EUROPEAN DATA PROTECTION SUPERVISOR

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Brussels, 30 July 2010
PH/MVPA/sk D(2010)1227 **C 2010-0458**

Dear Mr Diamandouros,

By letter of 31 May 2010, you consulted me, pursuant to Part C and D of our Memorandum of Understanding, signed on 30 November 2006, on an issue raised in a complaint lodged against OLAF by (...) ("complainant"), on behalf of (...), in a case before you (...).

Your letter contains the following brief summary of the relevant facts, which are supported by a number of enclosed documents.

Background

In 2006, OLAF carried out an on-the-spot investigation at (...). In October 2006, the complainant submitted a request for access to documents to OLAF. He asked for access to the documents which formed the basis for OLAF's decision to carry out the above-mentioned investigation. By decision of 21 March 2007, OLAF rejected the complainant's request on the grounds of the exception laid down in Article 4(1)(b) and Article 4(2) first indent of Regulation 1049/2001. The complainant subsequently made a confirmatory application, which was rejected on 21 May 2007.

In his complaint to the Ombudsman, the complainant contested the rejection of his application and alleged that OLAF's decision to reject his request for access to documents was unfair since, in his view, the exceptions invoked by OLAF were not relevant in his case.

In its opinion, OLAF basically maintained its position. It emphasised that Article 4(1)(b) of Regulation 1049/2001 provides for an exception that explicitly refers to EU legislation regarding personal data. The exception requires that the effect of the disclosure on the data subject must be taken into account. It further considered that, in this respect, informants and

whistleblowers are in a particularly sensitive situation and that the identity of any person who provides OLAF with information, whether informant or whistleblower, must not be disclosed to anyone other than the judicial authorities. In order to support this position, OLAF referred to two opinions delivered by the EDPS: the first one of 23 June 2006, on a notification for prior checking on OLAF internal investigations, and the second one of 4 October 2007, regarding OLAF external investigations.

In his observations, the complainant maintained his complaint.

Request for consultation

Your letter also contains a number of questions:

- First, you have asked me whether, and if so in what way, the two above mentioned opinions are applicable to the case at hand.

- Second, you have asked me to confirm whether it is the case that the identity of persons who provide OLAF with information, as informant or whistleblower, should not be disclosed to anyone other than the judicial authorities.

- Third, you have asked me to comment on whether the protection of informants and whistleblowers also has to be guaranteed after the closure of an investigation where there is no follow-up, and if so in what way, and to what extent?

After careful consideration of your questions, I have concluded that they focus on the position of informants and whistleblowers, and seek my comments on rule or policy level, rather than on case level. That is indeed the level on which I would like to react to them, leaving it for you to decide which conclusions should be drawn from my comments for the case at hand.

Applicability of opinions

Considering that the case at hand relates to a data processing activity apparently conducted by OLAF in the context of an OLAF external investigation, the EDPS Opinion of 4 October 2007[1] regarding OLAF external investigations is relevant for the case. That opinion referred at some point to the EDPS Opinion of 23 June 2006 on OLAF internal investigations, which is therefore also partially relevant.

However, let me emphasize that an opinion in a prior checking case is an advisory opinion, based on Article 27 of Regulation (EC) 45/2001 ("the Regulation"), on whether a processing operation as notified to the EDPS may involve a breach of any provision of this Regulation, and if so, what measures should be taken by the controller to avoid such breach. Where the controller does not follow the recommendations, this may give rise to enforcement actions (see Article 27(4)).

The EDPS Opinion of 4 October 2007 regarding OLAF external investigations concluded that there was *"no reason to believe that there is a breach of the provisions of Regulation 45/2001,*

[1] Opinion on five notifications for Prior Checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on external investigations, available at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2007/07-10-04_OLAF_external_investigations_EN.pdf

providing the considerations above are fully taken into account". These considerations, and the recommendations at the end, also expressly dealt with the right of access to one's own personal data, the scope of restrictions under Article 20 of the Regulation, and the confidentiality of informants and whistleblowers (see page 29, bullet points 3, 4 and 5). However, they do not take position on individual cases, except from emphasizing that *"any restriction under Article 20 ... should meet a necessity test and (be) applied on a case-by-case basis"*.

Confidentiality of informants or whistleblowers

A reply to your second question requires some preliminary remarks. First, it has to be noted that there is no Union legislation regulating the action of informants.

The OLAF Manual[2] defines an informant as *"an individual who:*

- *seeks to disclose information concerning a matter within the legal competence of OLAF regarding a matter which has already occurred or is ongoing;*
- *has obtained that information as a consequence of a business or personal relationship, often involving a duty of confidence;*
- *seeks to ensure that disclosure of his identity is withheld; and*
- *is not an official or servant of a Community organ (officials or servants have a legal obligation to provide information, and those who come forward with such information are referred to as "whistleblowers" (...))"*.

The OLAF Manual also describes the procedure for contacts with an informant: *"[a]ny OLAF official having contact with an informant must assure him that while the Office will make its best effort to respect his desire for anonymity, it cannot guarantee anonymity once the case has been passed to national judicial or prosecution authorities. If a request is made for the name of an informant, it will be handled in accordance with the requirements of Regulation (EC) 45/2001"*.

As to whistleblowers, Article 22a of the Staff Regulations provides that: *"1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct. (...)"*.

Therefore, contrary to informants, whistleblowers are under a legal obligation to give such information. The OLAF Manual points out that *"(...). Officials who comply with this duty are protected from adverse consequences on the part of the institution, provided they have acted reasonably and honestly. Officials are not expected to prove that the wrongdoing is occurring, nor will they lose protection if the concern turns out not to be correct"*.

The EDPS Opinion of 4 October 2007 dealt with the position of informants and whistleblowers in section 3.7 on the right of access (Article 13 of the Regulation). It used the same approach for whistleblowers and informants. This section recommends that OLAF should guarantee the

[2] OLAF Manual, 25 February 2005, page 64.

confidentiality of whistleblowers and informants' identity, except when this would contravene national rules regulating judicial procedures, or where they maliciously make a false statement.

The Opinion does not further develop the application of these two exceptions to the principle of confidentiality. However, the following comments can be made at this stage:

- For the application of the first point, the national rules applicable to judicial procedures are relevant. If these rules foresee the possibility to unveil the identity of whistleblowers or informants, account should be taken of Article 8(a) of the Regulation. In this case, the recipient (i.e. the judicial authorities) would have to demonstrate that the data required are *"necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority".*[3] Furthermore, Article 8 stipulates that the requisites mentioned in paragraph (a) are to be applied without prejudice of Articles 4, 5, 6 and 10 of the Regulation. Article 5 requires the existence of a legal basis for the processing (in the case under analysis the legal basis would be the obligation to cooperate with national judicial procedures). As Article 4 includes the data quality principle, the data transferred have to be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"* (Article 4(1)(c)). In other words, the transfer of data should not involve more information or more detailed information than necessary for the purpose declared.

- For the application of the second point, account should be taken of principles and rules of civil and/or criminal law protecting against slanderous accusations. It has to be noted that this point should be read in combination with the first one. Therefore, the identity of informants could only be transferred to judicial authorities who are competent in the mentioned type of actions.

Access by the person concerned to the identity of an informant

The complainant submitted a request for access to documents under Regulation 1049/2001 on public access. Hence, OLAF analysed whether Article 4(1)(b) of this Regulation was applicable. It concluded that this was the case, and therefore denied access.

The request for access to the identity of the informant could also have been made (or analyzed by OLAF) under Article 13 of Regulation 45/2001. Indeed, this information "relates to" the person concerned. In this case, Article 20 of the Regulation is relevant to determine whether the access right of a data subject could be restricted. In particular, it has to be assessed whether such restriction constitutes a *necessary measure to safeguard*: *"1. (a) the prevention, investigation, detection and prosecution of criminal offences; (...)"* and / or *"(c) the protection of the data subject or of the rights and freedoms of others; (...)."*

These restrictions to the right of access by the person concerned to the identity of an informant would also be relevant in the case under analysis.

However, in line with the EDPS Opinion of 4 October 2007, I would take the position that - as a general rule - the identity of a whistleblower or informant should not be disclosed, except when this would contravene national rules on judicial procedures and/or where they maliciously make

[3] In case the judicial authority is established in a Member State that has not transposed Directive 95/46/EC to the whole legal system, or is established in a third country, account should be taken of Article 9 of the Regulation.

a false statement (this second case to be read in combination with the first case). In those cases, these personal data could only be disclosed to judicial authorities.

Confidentiality after closure of an investigation

In principle, there are good reasons to think that protection of whistleblowers and informants has to be the same after the closure of an investigation, regardless of whether there is a follow-up or not. The vulnerability of the whistleblower's or informant's role, and therefore the risks to their privacy and integrity does not change depending on whether the investigation is opened or closed with no follow-up.

The protection of their *"rights and freedoms"* would therefore require a continuity of protection under Article 20(1)(c) of Regulation 45/2001. As to Article 20(1)(a) of the Regulation, in the absence of uniform Union legislation, there is a need to apply the precautionary principle. Since many Member States have a legal framework governing dealings with informants, *"[f]ailure by OLAF to take account of these rules may prejudice later national enquiries and criminal proceedings"*.

This approach would of course not exclude, that in practice there may be situations, where the protection of whistleblowers or informants should give in to legitimate claims of others, and lapse of time may be a relevant factor here, but it is obviously difficult to speculate about this in the abstract. Therefore, I would again take the position that - as a general rule - the identity of a whistleblower or informant should not be disclosed, except under specific and carefully defined conditions.

I hope that these comments are helpful for your analysis and decisions in the case before you.

Yours sincerely,

(**signed**)

Peter HUSTINX