

## **Entscheidung in der Sache 1764/2003/ELB - Verweigerung des Zugangs zu einem Prüfungsbericht - 2**

Entscheidung

**Fall 1764/2003/ELB - Geöffnet am 20/10/2003 - Entscheidung vom 12/01/2006**

### *Zusammenfassung der Entscheidung zur Beschwerde 1764/2003/ELB gegen die Europäische Kommission*

Der Beschwerdeführer beantragte bei der Kommission Zugang zu einem Prüfungsbericht über Niger. Ihm wurde nur partieller Zugang zu diesem Dokument gewährt (Auszüge aus der nationalen Gesetzgebung). Der Beschwerdeführer erhob den Vorwurf, dass die Weigerung der Kommission Zugang zu den restlichen Teilen des Prüfungsberichts zu gewähren, einen Verstoß gegen Verordnung 1049/2001 über den Zugang der Öffentlichkeit zu Dokumenten darstelle [1]. Er vertrat den Standpunkt, dass man ihm Zugang zu diesem Dokument gewähren müsse.

Die Kommission hielt dem entgegen, dass die Verweigerung des Zugangs zu den übrigen Teilen des Prüfungsberichts gerechtfertigt sei, da deren Verbreitung den Schutz des Zwecks der Prüfungen und des öffentlichen Interesses im Hinblick auf die internationalen Beziehungen beeinträchtigen würde. Ferner fielen bestimmte Teile mit personenbezogenen Daten unter eine weitere in der Verordnung 1049/2001 definierte Ausnahmeregelung.

Der Bürgerbeauftragte schlug eine einvernehmliche Lösung vor. Seiner Ansicht hatte die Kommission nicht nachgewiesen, dass sie sich zurecht auf die Ausnahmeregelung des Schutzes des Zwecks der Prüfungstätigkeit beruft, um den Zugang der Öffentlichkeit zu diesem Prüfungsbericht einzuschränken und dass sie hinsichtlich des Schutzes des öffentlichen Interesses in den internationalen Beziehungen ihre Weigerung zur Offenlegung der Berichtsteile, die selbst ihrer eigenen Ansicht nach offen gelegt werden konnten, nicht hinreichend begründet habe. Somit legte er der Kommission nahe, zu prüfen, ob sie nicht Zugang zu den Teilen des Berichts gewähren könne, die nach ihrem eigenen Bekunden offen gelegt werden könnten.

Obwohl sich die Kommission bereit erklärte, einen Teil des Dokuments der Öffentlichkeit zugänglich zu machen, wies der Beschwerdeführer darauf hin, dass das gelöschte Material im Wesentlichen dem gesamten Inhalt des Prüfungsberichts entsprach.



Der Bürgerbeauftragte merkte an, dass die Kommission bei Entscheidungen über eine Zugangsverweigerung auf der Grundlage des Schutzes des öffentlichen Interesses in den internationalen Beziehungen über einen großen Spielraum verfüge. Daher muss sich die Prüfung des Bürgerbeauftragten in diesem Zusammenhang darauf beschränken, ob die Verfahrensregeln und die Verpflichtung zur Begründung eingehalten wurden sowie darauf, ob der Sachverhalt korrekt angegeben wurde oder ein offensichtlicher Beurteilungsfehler oder ein Missbrauch von Befugnissen vorliegt. Hinsichtlich der Verpflichtung zur Begründung erinnerte der Bürgerbeauftragte daran, dass es zwar dem betreffenden Organ obliegt, nachzuweisen, ob für die Dokumente, zu denen Zugang begehrt wird, die Ausnahmebedingungen der Verordnung 1049/2001 tatsächlich gelten, es jedoch u.U. unmöglich sein könne, die Notwendigkeit der Vertraulichkeit für jedes einzelne Dokument zu rechtfertigen, ohne dessen Inhalt preiszugeben, was ja dem eigentlichen Zweck der Ausnahmeregelungen zuwiderliefe.

Der Bürgerbeauftragte merkte an, dass der Bericht eine detaillierte Überprüfung der Verwaltung von Niger enthielt. Er stellte ferner fest, dass nach Ansicht der Kommission die vollständige Offenlegung des fraglichen Dokuments den Beziehungen zu Niger schaden könnte. Nach seiner Ansicht habe die Kommission die angefochtene Ablehnung eindeutig begründet und diese Erklärung sei - unter Berücksichtigung der Tatsache, dass weitere Ausführungen, insbesondere über den Inhalt des betreffenden Dokuments, dem Zweck der angeführten Ausnahme widersprechen würden - trotz ihrer Kürze ausreichend. Ferner könne er bei der angefochtenen Entscheidung keine offensichtliche Fehlbeurteilung der Schutzwürdigkeit des öffentlichen Interesses bei den internationalen Beziehungen feststellen. Somit kam er zum dem Schluss, dass im Falle der beanstandeten Zugangsverweigerung der Kommission zu den vom Beschwerdeführer beantragten Teilen des Prüfungsberichts kein Missstand der Verwaltungstätigkeit vorliegt.

Der Beschwerdeführer erhob ferner den Vorwurf, dass das Dokumentenverzeichnis der Kommission unvollständig sei, da er bei einer Suche im Verzeichnis lediglich zwei der für die Prüfungstätigkeiten relevanten Dokumente gefunden habe.

Die Kommission hatte entschieden, dass das Dokumentenverzeichnis zunächst Verweise auf Dokumente enthalten solle, die im Wesentlichen ihre legislativen Aufgaben betrafen, und dann schrittweise ausgebaut werden. Um dem Beschwerdeführer entgegenzukommen, entschloss sich die Kommission, eine Liste der in ihrem Besitz befindlichen Dokumente im Zusammenhang mit der Prüfung zu erstellen.

Der Bürgerbeauftragte merkte an, dass die Öffentlichkeit großes Interesse an einer wirtschaftlichen Haushaltsführung habe und Prüfungsberichte eine wichtige Informationsquelle über die Verwendung der Gemeinschaftsmittel darstellten. Es sei daher nach den Grundsätzen einer guten Verwaltungspraxis erforderlich, Prüfungsberichten und zugehörigen Dokumenten im Besitz der Kommission beim Ausbau des Dokumentenverzeichnisses hohe Priorität einzuräumen. Der Bürgerbeauftragte bemerkte, dass die Kommission zum Inhalt ihres Verzeichnisses lediglich allgemeine Ausführungen gemacht habe, die nicht geeignet seien, den vom Beschwerdeführer aufgezeigten Mangel zu beheben und dass das



Dokumentenverzeichnis der Kommission hinsichtlich der Dokumente über die in Frage stehende Prüfung, unzulänglich sei, was einen Missstand in der Verwaltungstätigkeit darstelle. Der Bürgerbeauftragte machte eine kritische Anmerkung.

[1] Verordnung (EG) Nr. 1049/2001 des europäischen Parlaments und des Rates vom 30. Mai 2001 über den Zugang der Öffentlichkeit zu Dokumenten des Europäischen Parlaments, des Rates und der Kommission, ABl. 2001 L 145, S. 43.

Strasbourg, 12 January 2006

Dear Mr M.,

On 20 September and 23 September 2003, you made a complaint to the European Ombudsman against the European Commission concerning its refusal to grant you access to a document entitled "*Audit des fonds de contrepartie de l'appui à l'ajustement structurel en République du Niger - rapport final juin 2001 et janvier 2002*" as well as other related documents.

On 20 October 2003, I forwarded the complaint to the President of the Commission. On 17 October 2003, you sent me additional information, which I forwarded to the Commission on 12 November 2003. The Commission sent its opinion on 30 January 2004. I forwarded it to you with an invitation to make observations, which you sent on 25 February 2004. On 19 May 2004, I requested further information from the Commission. The Commission requested an extension of the deadline to reply and sent its supplementary comments on 5 August 2004. I forwarded them to you with an invitation to make observations, which you sent on 6 October 2004.

On 28 February 2005, I submitted a proposal for a friendly solution to the Commission, and on the same date I sent you a copy of my letter to the Commission. The Commission sent its reply on 13 June 2005. On 25 July 2005 and 29 September 2005, my services contacted you by e-mail and invited you to inform them whether you considered that a friendly solution had been achieved. As no reply was received from you, I forwarded the Commission's reply to you with an invitation to make observations, which you sent on 14 October 2005.

You contacted my services to have information on the progress made with your complaint on 10 May 2005 and 14 July 2005.

I am writing now to let you know the results of the inquiries that have been made.

## THE COMPLAINT

According to the complainant, the relevant facts are, in summary, as follows:

On 6 June 2003, the complainant wrote to the Commission, requesting access to a document



entitled " *Audit des fonds de contrepartie de l'appui à l'ajustement structurel en République du Niger - Rapport final juin 2001 et janvier 2002* " ("the audit report") as well as other relevant documents.

On 9 July 2003, the Commission (EuropeAid Co-operation Office) refused to grant him access.

On 17 July 2003, the complainant asked for a re-examination of his request and indicated that he would appreciate a list of any documents from the EuropeAid Co-operation Office that had been placed on the register of documents in accordance with Article 11 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (1) ("Regulation 1049/2001").

On 8 September 2003, the refusal of access was confirmed by the Secretary General of the Commission on the grounds that disclosure of the audit report would undermine the protection of the purpose of audits, the protection of the public interest as regards the EU's international relations and the protection of the public interest as regards privacy and the integrity of the individual. The Secretary General explained, however, that some parts of the document could be released, that is, extracts of national legislation. These parts were sent to the complainant.

The complainant contested the decision of the Secretary General on the following grounds.

The Commission's refusal to grant the complainant access showed that it believed that no information from any Commission-sponsored audits should be released. Since audits were a primary source of information on the efficiency and effectiveness of the Commission's activities, such rejection limited the public's ability to gather the information necessary to exercise its democratic responsibilities. In other developed countries, notably Canada, legislation on public access to documents did not provide for such an exclusion.

The audit in question had been completed more than a year before the complainant sought to gain access to it. It was therefore unlikely that information about it could be used to subvert the purpose of the audits, which was what the exception under Regulation 1049/2001 aimed to prevent. Moreover, it did not seem to be damaging for the purpose of the audit to release information related to the in-depth analysis of the legal and administrative situation in Niger. The release of the audit was unlikely to damage future co-operation with the authorities of Niger, as this country received co-operation assistance, which was a discretionary contribution by the EU. Compliance with an audit investigation was thus a condition for the receipt of aid. The complainant recognised that certain information might be sensitive and should not be disclosed. However it was unlikely that the report contained only information that might harm individuals and make them reluctant to co-operate with future audits.

It was in the public interest to know whether the audit revealed difficulties in the delivery and administration of development aid. The argument that information should not be provided because it might be used in bad faith or out of context, which was used in the refusal of the confirmatory application, went against the spirit of Regulation 1049/2001.



A professional auditing firm should have taken into account the protection of privacy and integrity of the individual in its administration of the audit. It was unlikely that all elements of the audit could be used to directly identify individuals.

Transparency in administration and audit were the most effective ways of ensuring that EU development aid was not misused. There was an overriding public interest in disclosure, based on the priority given by the European Union to openness, accountability and transparency. Moreover, the public had an overriding interest in knowing how its resources were being spent by its public servants. Any misuse of development aid was a direct threat to the survival of the people of Niger.

The exceptions put forward by the Commission cannot apply to all parts of the audit report. Parts relating, notably, to the terms of reference of the audit, matters relating to the EuropeAid Office's own administration of the development aid or the recommendations for improving the administration of development aid should not be covered by any exception.

The complainant also raised the following points.

The audit in question did not appear in the Commission's register of documents. The complainant carried out a search on the Internet, as advised by the Secretary General, and found only two documents. The complainant considered that the register was incomplete, which was contrary to Regulation 1049/2001. He argued that the European Union evaded the obligation to place documents on the register and made it impossible for citizens to know what documents to ask for. According to the complainant, the refusal to provide the complainant with a list of documents was a breach of Regulation 1049/2001 and of the Code of Good Administrative Behaviour.

The Secretary General of the Commission also mentioned in his letter of 8 September 2003 that "*the audit report has been made available to the European Court of Auditors*". The complainant therefore requested the Court of Auditors to grant him access to the audit report. On 13 October 2003, the Court replied that "*it does not appear to hold this document*". The complainant therefore considered that he had been misled by the Secretary General.

In summary, the complainant alleged that the Commission failed to comply with Regulation 1049/2001 when it refused to grant him access to the audit report and other related documents. He also alleged that the Commission's register of documents was incomplete. The complainant claimed that he should receive the document in question, as well as a list of the documents related to this audit. He also alleged that he had been misled by the Secretary General of the Commission, who wrote that "*the audit report has been made available to the European Court of Auditors*."

## THE INQUIRY

### The Commission's opinion



The Commission's opinion can be summarised as follows.

On 6 June 2003, the complainant wrote to the Secretariat General of the Commission requesting access to a document or documents, presumably unpublished, relating to an audit of the EU's budgetary aid to the Government of Niger.

On 9 July 2003, the EuropeAid Office replied to the complainant's initial application. Access to the audit report concerned was refused on the basis of several of the exceptions laid down in Article 4 of Regulation 1049/2001.

In his confirmatory application of 17 July 2003, the complainant contested the application of the above-mentioned exceptions, stating that, in any case, there was an overriding public interest in disclosure.

The Secretary General replied to this confirmatory application on 8 September 2003 granting partial access. He recognised that the release of extracts of national legislation was unlikely to satisfy the complainant's request. However, the assessment was made that the extracts of national legislation were not covered by any exception and, therefore, had to be disclosed. With regard to the rest of the audit report, he partly confirmed the position of the EuropeAid Office, concluding that access had to be refused since its disclosure would undermine the protection of the purpose of audits and the protection of the public interest as regards international relations. Moreover, he stated that sections containing personal data were covered by the exception laid down in Article 4 (1) (b) of Regulation 1049/2001. It was also explained that the means of redress were correctly indicated in the initial reply and that the balancing of interest with a view to establishing whether there was an overriding public interest in disclosure does not apply to the exceptions laid down in Article 4 (1) of the Regulation.

In his reply to the confirmatory application, the Secretary General stated that the audit report had been made available to the Court of Auditors and to the President of the Committee for Budgetary Control of the European Parliament in order to ensure that the use of these funds was subject to independent and democratic control. The fact was that this report was available to them upon simple request like any other audit report on the use of EU funds. Thus, the formulation "*has been made available*" had to be understood as "*is available*". The Commission recognised that the wording was unfortunate, since it can be interpreted as "*has been sent to*". The Commission apologised for this imprecision, which was in no way intended to mislead the complainant.

The protection of the purpose of the audits

With regard to the interpretation of Article 4 (2), third indent, of Regulation 1049/2001 regarding the protection of the purpose of audits, the general principle governing the Regulation was that all documents held by the Commission were accessible to the public, unless their disclosure would undermine certain public and private interests listed in Article 4 of the Regulation, in which case an exception to this general principle applied. The key element of the treatment of applications for access to documents was, therefore, the harm test, which had to be carried out on a case-by-case basis, in order to determine whether disclosure of the requested documents would undermine any of the interests listed in Article 4. The Secretary General thoroughly



analysed the audit report, in order to assess whether disclosure would undermine the interests to be protected and to what extent it would be possible to grant partial access to the report.

The purpose of the audits, in this case, was to preserve the Commission's capacity to carry out in future this kind of very sensitive and thorough audit in Niger in the broader context of development aid. It was clear that by their very nature audit reports were more likely than other document categories to contain sensitive information, disclosure of which would undermine the interests to be protected by Article 4 of Regulation 1049/2001. It was true that co-operation assistance was an entirely discretionary contribution by the EU and that, if the Government of Niger did not wish to co-operate with EU audits, it was not obliged to accept assistance. However, the Commission considered that the purpose of these audits had to be seen in the context of a long-term engagement towards the people of Niger and that this was not a question of misrepresenting the relationship between the EU and Niger. Considering the sensitive content of this particular audit report (that is, its very detailed level of specific audit information), its disclosure would breach the legitimate expectations of confidentiality of all the different informants who had co-operated thoroughly with the auditor. The Commission held that disclosure, therefore, would lead to a situation where informants would be more reluctant to co-operate. This, in turn, would jeopardise the Commission's ability to carry out such audits in future with the same level of precision.

The protection of the public interest as regards international relations

It was correct to state that it was in the interests of the EU's development assistance to promote good governance and transparency and that aid was provided on condition that it was used appropriately and was subject to audit. However, unlike the complainant, the Commission considered that these interests are better served by maintaining mutual confidence between the two parties, rather than by granting public access to the audit report and breaching this confidence. This development aid and this kind of in-depth audit of the administration of Niger enabled the EU to help Niger to identify problems, propose solutions and exercise pressure in order to improve the situation, in so far as the audit revealed difficulties in the delivery and administration of development aid.

The Commission confirmed that, considering the level of detailed, sensitive audit information contained in this document, it was a matter of fact that, if used in bad faith or out of context, the information could cause serious harm to the country.

The protection of privacy and integrity of the individual

The allegation that the Secretary General had adopted a broad interpretation of this exception was also groundless, since, in his reply to the confirmatory application, he clearly indicated that relevant sections of the audit report are covered by this exception. It was, therefore, current practice to blank out such personal data in order to facilitate partial access to the rest of the document.

The overriding public interest

There was always a public interest in transparency and in disclosure of any document held by a public administration, in accordance with recital 2 of Regulation 1049/2001. However, just like any other regime of access to documents, Regulation 1049/2001 established certain exceptions to this rule.





Accordingly, if the general public interest in disclosure automatically constituted an overriding public interest in disclosure, the exceptions of Article 4 of Regulation 1049/2001 would be deprived of any meaning.

As regards the exceptions laid down in Article 4 (2) and (3) of Regulation 1049/2001, there was a possible further exception to the exceptions, namely the existence of an overriding public interest in disclosure. In order to establish whether such an interest existed, the public interest in disclosure of the concerned documents had to be weighed against the interests to be protected by the exceptions laid down in Article 4 of the Regulation. In this particular case, the invoked exceptions concerning the protection of international relations and protection of privacy and integrity of the individual were mandatory and not subject to this further balance-of-interests test.

The register and the list of documents

Article 11 of Regulation 1049/2001 provided that each institution shall provide public access to a register of documents. However, it did not specify the content of these registers. The register was, obviously, a useful tool that enabled citizens to exercise their right of access. The fact that a document did not appear in the registers did not however in any way preclude an applicant from requesting the document and from being granted access to it.

Considering the importance of legislative documents as defined in Article 12 (2) of Regulation 1049/2001, the Commission decided that the register of documents created on the basis of Article 11 of the Regulation should, initially, contain references to the COM, C and SEC documents submitted to the College, which cover essentially the legislative activities of the Commission. The register contained all documents belonging to these document categories from 1 January 2001. The coverage of the register would be extended gradually. In a first step, minutes and agendas of the Commission's meetings had been added. Further extensions would follow. This gradual extension was not in breach of Article 11 of the Regulation. Moreover, considering the decentralised structure of the Commission and the Regulation's extremely broad definition of a document, there could never be an exhaustive register of Commission documents. It was true that, in the absence of an exhaustive register, it was difficult for the citizen to know which documents to ask for, and thus to formulate a request in a manner sufficiently precise to enable the institution to identify the document, unless the responsible Commission services provided appropriate assistance to the applicant.

In its reply of 9 July 2003 to the complainant's initial application, the EuropeAid Office explained that the conclusion had been drawn that it concerned only the audit report. With regard to this assessment, the complainant only made the following reference in his confirmatory application: *" I should add that I would appreciate a list of any documents of EuropeAid Co-operation Office that have been placed on the Register of Documents according to Article 11 of Regulation 1049/2001. "*

In his reply to the confirmatory application, the Secretary General indicated that the register of the Commission's documents was an electronic database, which was updated daily, and that there was no such list of documents having been put on this register by the EuropeAid Office. With a link to the register and an explanation on how to search in it, the complainant was invited





to search the register by himself and to report to the Secretary General, should he find documents of interest. Accordingly, the Commission would like to stress the fact that the complainant never confirmed his request for access to any document other than the audit report and that, consequently, the Secretary General treated the application correctly and did not "refuse to provide" the complainant with a list of documents or act in breach of Article 15 of Regulation 1049/2001 or the Code of Good Administrative Behaviour.

Nevertheless, in order to assist the complainant, the Commission had decided to establish a list of the documents held by EuropeAid relating to the audit concerned and attached this list to the present opinion.

#### **The complainant's observations**

In his observations, the complainant maintained his complaint and made the following further comments.

The complainant considered that the Commission did not address in its opinion the substantive issues that he had raised.

According to the complainant, the arguments put forward by the Commission to explain why his request was rejected would, if accepted, provide for a blanket protection of audit information contrary to the decision of the Court of First Instance in Case T-194/94 *Carvell v Council* (2) . Information about possible wrongdoing in either the European Union or Niger in the execution of these programmes would be removed from public scrutiny. Such a situation was an abuse of the Cotonou agreements under which this aid programme was to operate, as well as a violation of the spirit and the letter of Regulation 1049/2001.

If the administration of discretionary aid programmes was subject to exemption, it was difficult to see how any document relating to any international matter could be released. The complainant referred to the judgments of the Court of Justice in Case C-353/99 P, *Hautala v Council* (3) and in Case C-353/01 *Olli Mattila v Council and Commission* (4) . He noted that the Commission routinely released far more sensitive information on matters of international relations than any document relating to aid programmes in Niger.

It would also be contrary to good auditing practice and good administrative conduct if audit informants were in fact guaranteed confidentiality, because it might have been necessary for the Commission to pass the audit findings to law enforcement authorities for further investigation and action. The complainant requested the Ombudsman to rule that Article 4 (1) (b) of Regulation 1049/2001 cannot be used to justify refusal to provide access to this document.

As regards the overriding public interest, the exemption for protection of the public interest as regards international relations did not apply in this case. As for privacy and integrity of the individual, the Commission provided no details as to why this exemption applied and therefore the claimed exemption had to be dismissed as unfounded. The argument that overriding public interest did not apply with regard to the Article 4 (2) and (3) exemptions was justified by the Commission on the grounds that the public interest in disclosure did not outweigh the public interest in protecting the purpose of audits. By this statement, the Commission admitted that it



was applying a blanket exemption in the case of audits, contrary to the spirit and letter of the Regulation, and contrary to Community case-law which made it clear that exemptions cannot be applied to entire classes of Commission documents such as audits.

The complainant insisted that full access to the document was appropriate and considered that partial access must be determined by application of Regulation 1049/2001 and its exemptions must be applied on a case by case basis and not simply by selecting data that are already in the public domain and excluding all other content.

As regards the Commission's statement that the document had been made available to the Court of Auditors and the Parliament, the complainant was of the opinion that this constituted a wilful attempt to mislead him; that it was a breach of the Code of Good Administrative Behaviour; that it constituted maladministration; and that it warranted disciplinary measures against the authors of the statement.

The complainant considered that the absence of an appropriate and complete register of EuropeAid files represented a breach of the Code of Good Administrative Behaviour.

According to the complainant, the Commission did not reply to his evidence that other jurisdictions release audit information, notably the Government of Canada. The matter of release of audits conducted on the Commission's activities was particularly important in the promotion of good governance, given the longstanding and unresolved problems of financial accountability at the Commission.

#### **Further inquiries**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman requested the President of the Commission to respond to the following:

- Does the Commission consider that the exception for the protection of the purpose of audits and the exception for protection of the public interest as regards international relations both apply to all those parts of the document that have not already been released to the complainant?
- Would the Commission please respond specifically to the complainant's argument that (a) the terms of reference of the audit; (b) matters relating to the EuropeAid Office's own administration of the development aid; and (c) the recommendations for improving the administration of development aid should not be covered by any exception?

#### **The Commission's further reply**

The Commission's further reply can be summarised as follows.

As regards the applicability of the exceptions to all parts of the report, the two exceptions were very much inter-related as regards this audit report. The main reason for the Commission to refuse public access to such audit reports was the fact that these reports deal with information that was not necessarily public in the beneficiary countries themselves and thus might be quite sensitive. The Commission was not in a position to judge to what extent the information was sensitive or was considered to be sensitive by the national authorities, in this case by the authorities of Niger.



Disclosure of the audit report, or of parts thereof, may lead to strained relations with the beneficiary country, in this case Niger. This in turn may result in a less co-operative attitude of the authorities of the beneficiary country during the process of follow-up or when, in future, new audits were to be carried out.

As regards the content of the report, the Commission considered that large excerpts could be disclosed without causing any harm to the interests of Niger or to the purpose of the audit. However, any disclosure of information regarding the management of funds by the beneficiary was likely to be considered as an interference with the state's sovereignty. Therefore, the Commission had up to that point refused access to all parts of the report that were clearly not in the public domain, meaning everything except legislative texts.

The Commission was still of the opinion that disclosing any part of the audit report without the consent of the authorities of Niger would adversely affect its relations with those authorities and in particular hamper the follow-up of this audit as well as future audits in relation to aid provided to that country.

In order to obtain Niger's agreement to partial disclosure, the Commission's services had made a selection of those parts of the report that they considered could be disclosed without causing any harm. On 9 July 2004, the Commission has requested the agreement of the authorities of Niger to disclose this expunged version. No reply had been received so far.

As regards accessibility of certain parts of the audit report, the terms of reference are included in the expunged version of the report, which the Commission proposes to release with the consent of the authorities of Niger.

The report did not deal with EuropeAid's own administration of the development aid. If the report contained such information, the Commission would disclose it.

The recommendations concerned exclusively the management of public finance by the authorities of Niger.

The Commission would continue to try to obtain a response from the authorities of Niger. Without the agreement of these authorities, the Commission felt that any further disclosure, even of parts of the report, would adversely affect its relations with Niger and, by way of consequence, hamper future audits relating to development aid granted to this country.

#### **The complainant's further observations**

The complainant's further observations can be summarised as follows.

The complainant believed that the Commission had unnecessarily extended the process and should have contacted the authorities of Niger when he originally made the information request.

The complainant repeated that if any state did not want to administer assistance in a transparent manner, it was not obliged to accept that assistance. He considered that there was



maladministration if the Commission entered into a discretionary development assistance agreement in which there was an expectation that use of resources would be hidden from the European public.

It was inappropriate for the Commission to provide resources to a country if it believed that the country would refuse to respect its obligations as regards transparency, audit, and follow-up. The complainant referred in this context to Article 9 of the Cotonou Agreement, which stated that: "*Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.*"

According to the complainant, it did not make sense to ask Niger to authorise partial release. The Commission should have requested authorisation to release the report in full.

According to Article 57 (6) of the Cotonou Agreement, all decisions requiring the approval of recipient states shall be considered approved unless a response was received within 60 days. The Commission's failure to release the information requested in its letter of 9 July 2004 was not compliant with the Cotonou Agreement.

The complainant considered that the Commission did not provide any explanation as to why the terms of reference were not released in the first place.

## **THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION**

After careful consideration of the Commission's opinions and the complainant's observations, the Ombudsman did not consider that the Commission had responded adequately to all aspects of the complainant's allegation concerning access to the audit report. In accordance with Article 3 (5) of the Statute of the European Ombudsman (5), he therefore wrote to the President of the Commission to propose a friendly solution on the basis of the following analysis of the issues in dispute between the complainant and the Commission.

### **The issues in dispute between the Commission and the complainant**

The complaint concerned public access to documents related to an audit of the EU's budgetary aid to the Government of Niger.

The complainant alleged that the Commission failed to comply with Regulation 1049/2001 when it refused to grant him access to one document entitled *Audit des fonds de contrepartie de l'appui à l'ajustement structurel en République du Niger - Rapport final juin 2001 et janvier 2002* ("the audit report") and to other related documents. He also alleged that the register of documents of the Commission was incomplete. The complainant claimed that he should receive the document in question, as well as a list of the documents related to this audit. Finally, the complainant alleged that he was misled by the Secretary General of the Commission, who wrote that "*the audit report has been made available to the European Court of Auditors*".



The Ombudsman noted, however, that although the complainant's first allegation refers to "other documents related" to the audit report itself, the inquiry has revealed that this aspect of the case concerns, in fact, the second allegation and claim (that is, that the register of documents of the Commission was incomplete and that the complainant should receive a list of the documents related to the audit).

After careful consideration of the results of the inquiry so far, the Ombudsman did not consider that the Commission had responded adequately to all aspects of the complainant's allegation concerning access to the audit report.

The Ombudsman therefore made a proposal for a friendly solution as regards the question of access to the audit report.

The Ombudsman noted that, during the course of the inquiry, the Commission had clarified that:

- the audit report does not deal with EuropeAid's own administration of the development aid. If the audit report contained such information, the Commission would disclose it; and
- the recommendations in the audit report concern exclusively the management of public finance by the authorities of Niger.

The Ombudsman's proposal for a friendly solution was based on the following considerations:

*The Commission's justification of its position*

1.1 The Commission granted (at the stage of the confirmatory application) partial access to the audit report, consisting of access to extracts of national legislation. The Commission argued that the refusal of access to other parts of the audit report was justified since disclosure would undermine the protection of the purpose of audits (Article 4 (2), third indent, of Regulation 1049/2001) and the protection of the public interest as regards international relations (Article 4 (1), third indent, of the Regulation). Moreover sections containing personal data are covered by the exception laid down in Article 4 (1) (b) of the Regulation.

1.2 As regards the protection of the purpose of the audits, the Commission argued that the purpose of the audits, in this case, was to preserve the Commission's capacity to carry out in future this kind of very sensitive and thorough audit in Niger in the broader context of development aid. It was clear that, by their very nature, audit reports were more likely than other document categories to contain sensitive information. It was true that co-operation assistance was an entirely discretionary contribution by the EU and that, if the Government of Niger did not wish to co-operate with EU audits, it was not obliged to accept assistance. However, the Commission considered that the purpose of these audits has to be seen in the context of a long-term engagement towards the people of Niger. Considering the sensitive content of this particular audit report, that is, its very detailed level of specific audit information, the Commission believed that its disclosure would breach the legitimate expectations of confidentiality of all the different informants who had co-operated thoroughly with the auditor. The Commission further held that disclosure, therefore, would lead to a situation where informants would be more reluctant to co-operate. This, in turn, would jeopardise the Commission's ability to carry out such audits in future with the same level of precision.



As regards the question of a possible overriding public interest in disclosure, the Commission argued that, if the general public interest in disclosure automatically constituted an overriding public interest in disclosure, the exceptions of Article 4 would be deprived of any meaning.

1.3 Concerning the protection of the public interest as regards international relations, the Commission acknowledged that it was in the interests of the EU's development assistance to promote good governance and transparency and that aid was provided on condition that it was used appropriately and was subject to audit. However, unlike the complainant, the Commission considered that these interests were better served by maintaining mutual confidence between the two parties than by granting public access to the audit report and breaching this confidence. This development aid and this kind of in-depth audit of the administration of Niger enabled the EU to help Niger to identify problems, propose solutions and exercise pressure in order to improve the situation, in so far as the audit revealed difficulties in the delivery and administration of development aid. According to the Commission, the level of detailed, sensitive audit information contained in the audit report could, if used in bad faith or out of context, cause serious harm to the country.

1.4 As regards the protection of privacy and integrity of the individual, the Commission argued that it was current practice to blank out such personal data in order to make partial access possible to the rest of the document.

1.5 In its reply to the Ombudsman's request for further information, the Commission explained that the exception for the protection of the purpose of audits and the exception for protection of the public interest as regards international relations were very much inter-related in the case of this audit report. The main reason for the Commission's refusal to allow public access to such audit reports was the fact that these reports deal with information that is not necessarily public in the beneficiary countries themselves and which, for this reason, may be quite sensitive. Disclosure of the audit report, or of parts thereof, may lead to strained relations with the beneficiary country, in this case Niger. This in turn may result in a less co-operative attitude of the authorities of the beneficiary country during the process of follow-up or when, in future, new audits are to be carried out.

The Commission considered that large excerpts of the audit report, including the terms of reference, could be disclosed without causing any harm to the interests of Niger or to the purpose of the audit. However, any disclosure of information regarding the management of funds by the beneficiary was likely to be considered as an interference with the state's sovereignty. The Commission was of the opinion that disclosing any part of the audit report without the consent of the authorities of Niger would adversely affect its relations with those authorities. On 9 July 2004, the Commission requested the agreement of the authorities of Niger to disclosure of an expunged version. No reply had been received by the time the Commission issued its latest reply to the Ombudsman. The Commission would continue to try to obtain a response from the authorities of Niger.

#### *The complainant's arguments*

1.6 As regards the protection of the purpose of the audits, the complainant argued that audits are a primary source of information on the efficiency and effectiveness of the Commission's



activities and that refusal of access limits the public's ability to gather the information necessary to exercise its democratic responsibilities. In other developed countries, notably Canada, legislation on public access to documents did not provide for such an exclusion. It was in the public interest to know whether the audit in question revealed difficulties in the delivery and administration of development aid. Moreover, the audit had been completed more than a year prior to the complainant's request for access and it was therefore unlikely that information about it could be used to subvert the purpose of audits. The release of the audit was unlikely to damage future co-operation with the authorities of Niger, since co-operation assistance was a discretionary contribution by the EU. The arguments put forward by the Commission would, if accepted, provide for a blanket protection of audit information. The case-law of the Community courts, however, made it clear that exemptions cannot be applied to entire classes of Commission documents such as audits. It would be contrary to good auditing practice if audit informants had been guaranteed confidentiality, because it might have been necessary for the Commission to pass the audit findings to law enforcement authorities for further investigation and action. Finally, there was an overriding public interest in disclosure, based on the priority given by the European Union to openness, accountability and transparency. Moreover, the public had an overriding interest in knowing how its resources were being spent by its public servants.

1.7 As regards the protection of the public interest in matters concerning international relations, the complainant argued that the Commission routinely releases far more sensitive information on matters of international relations than any document relating to aid programmes in Niger. Article 9 of the Cotonou Agreement stated that: "*Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.*" Transparency in administration and audit were the most effective ways of ensuring that EU development aid was not misused. Such misuse was a direct threat to the survival of people in Niger. The argument that information should not be provided because it might be used in bad faith or out of context was against the spirit of Regulation 1049/2001.

1.8 As regards the protection of privacy and integrity of the individual, the complainant recognised that certain information might be sensitive and should not be disclosed. A professional auditing firm should have taken into account the protection of privacy and integrity of the individual in its administration of the audit.

#### *The Ombudsman's assessment*

1.9 The Ombudsman recalled that, according to Article 2 of Regulation 1049/2001, "*[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation (...) This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.*" Exceptions to this principle are provided for in Article 4 of the Regulation.

1.10 As regards the exception relating to the privacy and the integrity of the individual (Article 4 (1) (b) of Regulation 1049/2001), the Ombudsman first recalled that this exception was not





subject to the possibility of an overriding public interest in disclosure. The Ombudsman noted that the complainant, in his observations, accepted that certain information contained in the audit report might be sensitive and should not be disclosed. Moreover, the complainant did not appear to contest the extent of the deletions made by the Commission to give effect to this exception. The Ombudsman did not therefore consider that there was any significant dispute between the complainant and the Commission concerning the correct application of this exception in this case.

1.11 As regards the exception relating to the protection of the purpose of audits, the Ombudsman recalled that Article 4 (2) of Regulation 1049/2001 provides that: "*The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits, (...)*", subject to the possibility of an overriding public interest in disclosure. The Ombudsman found the complainant's arguments persuasive both as regards the absence of a likelihood that disclosure would cause real harm to the protected interest and as regards the overriding public interest in disclosure. Moreover, the Ombudsman noted that the Commission itself, in its reply to the Ombudsman's request for further information, considered that large excerpts from the audit report could be disclosed without causing any harm to the purpose of the audit. The Ombudsman therefore did not consider that the Commission had shown that it was entitled to rely on Article 4 (2), third indent, of the Regulation in order to limit public access to the above-mentioned excerpts from the audit report.

1.12 As regards the exception relating to the protection of the public interest in matters concerning international relations, the Ombudsman noted that the Commission made a selection of those parts of the audit report which it considered could be disclosed, that it requested the agreement of the authorities of Niger to consent to disclosure and that, at the date of the Commission's latest reply to the Ombudsman, the Commission had received no reply from the authorities of Niger. The Ombudsman understood the Commission's position to be that the exception for the protection of international relations justified it in refusing access to the above-mentioned parts of the audit report unless and until the authorities of Niger consented to disclosure.

1.13 The Ombudsman recalled in this context that, according to the case-law of the Court of First Instance, Article 4 (5) of Regulation 1049/2001 (6) was a *lex specialis* and that the Commission had no power to disclose a document originating from a Member State which requested it not to do so (7) .

1.14 The Ombudsman took the view that the Commission's position as regards the application of the exception for the protection of international relations, in substance, treats Niger as if it were an EU Member State. The Ombudsman considered that to apply the exception in this way was inconsistent with the above-mentioned case-law defining Article 4 (5) as a *lex specialis* and with the general principle that exceptions to the right of public access to documents should be strictly interpreted.

1.15 The Ombudsman provisionally concluded that the exception for the protection of



international relations cannot justify the Commission's refusal to disclose those parts of the report which the Commission itself has, in its communications with the authorities of Niger, accepted could be disclosed and that continued failure to disclose those parts of the report would, therefore, be an instance of maladministration.

#### **The proposal for a friendly solution**

The Ombudsman suggested that the Commission could consider granting access to those parts of the report which the Commission itself had proposed, in its communications with the authorities of Niger, could be disclosed.

#### **The Commission's response**

In reply to the Ombudsman's proposal, the Commission pointed out the following.

Further to the consultation, the authorities of Niger had not taken a clear position as regards disclosure of an expunged version of the audit report. The Commission would like to clarify its position as regards the application of the exception regarding the protection of international relations. The Commission considered that, if disclosure of the requested documents would lead to a deterioration of its relations with Niger and create difficulties as regards the effective monitoring of the Community's assistance to that country, the international relations of the Community would be affected. It was in order to examine to what extent such deterioration was likely to happen that the Commission consulted the authorities of Niger. The purpose of this consultation was not to grant these authorities a *de facto* right of veto. In any case, even a Member State could not oppose disclosure of the requested documents, since it was a Commission report.

Having carefully reconsidered the matter, the Commission took the view that disclosure of the expunged version of the audit report would not jeopardise its relations with Niger. Therefore, it welcomed the Ombudsman's proposal for a friendly solution. The expunged version of the audit report was enclosed.

#### **The complainant's observations**

In his observations, the complainant stated that he was unable to accept the Commission's reply for the following reasons. The expunged material represents in essence the entirety of the substantive content of the audit report. No explanation was provided as to why specific elements were removed from the report, leading him to conclude that a decision was made by the Commission simply to remove all substantive content irrespective of any specific exemption from public scrutiny according to Regulation 1049/2001. The report's page numbers had been removed making it essentially impossible to establish the extent of the expunged material; this alone was an abuse of power as the page numbers cannot conceivably be secret.

Taken together, these actions and omissions by the Commission demonstrate that it had abused its authority by refusing to provide the complainant with the requested material. He had, in previous correspondence, outlined in some detail his position that most if not all of this report should have been released, and that clear and specific reasons must be provided to justify the withholding of any specific item of information. According to him, such information has not been forthcoming. He added that the Commission's strategy of claiming to comply with Regulation 1049/2001 by releasing purely descriptive and non-analytical audit material, and attempting to conceal the extent of deletions, demonstrated the Commission's bad faith.



He requested, therefore, that the Ombudsman make a finding of maladministration and he thanked him for his assistance throughout the process.

## THE DECISION

### 1 Refusal to grant access to an audit report

1.1 The complainant requested the Commission to grant him access to a document entitled "*Audit des fonds de contrepartie de l'appui à l'ajustement structurel en République du Niger - Rapport final juin 2001 et janvier 2002*" ("the audit report"). Only partial access to the document in question was granted to the complainant, that is, extracts of national legislation. The complainant alleged that the Commission had failed to comply with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (8) ("Regulation 1049/2001") when it refused to grant him access to the audit report. He claimed that he should be granted access to the document in question.

1.2 The Commission argued that its refusal to grant access to the remaining parts of the audit report was justified since disclosure would undermine the protection of the purpose of audits (Article 4 (2), third indent, of Regulation 1049/2001) and the protection of the public interest as regards international relations (Article 4 (1) (a), third indent, of the Regulation). Moreover sections containing personal data were covered by the exception laid down in Article 4 (1) (b) of the Regulation.

1.3 The Ombudsman wrote to the President of the Commission to propose a friendly solution in accordance with Article 3 (5) of the Statute of the European Ombudsman on the basis of the following considerations.

As regards the exception relating to the privacy and the integrity of the individual, the Ombudsman did not consider that there was any significant dispute between the complainant and the Commission concerning the correct application of this exception.

With regard to the exception relating to the protection of the purpose of audits, the Ombudsman's preliminary conclusion was that the Commission had failed to show that it was entitled to rely on this exception in order to limit public access to the audit report at issue.

Concerning the protection of the public interest as regards international relations, the Commission acknowledged that it was in the interests of the EU's development assistance to promote good governance and transparency and that aid was provided on condition that it was used appropriately and was subject to audit. However, unlike the complainant, the Commission considered that these interests were better served by maintaining mutual confidence between the two parties than by granting public access to the audit report and breaching this confidence. This development aid and this kind of in-depth audit of the administration of Niger enabled the EU to help Niger to identify problems, propose solutions and exercise pressure in order to improve the situation, in so far as the audit revealed difficulties in the delivery and administration



of development aid. According to the Commission, the level of detailed, sensitive audit information contained in the audit report could, if used in bad faith or out of context, cause serious harm to the country. Nevertheless, the Ombudsman provisionally concluded that these considerations could not justify the Commission's refusal to disclose those parts of the report that the Commission itself accepted, in its communications with the authorities of Niger, could be disclosed. Therefore, he suggested that the Commission could consider granting access to those parts of the report that the Commission itself had proposed, in its communications with the authorities of Niger, could be disclosed.

1.4 In its reply to the Ombudsman proposal for a friendly solution, the Commission noted that, if disclosure of the requested documents would lead to a deterioration of its relations with Niger and create difficulties as regards the effective monitoring of the Community's assistance to that country, the Community's international relations would be affected. It was in order to examine to what extent such deterioration was likely to happen that the Commission consulted the authorities of Niger, which did not take a clear position on this issue. Having carefully reconsidered the matter, the Commission took the view that disclosure of the expunged version of the audit report would not jeopardise its relations with Niger. Therefore, the Commission accepted the Ombudsman's proposal for a friendly solution and attached to its reply the expunged version of the audit report.

The expunged version of the report contained the following parts:

- " - 1. *Synthèse: 1.1 Rappel des termes de référence; 1.2 Exécution du programme*
- 2. *Description de la procédure de la dépense publique: 2.2 Objectif et champ de la mission d'audit; 2.3 Cadres organiques de la loi de finances; 2.6 Justification des opérations*
- 3. *Audit du programme: 3.1 Montants audités; 3.2 Critères d'audit "*

The following parts of the audit report were partly deleted:

- " 1.3 *Constats relatifs à la chaîne de la dépense; 1.4 Audit du programme;*
- 2.1 *Les départements ministériels chargés du pilotage de l'économie; 2.4 Exécution de la loi de finances; 2.5 Les marchés publics; 2.7 Les fonctions de contrôle; 2.8 La loi de règlement et instances de contrôle a posteriori"* .

The following parts of the audit report were completely deleted:

- " 1.5; 1.6 *Recommandations;*
- 2.9 *Recommandations;*
- 3.3 *Constats d'audit sur les dépenses hors solde; 3.4 Constats d'audit sur les dépenses de solde;*



#### 4. Recommendations" .

1.5 In his observations, the complainant expressed his dissatisfaction with the Commission's reply to the friendly solution proposal. According to him, the expunged material represented in essence the entirety of the substantive content of the audit report, since only descriptive and non-analytical audit material was released. He considered that no explanation was provided as to why specific elements were removed from the report, leading him to conclude that a decision was made by the Commission simply to remove all substantive content irrespective of any specific exemption from public scrutiny. As indicated in his previous correspondence, most if not all of this report should have been released, and clear and specific reasons should have been provided to justify the withholding of any specific item of information.

1.6 The Ombudsman first recalls that, according to Article 4 (1) of Regulation 1049/2001, "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: (...) international relations*". The exceptions to access to documents, provided for by Article 4 (1) (a) of Regulation 1049/2001, are framed in mandatory terms; hence, the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (9) .

1.7 The Ombudsman further notes that the Commission enjoys a wide discretion in the context of a decision refusing access founded, as in this case, on the basis of the protection, *inter alia* , of the public interest concerning international relations (10) . Consequently, the scope of review in this context is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (11) . As to the duty to state grounds, the Ombudsman recalls that, although it is for the institution concerned to demonstrate, in each individual case, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation 1049/2001, 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, depriving the exception of its very purpose (12) .

1.8 As regards the case at hand, the Ombudsman first notes that the terms of reference of the audit in question were the following:

- to carry out an accounting and financial audit of structural adjustment support programmes;
- to examine compliance with the procedures of disbursement and modalities provided for in the financing and draft agreements;
- to check compliance with budgetary, administrative and accounting procedures in force in Niger;
- to examine critically the public expenditure process, the systems and procedures in force, the reliability of data on budgetary execution and to evaluate the financial and accounting follow-up and of achievements implemented to follow the execution of the budget of the State;
- to make recommendations for the execution of the European Community's structural adjustment support.

In this regard, as pointed out by the Commission, the report at issue involves an in-depth audit



of the administration of Niger. The Ombudsman further notes that the Commission considered that full disclosure of the requested document could lead to a deterioration of its relations with Niger. More specifically, the Commission considered that its interests in promoting good governance, transparency and compliance with the conditions under which development aid is provided, are better served by maintaining mutual confidence between the two parties than by granting public access to the audit report and breaching this confidence. This development aid and this kind of in-depth audit of the administration of Niger enabled the EU to help Niger to identify problems, propose solutions and exercise pressure in order to improve the situation, in so far as the audit revealed difficulties in the delivery and administration of development aid. The Commission stressed that the disclosure of detailed, sensitive audit information contained in the audit report could cause serious harm to the country. On this basis, the Commission has refused to grant access - in whole or in part - to the report at issue, concerning the financial administration of Niger and the conducting, findings, and recommendations of the audit. Under the above circumstances, the Ombudsman finds that the Commission has provided a clear explanation for its challenged refusal and that this explanation, although brief, is adequate, in this specific case, in light of the fact that mentioning additional information, in particular making reference to the content of the document concerned, would negate the purpose of the exception relied upon. The Ombudsman further finds that the contested decision is not vitiated by a manifest error of assessment as to the protection of the public interest concerning international relations.

1.9 Moreover, as regards the exception relating to the privacy and the integrity of the individual, (Article 4 (1) (b) of Regulation 1049/2001), the Ombudsman first recalls that this exception is not subject to the possibility of an overriding public interest in disclosure. The Ombudsman notes that the complainant, in his observations, accepted that certain information contained in the audit report might be sensitive and should not be disclosed. Moreover, the complainant did not appear to contest the extent of the deletions made by the Commission to give effect to this exception. The Ombudsman does not therefore consider that there is any significant dispute between the complainant and the Commission concerning the correct application of this exception in this case. The Ombudsman thus considers that no further inquiry into, and consideration of, this part of the complaint is justified.

1.10 In light of the above, the Ombudsman concludes that there is no maladministration with regard to the Commission's challenged refusal to grant access to parts of the audit report requested by the complainant.

1.11 As regards the exception relating to the protection of the purpose of audits (Article 4 (2), third indent, of Regulation 1049/2001), the Ombudsman recalls that, in his letter proposing a friendly solution, he reached the provisional conclusion that the complainant's arguments were persuasive both as regards the absence of a likelihood that disclosure would cause real harm to the protected interest and as regards the overriding public interest in disclosure. Moreover, the Ombudsman noted that the Commission itself, in its reply to the Ombudsman's request for further information, considered that large excerpts from the audit report could be disclosed without causing any harm to the purpose of the audit. The Ombudsman, therefore, reached the preliminary conclusion that the Commission had failed to show that it was entitled to rely on





Article 4 (2), third indent, of the Regulation in order to limit public access to the above-mentioned excerpts from the audit report. Nevertheless, in light of his findings in points 1.8. 1.9. and 1.10 of the present decision, the Ombudsman concludes that no further inquiry into, and consideration of, the propriety of the Commission's reliance on the above exception is justified.

## **2 Availability of the report to the Court of Auditors**

2.1 The complainant also claimed that he was misled by the Secretary General of the Commission when the latter stated that the audit report was at the disposal of the Court of Auditors.

2.2 In its opinion, the Commission explained that, in his reply to the confirmatory application, the Secretary General stated that the audit report had been made available to the Court of Auditors and to the President of the Committee for Budgetary Control of the European Parliament in order to ensure that the use of these funds was subject to independent and democratic control. The fact was that this report was available to them upon simple request like any other audit report on the use of EU funds. Thus, the formulation "*has been made available*" had to be understood as "*is available*". The Commission recognised that the wording was unfortunate, since it can be interpreted as "*has been sent to*". The Commission apologised for the imprecision in the wording used in the letter from the Secretary General, which was in no way intended to mislead the complainant.

2.3 The Ombudsman notes that the Commission apologised for the misunderstanding concerning the availability of the report to the Court of Auditors and considers that there is no need to further pursue his inquiry into the matter.

## **3 Alleged incomplete register of documents**

3.1 The complainant alleged that the Commission's register of documents was incomplete, because he found only two documents relevant to the audit at issue when searching the register. He also claimed that he should receive a list of the documents related to the audit in question. The refusal to provide the complainant with a list of documents was a breach of Regulation 1049/2001 and of the Code of Good Administrative Behaviour.

3.2 The Commission decided that the register of documents created on the basis of Article 11 of Regulation 1049/2001 should, initially, contain references to documents that cover essentially the legislative activities of the Commission. The coverage of the register would be extended gradually. Moreover, considering the decentralised structure of the Commission and the Regulation's extremely broad definition of a document, there could never be an exhaustive Commission register. It was true that, in the absence of an exhaustive register, it was difficult for the citizen to know which documents to ask for, and thus to formulate a request in a manner sufficiently precise to enable the institution to identify the document, unless the responsible Commission services provided appropriate assistance to the applicant.

The Commission stressed the fact that the complainant had never confirmed his request for access to any other document other than the audit report and that, consequently, the Secretary General treated the application correctly and did not "*refuse to provide*" the complainant with a list of documents or act in breach of Article 15 of Regulation 1049/2001 or the Code of Good





Administrative Behaviour. In order to satisfy the complainant, the Commission had decided to establish a list of the documents held by EuropeAid relating to the audit concerned.

3.3 The Ombudsman recalls that, according to Article 11 of Regulation 1049/2001, "*[t]o make citizens' rights under the Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay. (...) The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002 .*"

3.4 The Ombudsman further remarks that sound financial management is of great concern to the public and that audit reports are valuable sources of information on the way Community funds are used (13) . Hence, principles of good administration require that audit reports and relevant documents held by the Commission should receive high priority in the Commission's setting up of a register of documents, in accordance with Article 11 of Regulation 1049/2001.

3.5 The Ombudsman notes that the complainant found in the Commission's register only two documents related to the audit at issue. However, during the present inquiry, the Commission provided a list of 46 documents concerning this audit. Further, the Ombudsman observes that the Commission only made general remarks regarding the contents of its register, which cannot adequately justify the shortcoming pointed out by the complainant. In light of the above, the Ombudsman finds that the Commission's register of documents was inadequate, as regards the documents related to the audit at issue. This constituted an instance of maladministration. The Ombudsman makes a relevant critical remark below.

3.6 As regards the complainant's claim, the Ombudsman notes that the Commission provided a list of documents relating to the audit in question. He, therefore, takes the view that there is no need to further pursue his inquiry into the matter.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission as regards access to the audit report.

As regards the adequacy of the Commission's register, it is necessary to make the following critical remark:

Sound financial management is of great concern to the public and audit reports are valuable sources of information on the way Community funds are used. Hence, principles of good administration require that audit reports and relevant documents held by the Commission should receive high priority in the Commission's setting up of a register of documents, in accordance with Article 11 of Regulation 1049/2001.

In this case, the complainant found only two documents related to the audit at issue in the Commission's register. However, during the present inquiry, the Commission provided a list of 46 documents concerning this audit. Further, the Commission has only made general remarks regarding the contents of its register, which cannot adequately justify the shortcoming pointed out by the complainant. In light of the above, the Ombudsman finds that the Commission's



register of documents was inadequate as regards the documents related to the audit at issue. This constituted an instance of maladministration.

The Ombudsman therefore closes his inquiry.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2001 L 145, p.43.

(2) Case T-194/94 *John Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2765.

(3) Case C-353/99 *Council v Heidi Hautala* [2001] ECR I-9565.

(4) Case C-353/01 P *Olli Mattila v Council and Commission* [2004] ECR I-1073.

(5) " *As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint .*"

(6) " *A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement .*"

(7) Case T-168/02 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission* , judgment of 30 November 2004 (not yet reported), paragraph 58 (under appeal to the Court of Justice).

(8) OJ 2001 L 145, p.43.

(9) See Case T-110/03 *Sison v. Council* (not yet reported), paragraph 51.

(10) Cf. Case T-110/03 *Sison v. Council* , *ibid.*, paragraph 46.

(11) Cf. Case T-110/03 *Sison v. Council* , *ibid.*, paragraph 47 (concerning the CFI's scope of review).

(12) Cf. Case T-110/03 *Sison v. Council* , *ibid.*, paragraph 60.

(13) In this regard, it is worth noting that the Court of Auditors' annual and special reports are public documents, published in the Official Journal of the European Union.