

## **Decision in case 1336/2017/PB on how the European Commission handled a request for public access to its catalogue of nanomaterials used in cosmetics and to the related notifications made by cosmetics manufacturers**

Decision

**Case 1336/2017/PB - Opened on 03/10/2017 - Recommendation on 14/03/2018 - Decision on 12/12/2018 - Institution concerned** European Commission ( Maladministration found ) |

The case concerned a request for public access to a catalogue of nanomaterials used in cosmetic products and to related notifications made by cosmetics manufacturers. The European Commission, which had not completed the catalogue on time, argued that no such document existed when the complainant, an environmental NGO, made its request. The Commission also argued that it had no existing search tools to extract the requested notifications from its database.

The Ombudsman found that while the final version of the catalogue had not been published when the complainant made its access request, the Commission had failed to consult the complainant as to whether it would want access to any of the existing draft versions. This constituted maladministration.

The Ombudsman also found that some of the notifications could in fact have been extracted from the Commission's database. Concerning the other notifications, the Commission failed to look for a solution in consultation with the complainant. These failures also constituted maladministration.

The Ombudsman therefore recommended that the Commission grant the complainant access to those notifications that can be extracted from its database and that it try to find a solution regarding the others. As the catalogue of nanomaterials had in the meantime been published, the Ombudsman did not consider it necessary to recommend the disclosure of any drafts.

The Commission rejected the Ombudsman's findings of maladministration and her recommendation. The Ombudsman considered the Commission's response and confirmed her findings of maladministration.



## Failure to consult the complainant

### The Ombudsman's findings in her recommendation

[1]

1. The Commission had replied to the complainant's initial request [2] for public access to the *catalogue of nanomaterials* [3] by stating that access to the catalogue would seriously undermine its decision-making processes, as the disclosure would reveal preliminary views and policy options, which were under consideration at the time.

2. When the complainant challenged that view, the Commission, in its decision on the request for review, stated that the document in question did not yet exist (since the catalogue had not been completed). It essentially argued that because the catalogue had not yet been completed at the time of the complainant's access request, there was not yet a "catalogue", but merely internal draft versions. It took the view that draft versions of the catalogue could not possibly fall within the scope of the request.

3. The Ombudsman was not convinced by this argument, which is neither citizen friendly, nor in line with the EU public access rules. If the catalogue had been completed and published, the complainant would obviously not have had to ask for it. The complainant had clear indications that the Commission had "finalised" versions of the catalogue. Moreover, the Commission department dealing with the complainant's initial request had no problem identifying a version of the catalogue that was covered by the complainant's request. These circumstances should at least have raised sufficient doubts to alert the Commission to the need to consult the complainant about the documents which it had and which might have been covered by the request. No such consultation took place. The Commission simply rejected the request on the grounds that no catalogue existed. This constituted maladministration.

4. The Ombudsman's assessment was limited to this finding. The catalogue requested by the complainant had in the meantime been published (June 2017, shortly before the complaint to the Ombudsman), and so it was not necessary for the Ombudsman to recommend disclosure of any drafts.

### The Commission's reply

5. In its reply, the Commission first noted that the Ombudsman had not granted it the opportunity to specifically address the issue of a possible failure to consult the complainant. The Commission felt that the Ombudsman ought to have granted it this opportunity before making her recommendation.

6. On the substance, the Commission considered that it had not acted with maladministration. It recalled that the complainant had requested access to 'the' catalogue for nanomaterials and not any draft version of it, and that the complainant had even expressly formulated an alternative request in case the catalogue did not yet exist. It concluded that " *the formulation of the context*



*did not leave any doubts to the Commission that the complainant was requesting access to the finalised catalogue of nanomaterials. As the request was sufficiently precise, the Commission had no reason to go back to the complainant to request clarifications. ”*

## **The Ombudsman’s final assessment**

7. The Ombudsman does not accept the Commission’s arguments. The document to which the complainant sought access should have been published by the Commission long time before the request for access was made. It was the Commission’s failure to finalise and publish the document in time that prompted the complainant’s request for access. In those circumstances it was clear that the complainant sought access to the latest version of the document. If the Commission had any doubts in that respect it should have consulted the complainant.

8. Therefore, the Ombudsman upholds her finding of maladministration [4] .

## **Access to notifications**

### **The Ombudsman’s findings in her recommendation**

9. Regarding access to the so called Article 13 notifications - on the basis of which the Commission creates the catalogue of nanomaterials - , the Ombudsman found that when the Commission held that there was no catalogue to which to give access, it should have consulted with the complainant on how to find a fair solution for access to a sample of the apparently large number of notifications received under Article 13 of Regulation 1223/2009. The Ombudsman also found that the Commission should have granted access to the so called Article 16 notifications. She made those findings following an on-site inspection where her case handlers were given a demonstration of the notifications system [5] . The Ombudsman made a corresponding recommendation to the Commission.

### **The Commission’s reply**

10. The Commission stated that the complainant’s request for notifications had been an alternative to its primary request for access to the catalogue of nanomaterials. It concluded that “[t] hrough the publication on 15 June 2017 [of the catalogue] , this alternative part of the complainant’s request no longer serves any purpose. ” There was therefore no need to act on the recommendation.

## **The Ombudsman’s final assessment**

11. The Ombudsman understands the Commission’s view on the recommendation made. The



Commission's view, however, does not detract from the underlying finding of maladministration which the Ombudsman upholds.

**12.** In its comments on the Commission's view the complainant said that, although the catalogue had been published, it was still interested in getting access to the notifications at issue.

**13.** The Ombudsman believes that the interest of the complainant is served best by the complainant lodging a new request for access, rather than by the Ombudsman pursuing the matter in this inquiry.

## Conclusion

The Ombudsman closes her inquiry with the following finding :

**There was maladministration by the European Commission.**

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

Emily O'Reilly

European Ombudsman

Strasbourg, 12/12/2018

[1] Paragraphs 11-20, <https://www.ombudsman.europa.eu/en/recommendation/en/91138> [Link]

[2] Made in accordance 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, OJ 2001 L 145, p. 43.

[3] The creation of this catalogue is provided for in Article 10 of Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ 2009 L 342, p. 59, consolidated version available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516965777619&uri=CELEX:02009R1223-20171225> [Link]

[4] Paragraphs 28-36: <https://www.ombudsman.europa.eu/en/recommendation/en/91138> [Link]

[5] Her detailed assessment can be consulted online



<https://www.ombudsman.europa.eu/en/recommendation/en/91138> [Link]