

## Decision of the European Ombudsman on internal rules concerning disclosure in the public interest ('whistleblowing')

Correspondence - 20/02/2015

**Case** OI/1/2014/PMC - **Opened on** 24/07/2014 - **Decision on** 26/02/2015 - **Institutions concerned** European Parliament ( No further inquiries justified ) | Council of the European Union ( No further inquiries justified ) | European Commission | Court of Justice of the European Union | European Court of Auditors | European Data Protection Supervisor ( No further inquiries justified ) | European Economic and Social Committee ( No further inquiries justified ) | European Committee of the Regions | European External Action Service ( No further inquiries justified ) |

[1]

The European Ombudsman has adopted internal rules on whistleblowing by members of her staff concerning serious misconduct or wrongdoing affecting the Ombudsman's Office.

These rules are intended to enable whistleblowers to fulfil their duty to speak up if they become aware of serious misconduct or wrongdoing within the Ombudsman's Office, thus serving the public interest, by fostering integrity, transparency, accountability, and ultimately legitimacy in and of the Ombudsman's Office.

The rules are based on the following considerations:

(a) Integrity is an essential principle of the European civil service. The public expects members of staff of the EU institutions, bodies, offices and agencies to behave with the highest degree of integrity. Therefore, it is not only desirable, but essential that staff should report any reasonable suspicion of serious misconduct or wrongdoing within the Ombudsman's Office.

(b) Whistleblowers play an essential role in helping the EU institutions, bodies, offices and agencies, including the Ombudsman, to deter breaches of the principle of integrity as well as to detect any breaches that may occur.

(c) Deciding whether it is necessary to blow the whistle can be a difficult issue. Members of the Ombudsman's staff should therefore know that the Ombudsman welcomes whistleblowing and encourages whistleblowers to step forward in cases where they are uncertain whether they



should report possibly serious misconduct or wrongdoing affecting the Ombudsman's Office.

(d) Whistleblowers should disclose their identity when reporting information suggesting the existence of serious misconduct or wrongdoing in the Ombudsman's Office. However, the Ombudsman will also examine any such reports that are submitted anonymously though such cases are not covered by the present rules.

(e) The Staff Regulations provide for whistleblowers to be protected against negative action by the institution for which they work [2] . Whistleblowers may suffer in other ways, however; for example, by retaliation from colleagues. Not only is this unfair to the whistleblower, it may also discourage whistleblowing and thereby weaken it as a mechanism for ensuring integrity, accountability and transparency.

(f) Confidential advice and support should be available to guide and support potential whistleblowers.

(g) If the whistleblower so desires, his or her identity must, to the greatest extent possible, remain confidential.

(h) Whistleblowers need the assurance that, in accordance with principles of good administration, their reporting will lead to a proper investigation and that they will be informed of the outcome.

(i) The rights of any person implicated by a whistleblower's report must be fully respected.

(j) The above considerations also apply, in principle, to whistleblowers who are not members of the Ombudsman's staff, such as external contractors, sub-contractors and their employees. Within the limits of their legal and operational capacity to do so, the EU institutions, bodies, offices and agencies should thus seek to safeguard also the rights and interests of such external whistleblowers.

(k) The Staff Regulations require members of staff of the Ombudsman's Office, who are aware of serious misconduct or wrongdoing in an EU institution other than the Ombudsman's Office, to report that matter. If the Ombudsman receives such a report from members of her staff, this report will be forwarded to OLAF as rapidly as possible. Reports of this kind are not, however, covered by these present rules.

## **The Ombudsman has adopted the following rules:**

### **Article 1 - Scope**

These rules apply to anyone working in the Ombudsman's Office, irrespective of their administrative position or status (including seconded national officials and trainees).



These rules do not apply to persons reporting to the Ombudsman [3] serious misconduct or wrongdoing affecting another EU institution, body, office or agency [4] .

## Article 2 - Definitions

For the purpose of these rules, a *whistleblower* is a person who, in good faith, reports information suggesting the existence of serious misconduct or wrongdoing in the Ombudsman's Office.

*Serious misconduct or wrongdoing* includes, for example, fraud, corruption, theft, and other criminal offences, serious violations of rules on public procurement and serious violations of professional obligations.

Disclosure is made *in good faith* if the whistleblower honestly and reasonably believes that the information disclosed, and any allegation contained in it, is substantially true. Good faith is presumed unless and until proven otherwise.

*Manager* means a Head of Unit or Director or the Secretary-General of the Ombudsman's Office.

## Article 3 - Procedure

In accordance with Article 22a of the Staff Regulations, members of the Ombudsman's staff are obliged to report suspicions of serious misconduct or wrongdoing affecting the Ombudsman's Office. Such reports should be made **in writing** and may be made either internally within the Ombudsman's Office or externally to OLAF. Any such report, whether made internally or to OLAF, should contain all the available facts and/or evidence in order to facilitate a full investigation of the matter.

### Making a report internally

A report of serious misconduct or wrongdoing affecting the Ombudsman's Office should be addressed, in writing, to a manager, who (unless the report has been addressed directly to the Secretary-General) shall pass it on promptly to the Secretary-General.

A manager receiving such a report is required, in accordance with Article 22a of the Staff Regulations, to transmit to OLAF without delay "any evidence" of which he or she is aware from which the existence of serious misconduct or wrongdoing affecting the Ombudsman's Office "may be presumed". Responsibility for ensuring that this requirement is met shall rest with the Secretary-General.



The report submitted by the whistleblower will be examined as rapidly and as thoroughly as possible by the Ombudsman's Office. Where this is necessary, an administrative inquiry will be opened. This inquiry will be conducted in accordance with the rules set out in the General Implementing Provisions concerning disciplinary and administrative inquiries that were adopted by the Ombudsman on 4 November 2004.

The rights of persons implicated by a whistleblower's report are set out in Article 14 below. The information rights of a whistleblower in relation to the action taken or being taken in response to his or her report are set out in Article 6 below.

OLAF shall be informed of the outcome of any such inquiry conducted by the Ombudsman.

Where a whistleblower's report implicates the Secretary General, the whistleblower's report shall be submitted to or passed on to the Ombudsman. The timing and form of the investigation to be undertaken shall be decided upon by the Ombudsman following the provisions set out above, with the Ombudsman taking the role that these provisions otherwise assign to the Secretary-General.

## **Making a report to OLAF**

Ombudsman staff not wishing to make a report internally within the Ombudsman's Office may, as an alternative, satisfy the obligation to report misconduct or wrongdoing by making a report to OLAF [5] . Where a report is made to OLAF, the procedures it follows for dealing with the report will be a matter for OLAF to decide.

## **Article 4 - Option for further reporting**

In accordance with Article 22b of the Staff Regulations, a whistleblower may also disclose information to the President of the Commission, the President of the Court of Auditors, the President of the Council or the President of the European Parliament.

## **Rights of whistleblowers**

### **Article 5 - Guidance and support**

Potential whistleblowers may approach a designated staff member to seek guidance on whether concerns they have require to be reported to the Ombudsman's Office in accordance with these rules and Article 22a of the Staff Regulations.

The Ombudsman acknowledges the important role played by the Staff Committee and may request that it propose one of its members, or another staff member of its choice, to fulfil this



role. Where the Staff Committee is not in a position to comply with such a request, the Ombudsman shall designate such a staff member.

Potential whistleblowers may also approach a manager for guidance and support. They may further consider contacting OLAF, which provides anonymous guidance and support online [6] . To the maximum extent permitted by the Staff Regulations, guidance and support to potential whistleblowers shall be provided in confidence.

Where a report of serious misconduct or wrongdoing has been made, the whistleblower may request guidance and support, which shall be provided to the maximum extent possible in the circumstances.

## Article 6 - Information guarantees

A whistleblower in the Office of the Ombudsman has the following information rights:

- (i) to be provided with an acknowledgement of receipt of his/her report as rapidly as possible and, in any event, within five working days;
- (ii) to be informed, no later than 60 days following receipt of the report, if it is proposed to investigate the matters raised in the report and, if so, what arrangements are being made for that investigation as well as the expected timescale of the investigation;
- (iii) to be told, as soon as possible and, in any event, no later than 60 days following receipt of the report, whether a report has been sent to OLAF;
- (iv) to be kept informed, to the greatest extent possible, of progress in any investigation being undertaken, provided this is consistent with the rights of any affected third party and with the protection of the investigation process itself;
- (v) to be informed, as rapidly as possible, and within a maximum of 30 days of its conclusion, of the outcome of the investigation; depending on the circumstances, and having regard to the requirement to protect the position of any person who may as a result of the investigation be facing disciplinary or other proceedings, there may be some restriction on the extent to which the whistleblower is informed of the outcome as regards that person.

## Article 7 - Protection of whistleblowers

The Ombudsman shall, to the greatest extent possible, protect a whistleblower against any acts of retaliation or reprisal, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. The same protection is granted to members of staff who have supported a whistleblower.



If a whistleblower decides to send his or her report to one of the persons mentioned in Article 22b of the Staff Regulations (see Article 4 above), this protection is granted if the whistleblower has previously disclosed the same information to OLAF or the Ombudsman and has allowed OLAF or the Ombudsman the period of time that OLAF or the Ombudsman consider to be necessary for taking appropriate action, unless that period is unreasonable, having regard to the circumstances of the case.

Where an individual who was involved in serious misconduct or wrongdoing subsequently decides to blow the whistle, the fact of having reported the matter shall be taken into account, in his or her favour, in any disciplinary procedure.

## Article 8 - Confidentiality and anonymity

The Ombudsman's Office shall, to the greatest extent possible, seek to protect the identity of a whistleblower and the confidentiality of the report received, as well as the identity of persons implicated.

The name of a whistleblower shall not be disclosed to any person potentially implicated in the reported misconduct or to any other person, except where the whistleblower has given express permission for his or her name to be disclosed, or where this is absolutely necessary to ensure procedural fairness in disciplinary or other proceedings. This assurance does not apply where a member of staff knowingly reports false information.

Where the Ombudsman's Office refers the matter to OLAF, the report received from the whistleblower shall be anonymised as regards the latter's name and the identity of the whistleblower shall be protected, to the greatest extent possible.

Whistleblowers and/or persons implicated who consider that the Ombudsman's Office has not adequately protected their confidentiality and their related personal data may complain to the European Data Protection Supervisor.

## Article 9 - Mobility

Where, as a protection against any possible retaliation, a whistleblower wishes to be moved to another unit within the Office (including moving from Strasbourg to Brussels or vice versa), the Ombudsman will endeavour to facilitate this request to the greatest extent possible.

Where, for the same reasons, a whistleblower seeks a transfer to another EU institution, body, office or agency, the Ombudsman will support and assist with this request as much as possible.

## Article 10 - Appraisal and promotion



The Ombudsman's Office shall ensure that a member of staff who has made a report under these rules shall suffer no adverse consequences in relation to staff appraisal reports or promotion. To the extent that this may be possible, the fact of having made a report under these rules will be looked upon favourably for the purposes of appraisal reports or promotion.

Whistleblowing shall be mentioned in the whistleblower's staff report only where he or she explicitly requests or agrees that such a reference should be included.

## Article 11 - Penalties for persons taking retaliatory action

Any form of retaliation against a whistleblower is prohibited.

A whistleblower, who believes that an action affecting him or her adversely was taken at the workplace in retaliation for having made a report under these rules, should notify the Secretary-General or the Ombudsman, who will investigate the matter. It shall be up to the person who has taken the action in question to establish that it was motivated by reasons other than the reporting.

If such retaliation is found to have occurred, the Ombudsman shall take appropriate action, including, if necessary, disciplinary measures against any member of staff concerned.

## Article 12 - Remedies

Members of the Ombudsman's staff who have made a report under these rules and who consider that they have not received adequate support and protection, or have been affected adversely by the making of a report, may request assistance (including compensation) in accordance with Article 24 of the Staff Regulations. A reasoned decision on an Article 24 request shall be provided to the whistleblower as rapidly as possible, and in any event no later than two months after he or she submitted the request. Where the staff member regards the decision as unsatisfactory, he or she may make a complaint, within three months, under Article 90(2) of the Staff Regulations.

If the whistleblower so requests, he or she shall have the opportunity to present the complaint orally and may be accompanied at a meeting for this purpose by a member of the Staff Committee and/or any other person. In dealing with Article 90(2) complaints, the Ombudsman's Office may consult or involve a person or persons from outside the Ombudsman's Office in order to ensure that the procedure is as fair and equitable as possible.

The decision on the complaint shall be given to the whistleblower no later than two months after he or she has submitted the complaint.

## Article 13 - Abuse of Process



If a member of staff knowingly reports false information, he or she may be subject to disciplinary measures.

The burden of proof in this respect shall lie with the Ombudsman's Office.

## **Other provisions**

### **Article 14 - Rights of persons implicated**

Where the Ombudsman decides that no administrative inquiry is justified, staff members implicated in reports of serious misconduct or wrongdoing shall be informed in good time of the allegations made against them and of any relevant information provided by the whistleblower.

Where the Ombudsman decides to initiate an administrative inquiry on foot of a whistleblower report, staff members implicated in the report shall benefit from the procedural guarantees laid down in Article 2 of the General Implementing Provisions concerning disciplinary and administrative inquiries that were adopted by the Ombudsman on 4 November 2004 (set out in Annex 1 to these rules).

Following the conclusion of the administrative inquiry, the staff members concerned shall be informed as rapidly as possible as to whether or not it is proposed to take any action against them.

The Ombudsman's Office shall support those members of staff who have suffered as a consequence of reports made maliciously, based on information known to be false or incorrect. Similarly, staff members who have suffered as a consequence of reports which, while not made maliciously, are found not to be correct, shall be supported.

### **Article 15 - Training and awareness raising**

These rules and the relevant procedures shall be drawn to the attention of persons when they join the Ombudsman's staff and not less than once a year thereafter.

Training sessions shall be regularly organised with the aim of ensuring that all members of the Ombudsman's staff understand that readiness to blow the whistle on serious misconduct or wrongdoing plays an essential role in maintaining a culture of integrity, accountability and transparency in the Office.

During these training sessions, information about the Ombudsman's experience as regards whistleblowing shall be provided, if applicable.





## Article 16 - Reporting

The Ombudsman's public annual activity report submitted to the budgetary authority shall include a section on whistleblowing, and provide, in particular, general information about the number and types of concerns raised, as well as about the conclusions and follow-up actions taken in relation thereto.

## Article 17 - External whistleblowers

Every person who enters into a contract with the Ombudsman's Office shall be informed (i) that it is possible to report serious misconduct or wrongdoing affecting the Ombudsman's Office either to the Ombudsman or to OLAF and (ii) that making use of this possibility will not result in any retaliation, reprisal or other negative action on the part of the Ombudsman's Office, provided that he, she or it reasonably believes the information reported to be true.

## Article 18 - Data protection

Any processing of personal data in the application of these rules is subject to Regulation (EC) N° 45/2001 [7] and shall be carried out in accordance with that Regulation and with the EDPS' opinion on this matter. [8]

In cases where it is necessary to postpone informing the person concerned about the opening of an administrative inquiry into issues raised by a whistleblower so as not to jeopardise the conduct of this inquiry, the reasons for doing so will be explained in a note to be added to the file. If it is necessary, for the same reason, to limit the right of the person concerned to access or rectify his or her personal data, the reasons for this limitation will be explained in the decision on such a request.

In cases where the information provided by a whistleblower contains personal data that are clearly not needed for examining the issues raised in the report, this data will be erased from the report, if necessary after consulting the whistleblower, to the extent that this is possible without resulting in the substantive examination being unduly delayed.

## Article 19 - Review

These rules shall be reviewed within one year of their adoption, and every three years thereafter, with a view to deciding whether they need to be supplemented or revised. The results of each review shall be made public.

Before deciding on any changes to these rules, the Ombudsman shall consult the Staff Committee.



## Article 20 - Entry into force

The rules shall enter into force on the day of their adoption.

Emily O'Reilly

Strasbourg, 20/02/2015

### **Annex 1**

The following procedural rules, set out in the General Implementing Provisions concerning disciplinary and administrative inquiries that were adopted by the Ombudsman on 4 November 2004, shall apply in the investigation of a whistleblower report:

- The staff members concerned are informed to the extent that this does not harm the conduct of the administrative inquiry;
- The investigator(s) in charge of the case shall carry out the inquiry independently, thoroughly and as rapidly as possible. When carrying out this inquiry, the investigator(s) neither ask(s) for nor receive(s) instructions.
- No conclusions can be drawn at the end of the inquiry as regards any member of the Ombudsman's staff who is identified by name unless this person has been given the opportunity by the investigator(s) to express his or her views on all the relevant facts concerning himself or herself.
- The person concerned has the right to be accompanied by a person of his or her choice.
- The investigator(s) prepare(s) a report setting out all the facts of the case. The report states whether the applicable rules and procedures have been respected, lists any aggravating or extenuating circumstances, states the extent of the damage suffered by the Ombudsman's Office and makes a recommendation as to what action the Ombudsman should take.
- The Ombudsman informs the person concerned that the inquiry has been completed and forwards to him or her the conclusions of the investigator(s). Upon request, and subject to the protection of the legitimate interests of third parties, all the documents that are directly linked to any allegations that are made against the person concerned are communicated to that person.

[1] These rules are based on the Staff Regulations of Officials of the European Union, in particular Articles 22(a), (b) and (c), as well as the Conditions of Employment of Other Servants of the European Union (Regulation (EU, Euratom) No 1023/2013 of the European Parliament



and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ 2013 L 287, p. 15). They also take into account the opinion of the European Data Protection Supervisor on this issue. See EDPS Opinion on a notification for Prior Checking regarding the European Ombudsman's Whistleblowing Procedure, Brussels, 4 December 2014 (Case 2014-0828).

[2] See Article 22(a) and (b) of the Staff Regulations.

[3] In accordance with Article 22(b) of the Staff Regulations.

[4] Such reports are normally dealt with as complaints in line with the Ombudsman's complaint procedures.

[5] For more information, visit <https://fns.olaf.europa.eu/>

[6] See footnote 5 above.

[7] 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 (OJ 2001 L 8, p. 1)..

[8] See footnote 1 above.