



## Decision of the European Ombudsman closing the inquiry into complaint 362/2011/KM against the European Commission

Decision

**Case 362/2011/KM - Opened on 11/03/2011 - Decision on 22/12/2015 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned a request to the Commission, from one of its former officials, for detailed information relating to possible disciplinary proceedings against another former Commission official.

The Commission replied that it could not divulge the requested information. It also sought to reassure the complainant that it was dealing with the matter of the former official by taking all necessary measures.

The Ombudsman's inquiry into the issue included inspections of the Commission's files relating to the former official. The Ombudsman found that, while the institutions are required to maintain a high level of transparency, in the present case, the Commission was entitled to take the view it could not reveal details of its actions relating to the former official without harming the fair conduct of proceedings in general as well as the privacy of the official concerned.

The case was thus closed with a finding of no maladministration.

The background

1. The complainant is a former Commission official. In January 2010, he contacted the European Anti-Fraud Office (OLAF) to ask whether the Commission had opened or would open disciplinary proceedings against a high-ranking Commission official who, according to an article in the *Sunday Times*, met journalists posing as Chinese businessmen and passed confidential information to them. [1] In February 2010, OLAF informed the complainant that it had opened an investigation. It added that the question of whether disciplinary proceedings would be opened would depend on the outcome of its investigations.
2. On 28 October 2010, the complainant wrote a letter to the President of the Commission, asking him whether he was going to open disciplinary proceedings in the matter, or if not, to explain the reasons for this decision.
3. In its reply of 30 November 2010, the Commission stated that " *the responsible services had taken all the necessary measures to deal with the situation* ". However, it could not give the



complainant any more information because this was " *a confidential personal matter that cannot be divulged to third persons* ".

4. The complainant was not satisfied with this reply. He thus turned to the Ombudsman. [2] Allegation that the Commission did not properly reply to the complainant and claim that it should, if it did not intend to open disciplinary proceedings, explain its reasons

## **The Ombudsman's solution proposal**

5. After examining the complaint, inspecting the Commission's file, obtaining the opinion of the Commission and the observations of the complainant, on 28 June 2013 the then Ombudsman made the following proposal for a solution:

"The Commission should reconsider its initial refusal to provide any kind of information in reply to the complainant's question whether a disciplinary action had been taken against the official".

6. In his analysis, the then Ombudsman found that the Commission was legally correct when it stated that it could not provide the complainant with any information as to whether it had commenced disciplinary proceedings against the former official (who had, at this stage, retired), unless the complainant could establish that the transfer to him of the personal data of the former official was necessary. [3] However, the then Ombudsman considered that the particular circumstances of this case called for a more nuanced approach. Firstly, ample information on the case, including the name of the former official, was already publicly available, from the *The Sunday Times* article and from two court cases that the former official had brought using his full name. Secondly, the Ombudsman noted that the Civil Service Tribunal had stated that, while the administration had a duty to have regard to the welfare of its officials, and thus could not give more information on investigations than necessary, an increasing " *culture of accountability* " meant that " *officials and other servants who hold posts of responsibility within an administration such as the Commission must take into account the possible existence of a justified need to communicate a degree of information to the public.* " [4] Thirdly, the Ombudsman considered that if the Commission had actually concluded disciplinary investigations in the matter, it might now be able to provide information.

## **The Commission's response to the proposal for a solution**

7. The Commission maintained that it could not provide information on whether disciplinary action had been taken against the former official. It said that the information which the complainant had requested was not already in the public domain, nor could it be " *readily discovered* ". It noted that both press reports and the Civil Service Tribunal judgments, in cases F-80/08 or F75/09 relating to the official concerned, referred to the alleged facts underlying those court cases, the OLAF investigation, and the pre-disciplinary measures taken by the Commission. However, the publicly available information did not disclose information on any possible disciplinary follow-up by the Commission.



8. More generally, the Commission insisted that disclosure of information about possible disciplinary cases could be prejudicial to the fair conduct of any proceedings, if they were opened. It could also be prejudicial to the right to a fair trial, should the alleged facts be in issue in any criminal proceedings. Not compromising the proper administration of justice clearly takes precedence, it insisted, over any possible interest of the complainant, even if he had demonstrated one, which (according to the Commission) was not the case.

9. The Commission also stated that disclosing this information to the complainant might infringe the official's right to privacy, in particular if it was inappropriately handled or further disclosed by the complainant. The complainant has not satisfied the "need-to-know" test required by data protection rules, that is, he had not shown that he, specifically, had a need to receive this information. It added that he had not demonstrated why any possible need he might have should override the Commission's obligation to protect the privacy of the former official, as provided for in the Charter of Fundamental Rights of the European Union and in Regulation 45/2001 on the protection of personal data.

10. The Commission concluded that there was no justification for disclosing the information concerned to the complainant. It therefore stated that it could not accept the Ombudsman's proposal for a solution. It stated that the most it could do was to confirm that it did react when the allegations against the former official were reported by the newspaper: it suspended the official, given the very serious nature of the allegations. This suspension was subsequently annulled by the Civil Service Tribunal on procedural grounds. The official in question had retired in the meantime and does not work anymore for the Commission. This information is in the public domain. With regard to further details of this case, the Commission stated that it cannot comment for the reasons mentioned above.

11. The Commission said that it can, in general terms, assure the Ombudsman that it deals with all cases where rules and obligations are breached by a staff member and takes appropriate action based on established facts and the law. It said that, where disciplinary action is justified, the fact that an official has retired does not prevent a European institution from pursuing the disciplinary action.

#### **The complainant's response**

12. In his response to the Commission's opinion, the complainant restated his view that the Commission was protecting a top Commission official by means of censorship and by refusing to open disciplinary proceedings against the former official who had committed a serious professional irregularity damaging to the reputation of the Commission. The complainant expressed the view that the Commission will never co-operate with the Ombudsman on cases that reveal serious maladministration and even corruption and other criminal behaviours. He disagreed with the view that the former official's right to privacy prevents the Commission from explaining the reasoning behind its decisions. In its decision to suspend the former official, the Commission itself characterised that official's acts " *as a serious professional irregularity* ". The complainant maintained that the facts at issue were no longer mere allegations, but had already been established in court.

#### **The Ombudsman's further assessment The second inspection**

13. In July 2015, the Ombudsman's services undertook a second inspection of the



Commission's file in order to establish what steps, if any, the Commission might have taken in the meantime. In addition this inspection was intended to check whether, with the passage of time, the obstacles to disclosure identified by the Commission continued to apply.

**14.** As a result of the information obtained during the inspection, the Ombudsman was persuaded by the position being taken by the Commission. The Ombudsman accepted the Commission's view that it was not possible at the point, in October 2013, when it replied to the solution proposal, for the Commission to reveal to the complainant any details of the steps taken by the Commission without harming the interests referred to in paragraph 8 above. Further, following this inspection, and on the basis of its handling of this particular case, the Ombudsman accepted that the Commission appeared to be justified in making the statement that "*[i]n general terms, the Commission can assure the Ombudsman that it deals with all cases where rules and obligations are breached by a staff member and draws the appropriate consequences based on established facts and the law. In case disciplinary action is justified, retirement does not prevent a European institution from pursuing it*"

**15.** A report on the inspection was sent to the complainant with an invitation to submit observations on it.

**16.** In his observations on that report, the complainant took the view that the inspection report did not "*provide any information*" on the steps taken by the Commission, nor "*reveal... a single fact*" which would allow him to understand the conclusions the Ombudsman had drawn from the inspection. He doubted that the Ombudsman's staff had examined the Commission's documents sufficiently carefully. He also accused the Ombudsman and Ombudsman staff of not being impartial.

#### **The Ombudsman's analysis**

**17.** It is important for the institutions of the EU to conduct their business as openly as possible and provide citizens with as much information as possible regarding their activities. However, this general principle of transparency is not without certain limits.

**18.** In this case, the Ombudsman had earlier been of the view that "*most of the relevant facts*" in the matter were already in the public domain. However, it has emerged from the second inspection of the Commission's files that certain important relevant facts are not in the public domain already. The nature of this information is such that the Ombudsman is led to conclude that the Commission cannot, at the present time, disclose this information. The Ombudsman also concludes that providing any detailed information as to the reasons for the non-disclosure of this information would not be possible without revealing the core nature of the information.

**19.** On this point, the Ombudsman is guided by the case law of the European Courts [5]. While there is a general requirement that EU bodies should explain their actions and decisions in a clear and unequivocal fashion, there can be individual instances in which the extent to which an explanation can be given is limited. This type of scenario arises also, for example, in the case of requests for documents made under Regulation No 1049/2001. In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its



disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception.

**20.** The Ombudsman understands that she is prevented, by law, from giving a fuller explanation of why she is now satisfied that the Commission is justified in taking the stance it has taken in this case. Under Article 4 (1) of the Ombudsman's Statute, the Ombudsman and her staff are, like all EU staff, bound by the duty of confidentiality now reflected in Article 339 of the Treaty on the Functioning of the European Union **[6]** . Accordingly, the Ombudsman must not divulge information or documents obtained in the course of Ombudsman inquiries, in particular where this information is classified or "**any information which could harm the person lodging the complaint or any other person involved...**".

**21.** It is a feature of the Ombudsman institution in general that the Ombudsman has privileged access to information and documents necessary for the conduct of an Ombudsman inquiry. In most instances it is possible for the Ombudsman, in publishing an inquiry report or decision, to convey at least the substance of what the Ombudsman has learned from the information or documents provided. In some few cases, as with the present inquiry, it is not possible for the Ombudsman to disclose in any detail what he or she has learned from the documents or information provided. In these latter cases the complainant, and the public generally, must trust in the integrity and independence of the Ombudsman. In the case of the present inquiry, the complainant has expressed a lack of trust in the Ombudsman. This is regrettable but cannot justify any departure by the Ombudsman from the legal obligations by which she is bound.

**22.** To conclude, the Ombudsman considers that the Commission was correct when it stated that it cannot reveal further information to the complainant. Despite the passage of time since the complaint was first received in 2011, the Ombudsman believes that the Commission is not even now in a position to disclose the kind of information sought by the complainant. She therefore closes this case with a finding of no maladministration.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**There has been no maladministration.**

The complainant and the Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 22/12/2015

[1] The underlying facts are set out in detail in the Tribunal's decision Case F-80/08 *Wenig v*



Commission (ECR – Staff Cases 2009 I-A-1-00479; II-A-1-02609, paragraphs 11 to 24). The Tribunal, on procedural grounds, annulled the Commission's decision to suspend the official.

[2] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal available at:  
<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/61721/html.bookmark> .

[3] Case F-30/08, *Nanopoulos v Commission* , paragraph 171.

[4] F-23/05 Jean-Louis Giraudy v Commission [2007] FP-I-A-1 p. 121; FP-II-A-1 p. 657, paragraphs 161 to 165.

[5] Joint Cases T-355/04 and T-446/04 Co-Frutta v Commission [2010] ECR II p. 1, paragraphs 99-101 .

[6] The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.