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Content

Submission to the European Ombudsman on the Ombudsman's draft internal rules on whistleblowing

Introduction

Thank you for the opportunity to provide comments to the Ombudsman regarding the draft internal rules on whistleblowing.

Blueprint for Free Speech (**Blueprint**) is an Australian-based, internationally focused, not-for-profit concentrating on research into 'freedoms' law. Our areas of research include public interest disclosure (whistleblowing), freedom of speech, defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of 30 countries' whistleblowing laws, protections and gaps.

Blueprint recommends the following revisions, and offers the following questions and comments (**the relevant Articles have been replicated here, with the suggested amendments underlined with notes in tracked changes for your reference**):

Article 1 - Scope

The rules apply to anyone working in or for the Ombudsman's office, irrespective of their administrative position or status, including employees, seconded national officials, trainees, contractors, consultants, and others who are subject to management oversight.

Article 2 - Definitions

For the purpose of these rules, a *whistleblower* is a person who in good faith, reports information facts which he or she honestly and reasonably believes to be true and suggests the existence of serious misconduct or wrongdoing in the Ombudsman's Office.

Serious misconduct or wrongdoing includes fraud, corruption, theft and other criminal offences, serious violation of rules on public procurement, and serious violation of professional and legal obligations, abuse of authority, unauthorised use of public funds or property, gross waste or mismanagement, damage to public health or the environment, conflicts conflict of interest, wrongdoing related to the handling of cases and disclosures reported to the Ombudsman's Office, non-compliance with Article 22a of Staff Regulations and other regulations or policies related to whistleblowing, and acts to cover up of any of these.

Article 3 - Procedure

In accordance with Article 22a of the Staff Regulations, members of the Ombudsman's staff have the obligation to report, in writing, suspicions of serious misconduct.

Such reports may be made to a manager, to the Ombudsman, or to a third party such as the media or a member of parliament (when the whistleblower considers it necessary in all of the circumstances to ensure investigation of the wrongdoing).

Article 22a of the Staff Regulations also provides for the possibility to report to the European Anti-Fraud Office (OLAF).

Article 22b of the Staff Regulations provides for the additional possibility to report to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, if certain conditions are met.

Article 4 - Guidance and support

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

Comment [M1]: May request guidance and support" from whom?

Article 5 - Information guarantees

(iv) to be informed of any major steps taken in the course of any internal investigation based on the whistleblower's report, including the result of this investigation and any referral to OLAF. This information shall be provided within 30 working days of the whistleblower's disclosure.

Article 6 - Protection of whistleblowers

The Ombudsman shall protect a whistleblower against any acts of retaliation or reprisal.

[Blueprint comment: We believe that this Article needs further clarification – i.e. how will the Ombudsman protect a whistleblower against acts of retaliation and reprisal? Perhaps it should be drafted to ensure that the Ombudsman is the main point of contact for the whistleblower and the Ombudsman will assist in liaising with human resources, the police, witness protection of whatever other services might be required in the particular case. In other words, the guardian role that the Ombudsman will adopt should have greater clarification.]

Article 7 - Confidentiality and Anonymity

The Ombudsman shall protect the identity of a whistleblower and the confidentiality of the report received to the greatest extent possible.

Comment [M2]: Are there any provisions to accept and review anonymous disclosures? There should be the same protections for people who report anonymously who are then later identified or exposed without their consent.

These protections must include:

Comment [M3]: Protect from whom?

(a) An anonymous service must be created by the Ombudsman to allow whistleblowers to reveal wrongdoing without revealing themselves. If a Whistleblower chooses to disclose anonymously, but is later revealed, they should be afforded the same protections as a whistleblower who did not whistleblow anonymously.

Comment [M4]: Who determines the "greatest extent possible"? This should be clarified.

(b) The name of a whistleblower shall not be disclosed to any person unless:
a. The whistleblower has given express permission for their name to be disclosed;
b. The release of the whistleblower's name is absolutely necessary (in other words, the only way) to secure procedural fairness in a disciplinary or criminal proceeding about the wrongdoing of which the whistleblower has revealed;

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(a)(c) In either case above at (a), necessary precautions and protections shall be put in place by the Ombudsman to ensure that no further retaliation or harm can occur to the whistleblower as a result of their identification.

(b)(d) Whistleblowers who consider that the Ombudsman has not adequately protected their confidentiality and their related personal data may complain to the European Data Protection Supervisor.

Article 11 - Remedies

An express decision on whether or not a whistleblower has qualified for remedies (a determination of whether they have suffered retribution or reprisal), including reasons, shall be given to the whistleblower as rapidly as possible and in any event no later than two months after he or she submitted the request.

If the whistleblower so requests, the Ombudsman shall offer the opportunity to present the complaint orally. The whistleblower has the right to be accompanied by a member of the Staff Committee and/or any other person at a meeting for this purpose.

Unless a longer period is justified in the circumstances, the Ombudsman's express decision on the complaint shall be given to the whistleblower no later than two months after he or she submitted the complaint.

[Blueprint comment: the decision of the Ombudsman should be capable of review. Blueprint recommends that a suitable body is considered for the task of reviewing any decision, and that this review process should be written into this Remedies section.]

Article 13 -

A malicious or frivolous report does not constitute whistleblowing and may lead to disciplinary measures particularly if it is definitively and independently shown that the whistleblower made the report knowing it to be false-accusations are made.

Article 15 - Reporting

The annual activity report to the budgetary authority shall include a section on whistleblowing by members of the Ombudsman's staff. It shall also give details of the activities mentioned under Article 14 above. The annual activity report will be publically available.

Article 16 - External whistleblowers

In the context of these rules, any person who enters into a contract with the Ombudsman's Office has the same rights and remedies as employees of the Office. They shall be informed (i) that it is possible to raise suspicions of suspected serious irregularities either with the Ombudsman or with OLAF and (ii) that making use of this possibility in good faith will not result in any retaliation, reprisal or other negative action on the part of the Ombudsman's Office.

[Blueprint comment: if the scope of the definition of a 'whistleblower' is extend above to include 'external whistleblowers' then this section may be deleted.]

Comment [M5]: How can the European Data Protection Supervisor remedy the situation? Are there penalties for not adequately protecting the confidentiality of a whistleblower?

Comment [M6]: This section should be more clear. Decisions about what specifically? Remedies for what specifically?

Comment [M7]: A decision on what specifically – i.e. on whether the whistleblower was retaliated against? Who will make this decision? What does "express" mean here?

Comment [M8]: This is not clear. Specifically, who has the opportunity to present what complaint to whom?

Comment [M9]: Is there a mechanism – internal or external – for the whistleblower to appeal the decision?

Comment [M10]: Will this section be made available to the public? Ideally it should be.

Article 18 - Review

These rules shall be reviewed within one year of their adoption (the **Initial Review**), and every three years thereafter (each a **Periodic Review**), with a view to deciding whether they need to be supplemented or revised. Both the consultation and the results of each Initial review and Periodic review will be made accessible and available to the public.

Comment [M11]: This should be a public process.

Comment [M12]: Following this initial review, there should be public reviews every three years at a minimum.

Blueprint for Free Speech

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