion on complaint 1840/2002/GG, that it possessed no personal data concerning the complainant (apart from his professional address, telephone number etc.) was incorrect.

1.9 The *third* statement to which the complainant takes exception concerns OLAF'S letter to



the Ombudsman of 24 March 2003. In this letter, OLAF stated that "[n]o specific journalist or person was implicated for having made such a payment". In its opinion on the present complaint, OLAF pointed out that this statement had been made in response to the Ombudsman's invitation to comment on the contents of Mr B.'s e-mail of 11 April 2002. In that e-mail, no names had been mentioned in connection with a possible payment. According to OLAF, the relevant statement had thus only stated the obvious, i.e. that no name had been mentioned in the e-mail in connection with the possible payment, and had therefore not been misleading.

The Ombudsman notes that the relevant statement is immediately preceded by the statement that "OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents." He therefore considers that any reasonable reader was led to understand the following statement that "[n]o specific journalist or person was implicated for having made such a payment" in the sense that no specific journalist or person had been named by these "reliable sources". However, and as set out above, the source on which OLAF relied (Mr G.) had named the complainant as being suspected of bribery. In these circumstances, OLAF's statement was at the very least misleading, if not outright incorrect.

1.10 The *fourth* statement criticised by the complainant is OLAF's claim, in its letter of 24 March 2003, that "OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents". In his complaint, the complainant referred to a statement made by Mr B. [11], an OLAF official, before the European Parliament's Budgetary Control Committee on 7 April 2004. According to this statement (as quoted by the complainant), Mr B. had "no idea" as to the origin of the allegation that information had been received from MEPs. Mr B. had mentioned the possibility that this could have been a "rumour". In the complainant's view, OLAF had thus misled the Ombudsman by referring to rumours as facts. In its opinion on the present complaint, OLAF submitted that this statement had been made in explanation of the statement in Mr B.'s internal e-mail of 11 April 2002 that "rumours were circulating in the Office and in the Commission in general that these documents may have been paid for". According to OLAF, its letter of 24 March 2003 had explained that "OLAF had received information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents." OLAF stressed that it could only re-iterate that this had in fact been the case.

The Ombudsman notes that Mr B.'s e-mail of 11 April 2002 does not refer to members of the European Parliament as the source of the rumours it mentions. The wording of this e-mail, according to which these rumours were circulating "within the Office and in the Commission in general" would furthermore appear to exclude that any reference to MEPs might have been intended. The Ombudsman further notes that OLAF has not replied to the complainant's submission that Mr B. had told Parliament's Budgetary Control Committee that he had no knowledge of any such statements. He therefore assumes that OLAF accepts that the complainant has correctly rendered Mr B.'s remarks before that committee. In this context, it should be noted that Mr B. appears to be one of the most senior OLAF officials who have dealt with the matter [12]. The Ombudsman therefore assumes that Mr B. had a thorough knowledge



of the file. Since it cannot be assumed that Mr B. should have been untruthful in his statements to the European Parliament's Budgetary Control Committee, the likeliest conclusion to be drawn from Mr B.'s statements is that OLAF had indeed not received any such information from MEPs. This interpretation is moreover supported by the fact that the letters to the national prosecutors of 11 February 2004 do not refer to any information provided by MEPs. The Ombudsman notes that OLAF itself has stressed in its opinion on the present complaint that the letters of 11 February 2004 to the national prosecutors set forth *all* the information obtained by OLAF during its internal investigation.

In the light of the above, the Ombudsman considers that OLAF's statement, in its letter of 24 March 2003, that it had received "information from reliable sources, including members of the European Parliament, that a payment may have been made for the documents" appears to have been incorrect.

1.11 On the basis of his inquiry into the present complaint, the Ombudsman concludes that OLAF did indeed, as the complainant alleged, provide incorrect or misleading information in the context of inquiry 1840/2002/GG.

OLAF's detailed opinion

After having received the draft recommendation, and in accordance with Article 3 (6) of the Statute of the European Ombudsman, OLAF sent a detailed opinion on 8 March 2005.

In its detailed opinion, OLAF made the following comments:

As regards the *first* group of statements, the complainant's allegation in complaint 1840/2002/GG had been that "OLAF had acted wrongly by making public, in its press release of 27 March 2002 and in comments to *European Voice*, incriminations of bribery that had to be understood as directed at the complainant and his newspaper". OLAF's statements in its submissions to the Ombudsman of 10 December 2002 and 24 March 2003 had been made in response to this allegation. They had focused on how the statement in the press release could be interpreted, and whether it was true that the incriminations of bribery could only be understood as being directed against the complainant and his newspaper. The fact that OLAF had received information on 22 March 2002 indicating that the complainant had paid the bribe was not relevant to the question of whether OLAF's statement about the press release was misleading. OLAF had not been asked to explain what information it had actually possessed at the time.

As regards the *second* statement, OLAF had not sought to provide misleading or incorrect information to the Ombudsman. Its letter of 22 August 2002 had been based on the interpretation of Article 2 (a) of Regulation 45/2001 applied by OLAF at that time (August 2002). The Court of Justice had not yet pronounced on the interpretation of this Article, and the issue was currently the subject of litigation before the Court. OLAF acknowledged, however, that the Ombudsman's broader reading of the legislation was the more prudent view. It would therefore



follow the Ombudsman's interpretation of this article in the future, unless and until the Court ruled otherwise. Moreover, OLAF would, in the near future, submit a notification to the European Data Protection Supervisor and request a prior check, pursuant to Articles 27 and 46 (j) of the Regulation, concerning its processing of personal data related to the investigation of suspected offences.

As regards the *third* statement, the question that had been put to OLAF by the Ombudsman had been understood as referring to Mr B.'s e-mail of 11 April 2002. OLAF could only reiterate that its statement that "[no] specific journalist or person was implicated for having made such a payment" had been an explanation of the contents of the e-mail. OLAF had had no intention to mislead the Ombudsman.

As regards the *fourth* statement, OLAF's Director-General had appeared before the European Parliament's Budgetary Control Committee in Strasbourg on 11 March 2002 to answer questions about the leak of confidential information. On that occasion, several members of the Committee had indicated to him that they had heard that a payment may have been made for the leaked document. Although these statements had not included concrete details, OLAF's Director-General had nevertheless attributed a certain weight to them because they had been statements of members of Parliament. However, in the light of the hearsay nature of the information, OLAF's Director-General had not prepared a note for the file and thus there had been no indication in the official case file of this information. Also for this reason, it had not been included in the information provided to the national judicial authorities by OLAF.

Mr B. [13] had not begun working at OLAF until 1 November 2002, and first had had responsibility for this matter only when he had been appointed acting adviser for internal investigations on 1 November 2003. Thus, he had not even been at OLAF when its Director-General had received this information. Since the relevant statements had never become part of the file, it was not surprising that Mr B. had had no first-hand knowledge of them. Accordingly, there was nothing contradictory between the statement in the letter of 24 March 2003 and that of Mr B. in his testimony before the European Parliament's Budgetary Control Committee.

OLAF concluded by saying that for the reasons set out above it was unable to accept the Ombudsman's conclusion that it had made misleading statements to the Ombudsman.

The complainant's observations

In his observations, the complainant made the following comments:

OLAF had not produced any new and convincing arguments to call into doubt the Ombudsman's conclusions. Senior OLAF officials had thus knowingly made incorrect statements in order to manipulate the Ombudsman's inquiry in case 1840/2002/GG. In view of the serious nature of the case, a special report should be submitted to the European Parliament.



As regards the *first* set of statements, OLAF itself had clearly admitted, in its note to the Belgian authorities of 11 March 2004, that the reproaches made in its press release of 27 March 2002 and towards *European Voice* had only been directed at himself.

As regards the *second* statement, OLAF repeated its claim that Mr I. had believed that Mr G.'s incriminations against him (the complainant) had not been held by OLAF for the purpose of processing and that the information had not been part of a dossier. However, this was a manifestly incorrect statement. Mr I. himself, in his note of 22 March 2002, had noted that "we continue our investigation" and that the Commission "will presumably want to make an example of the journalist if evidence can be found". As mentioned in OLAF's note to the Belgian authorities, the statements of Mr G. had already been used in OLAF's press release of 27 March 2002. It was unimaginable that Mr I. should have been unaware of this press release. Nor could OLAF's Director-General have been unaware of how the statements of Mr G. had been handled. This was all the more so in view of the fact that Mr G. had formally been heard by OLAF on 9 December 2002, one day before OLAF had sent its opinion on case 1840/2002/GG to the Ombudsman. [14] It was unimaginable that OLAF's Director-General had not checked the state of the procedure before writing to the Ombudsman. OLAF's Director-General had thus manifestly and knowingly misled the Ombudsman by failing to correct the statement made by Mr I. on 22 August 2002.

As regards the *third* statement, OLAF's explanations would mean that its investigation had been based on statements made by its own spokesman. This would be manifestly nonsensical.

As regards the *fourth* statement, OLAF's statements only confirmed the Ombudsman's conclusions. Everything suggested that the alleged statements by members of Parliament had never been made. In view of the importance that OLAF attributed to the rumours passed on by Mr G. it would be inexplicable if OLAF's Director-General had refrained from using the possibility of asking the members of Parliament concerned about the possible sources of the relevant information. OLAF's Director-General had not even explained why he had not informed Mr B. about the alleged statements by members of Parliament. OLAF had been informed in writing on 5 April 2004 by Dr. Gabriele Stauner MEP that it would be asked about the alleged statements by MEPs on the occasion of the meeting of the Budgetary Control Committee on 7 April 2004. It was barely imaginable that in these circumstances Mr B. would not have checked the matter internally before appearing before the Committee. In any event, OLAF's Director-General should at least have mentioned the names of the MEPs concerned so as to lend credibility to his statement. However, he had refrained from doing so.

The Ombudsman's evaluation of OLAF's detailed opinion

The Ombudsman considers that OLAF has in effect refused to accept his draft recommendation in its entirety. It is true that OLAF has pointed out, in relation to the second of the statements referred to in the draft recommendation, that it would follow the Ombudsman's interpretation of Article 2 (a) of Regulation 45/2001 in the future, unless and until the Court ruled otherwise. The



Ombudsman notes, however, that OLAF nevertheless rejected his conclusions regarding this statement as well.

Upon a careful analysis of OLAF's detailed opinion, the Ombudsman takes the view that OLAF has not put forward any substantial and new arguments in so far as the *first three* statements (or groups of statements) discussed in the draft recommendation are concerned. The Ombudsman therefore cannot but confirm the conclusions he has reached with regard to these statements.

As regards the *fourth* statement, the Ombudsman notes that OLAF refers to hearsay information that its Director-General claims to have been given by members of Parliament on the occasion of the meeting of the European Parliament's Budgetary Control Committee in Strasbourg on 11 March 2002. However, the Ombudsman also notes that OLAF's Director-General had abstained from preparing a note for the file on this information, despite the fact that he had attributed "a certain weight" to the relevant statements.

The Ombudsman finds it difficult to understand why OLAF considered it appropriate to refer, in its letter to the Ombudsman of 24 March 2003, to "information from reliable sources, including members of the European Parliament", given that OLAF itself (1) accepts that the alleged statements did not include concrete details but constituted only hearsay evidence, (2) considers that the information was not important enough to merit being recorded in a note for the file and (3) acknowledges that the relevant information was not mentioned in the notes to the national authorities, notwithstanding the fact that OLAF declared that these notes contained *all* the information it had obtained. Furthermore, the Ombudsman remains unconvinced as to how Mr B.'s statements before the European Parliament's Committee on Budgetary Control on 7 April 2004 could be reconciled with OLAF's above-mentioned statement of 24 March 2003. As the complainant has correctly observed, Dr. Gabriele Stauner MEP sent a number of questions to OLAF's Director-General before the said meeting of the Committee on Budgetary Control. Copies of this letter were sent to the members of the Committee and to the European Ombudsman. One of Dr. Stauner's questions concerned the above-mentioned statement made by OLAF in its letter to the Ombudsman of 24 March 2003 (which Dr. Stauner quoted in her letter). Unless it were to be assumed that Mr B. (the person representing OLAF before the Committee) had not been properly briefed or did not have a sufficient knowledge of the file, Mr B.'s statements before the committee can hardly be interpreted otherwise than as saying that OLAF was not aware of any such statements made by members of the European Parliament.

In any event, and as the complainant correctly observes, OLAF has still not made any effort to substantiate its claim by giving the names of the members of Parliament that it claims provided the relevant information.

In these circumstances, the Ombudsman takes the view that his conclusions as regards the *fourth* statement remain valid as well.

The Ombudsman's recommendation



In view of the above, the Ombudsman re-states his draft recommendation as a recommendation to OLAF as follows:

OLAF should acknowledge that it made incorrect and misleading statements in its submissions to the Ombudsman in the context of the latter's inquiry into complaint 1840/2002/GG.

The European Parliament could consider adopting the recommendation as a resolution.

Strasbourg, 12 Mai 2005

P. Nikiforos DIAMANDOUROS

[1] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

[2] 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 No. L 136 p. 1.

[3] This is the wording of the German version of the press release. The English text of this press release which is available on OLAF's website contains slightly different wording: "According to information received by the Office, a journalist has received a number of documents relating to the so-called 'Van Buitenen affair'. It is not excluded that payment may have been made to somebody within OLAF (or possibly another EU institution) for these documents."

[4] The German prosecutor also initiated an inquiry but did not order a search of the complainant's house or office.

[5] Not identical with the above-mentioned spokesman of OLAF.

[6] Copies of these notes were also submitted to the Ombudsman by OLAF during the inquiry described below.

[7] The English text of this press release which is available on OLAF's website contains slightly different wording: "According to information received by the Office, a journalist has received a number of documents relating to the so-called 'Van Buitenen affair'. It is not excluded that



payment may have been made to somebody within OLAF (or possibly another EU institution) for these documents."

[8] The German prosecutor also initiated an inquiry but did not order a search of the complainant's house or office.

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

[10] OJ 2001 L 8, p. 1.

[11] Not identical with the above-mentioned spokesman of OLAF.

[12] His name appears on the report that was forwarded to the Belgian prosecutor on 11 February 2004.

[13] Not identical with the above-mentioned spokesman of OLAF.

[14] A copy of the minutes of this hearing was provided to the Ombudsman by the complainant.