

Mr. Maina Kiai
Special Rapporteur on the rights to
freedom of peaceful assembly and
association

Mr. Michel Forst
Special Rapporteur on the situation of
human rights defenders

Special Procedures Branch, HRCSPD
OHCHR

(By e-mail: freeassembly@ohchr.org &
defenders@ohchr.org)

November 25, 2014

Dear Mr. Kiai,
Dear Mr. Forst,

I refer to your letter of October 22, 2014, concerning the case of Mr. Moncef Kateb, a former staff member of WIPO. I have the following comments to make.

1. I wish to assure you that disciplinary action was taken in respect of Mr. Kateb for actions undertaken in a personal capacity and not for any action undertaken in his capacity as President of the Staff Council. All disciplinary action is circumscribed by the WIPO Staff Regulations and Rules, an instrument adopted by the Member States. The Staff Regulations and Rules set out the rights and obligations of both staff members and the Administration involved in a disciplinary case, which importantly includes the right of staff members to appeal, before the WIPO Appeal Board, and ultimately the Administrative Tribunal of the International Labor Organization ("the Tribunal"), against any disciplinary sanctions imposed on them by the Administration. The confidentiality, integrity and independence of any such proceedings must be respected at all times.

/...

The Staff Regulations and Rules provide, amongst other things, that staff members of WIPO may only be dismissed after they have been given the opportunity to defend themselves fully against the charges laid. Mr. Kateb was afforded all due process rights. He was given the opportunity to defend himself fully against the charges of serious misconduct that had been laid against him. Mr. Kateb availed himself of that opportunity, by seeking legal advice and responding to the charges via his lawyer. In addition, Mr. Kateb currently has the right to appeal against his dismissal before the WIPO Appeal Board, and ultimately the Tribunal.

2. The fact that Mr. Kateb happened to be a staff representative at the time of his dismissal does not make him immune from the application of disciplinary sanctions, purely by reason of holding such office. In Judgment 1061, the Tribunal held that “[s]taff representatives are not exempted from observance of the rules by reason of holding office in the Union [of General Service Staff]” (at consideration 4). As Mr. Kateb was dismissed in his personal capacity as a staff member of WIPO, I do not believe that there had been any attack on the right of association, or that freedom of expression had been compromised in any way. I could not agree more that freedom of association and freedom of expression are fundamental human rights of the utmost importance (which dual rights have always been valued and duly respected by this Organization). WIPO fully recognizes that staff have the right of association (as statutorily enshrined in Staff Regulation 8.1 of the WIPO Staff Regulations and Rules), and further fully respects that duly elected staff representatives enjoy freedom of speech in carrying out their mandate.
3. As mentioned, disciplinary proceedings are confidential in nature, a measure designed to protect the privacy of the staff member concerned. For this reason, I am constrained in my capacity to respond to you concerning the substance of the matters in respect of which disciplinary action was taken in relation to Mr. Kateb. However, in view of the seriousness of the concerns that you have raised in your letter and in view of the unilateral information that has been released into the public domain by those acting for Mr. Kateb, I believe that certain general comments are warranted.
4. The matter in respect of which disciplinary action was taken concerns the treatment of confidential information and the integrity of the data systems of the Organization, as well as the integrity of WIPO’s internal justice system. The primary organizational risk of WIPO is the preservation of confidential information and the integrity of its data systems. The Organization receives over 200,000 international patent applications each year, as well as international applications for marks and designs, and administers mediations, arbitrations and domain name disputes between private parties. The risk to the reputation of the Organization arising from failure to respect confidentiality and disregard of proper practices in this regard is fundamental. The importance of this matter has been repeatedly brought to the attention of staff.

/...

I would not wish you to understand by raising this point that Mr. Kateb was accused of releasing any confidential client data, but I do wish to convey that the importance of practices and protocols concerning confidential information is a primary concern for the Organization.

5. The points raised in your letter and the characterization of the case therein closely resemble those advanced by Mr. Kateb's lawyer, an advocate for one side rather than an independent, impartial or objective analyst or evaluator. Your letter suggests that you may not be in full possession of all the relevant facts. Before taking a decision on the disciplinary proceedings, I fully considered the arguments put forward by Mr. Kateb's lawyer, and provided a detailed response thereto in my letter to Mr. Kateb dated September 19, 2014. It appears however that you may not be in possession of that letter.¹ While I am not in a position to disclose that confidential communication to you, I expect that you would have no difficulty in obtaining a copy thereof, either from Mr. Kateb himself, his lawyer, or any other third party acting on his behalf. I respectfully suggest that you obtain a copy of the above-mentioned letter.
6. Concerning the reference made in your letter to Judgment 1391 of the Tribunal, I should like to point out that the conduct for which Mr. Kateb was sanctioned is unrelated to the principle of "in court privilege" (which is, in any event, not absolute).² In Judgment 1391, the Tribunal was called upon to consider whether the complainant in question had gone too far in using language in written pleadings that was allegedly unacceptable or offensive. It is not disputed that statements made during the course of judicial or quasi-judicial proceedings are, generally speaking, privileged. While, as I mentioned, I am not at liberty to disclose the particular instances of serious misconduct engaged in by Mr. Kateb, I would like to reassure you that he was not dismissed for the particular language used, or the way he expressed himself, during (quasi) legal proceedings. For further details, I respectfully refer you to my letter dated September 19, 2014, a copy of which I hope you will be able to obtain.
7. Your letter also states that it was brought to "[y]our attention that conflict of interest in the WIPO Standards of Conduct relates to the context of procurement and to the acceptance of gifts only." The information that you received in this regard does not appear to be correct. The Standards of Conduct for the International Civil Service (2013), which form part of WIPO's regulatory framework by virtue of Staff Regulation 1.5(c), provide an obligation on international civil servants to disclose, address and resolve conflicts of interest in the best interests of the Organization. This provision is drafted in general terms, and is not limited to "procurement" or the "acceptance of gifts."

/...

¹ It is noted that while the initial charge letter and the response thereto have been widely circulated on the internet, the person(s) who decided to release those documents into the public domain did not consider it necessary to equally circulate my letter dated September 19, 2014.

² See Judgment 2751, at consideration 6.

Messrs. Maina Kiai and Michel Forst – November 25, 2014

8. Your reference to previous disciplinary action taken against Mr. Kateb appears to be based on incorrect information. The matter in question concerned an investigation that was *not* commenced by me. Indeed, I was unaware of it until it was brought to my attention by way of a report. Despite the recommendations of the report, in view of what I considered to be the minimal damage resulting from the alleged breach, I opted not to pursue any disciplinary action against Mr. Kateb. This was not the only instance of a complaint lodged against him in his personal capacity. In this other case, again *not* initiated by me, and again despite the recommendation of the investigating officer, I refrained from taking any action whatsoever.
9. I am concerned that the appearance of the impartiality of your office as Special Rapporteurs seems to have been compromised by the unfortunate unilateral release by persons unknown of information to one side only in this case. The Organization was informed by the lawyer for Mr. Kateb that you would be sending a letter to me well in advance of the receipt of that letter by this Organization. It does not appear to be correct that Mr. Kateb's lawyer should have been informed of your action before it was taken. Likewise, the letter itself, which received strictly limited circulation inside this Organization, came into the possession of the WIPO Staff Council, which in turn sent it to all WIPO staff on November 5, 2014. You will see from the attached e-mail from the Staff Council that FICSA was in possession of the letter and that it, in turn, forwarded the correspondence to various staff associations, including the WIPO Staff Council. These occurrences appear to be part of a pattern of politicization of a case for which a legal procedure, with attendant rights and obligations, is established by a statutory framework. The independence of that legal procedure, in respect of which Mr. Kateb's lawyer has indicated that he will exercise his right of appeal, is critical. As noted by Tom Bingham in *The Rule of Law* (at page 92), the principle of independence of judicial decision-makers "calls for decision-makers to be independent of local government, vested interests of any kind, public or parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be."

I remain at your disposal should you have any further questions, or should you require additional information, to the extent that it is within my capacity to answer or to provide at this stage.

Yours sincerely,



Francis Gurry
Director General