

Decision of the European Ombudsman on complaint 158/2000/PB against the European Commission

Decision

Case 158/2000/(IJH) PB - Opened on 01/03/2000 - Decision on 31/05/2001

Strasbourg, 31 May 2001

Dear Sirs,

On 3 February 2000, you made a complaint to the European Ombudsman against the European Commission concerning the Commission's refusal to give you access to a letter from OLAF to the Dutch customs authorities concerning a Community mission to Bangladesh.

On 1 March 2000, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 8 March 2000. I forwarded it to you with an invitation to make observations, which you sent on 28 June 2000. In your observations you made a new allegation. On 11 July 2000, I asked the Commission to comment on your new allegation, and the Commission sent its second opinion on 3 October 2000, which I forwarded to you with an invitation to make observations. It appears that I have not received observations from you on the Commission's second opinion.

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

THE COMPLAINT

In February 2000, the complainant submitted a complaint to the Ombudsman concerning access to a Commission document.

The complainant was a company, acting on behalf of clients, with an appeal against the Dutch customs (Customs District Arnhem). The appeal was against the imposition of customs duties on textile imports from Bangladesh. The duties were imposed because Customs District Arnhem considered that the certificates of origin were invalid. The complainant stated that during the appeal procedure, Customs District Arnhem have referred to a letter (SG/TF8/SO/Ban58, dated 29 January 1999) from OLAF to Customs District Arnhem. The complainant tried unsuccessfully to obtain a copy of the letter from the Dutch authorities. The complainant then tried to obtain the letter from the Commission. Its application and confirmatory application were refused.



The Commission's first refusal was sent by the European Anti-Fraud Office (OLAF), an anti-fraud unit within the Commission. In making its refusal, OLAF referred to Article 19 of Regulation (EEC) N°1468/81, which provides that information obtained in whatever form pursuant to the Regulation shall be of a confidential nature and prohibits the transmission of information obtained in this context to anyone other than those persons in the Member States or within the Community institutions whose duties require that they have access to it. OLAF's letter added that the document is covered by the exceptions provided for under the access policy. The exceptions referred to were: public and private interests, the Commission's internal deliberations, the Community's financial interests, the protection of confidentiality as requested by the natural or legal person that supplied the information or as required by the legislation of the Member State that supplied the information.

The complainant's confirmatory application to the Commission's Secretary General was rejected on essentially the same grounds as those referred to by OLAF.

The complainant asked the Secretary General to reconsider his refusal in the light of the *Interporc II* judgement (Case T92/98, judgement of 7 December 1999). This request was rejected in a letter dated 14 January 2000.

The complainant alleges that the Commission's refusal to release the letter is illegal.

THE INQUIRY

The Commission's opinion

The Ombudsman forwarded the complaint to the Commission for opinion, and stated that he wished to inspect the document concerned. The Commission sent its opinion on 6 June 2001. On 8 June 2001, the Ombudsman inspected the document on the Commission's premises in Brussels.

In explaining the Commission's refusal, the Commission's opinion referred to the two bases mentioned above, i.e.:

- a) Exceptions contained in Commission Decision of 8 February 1994 on public access to Commission documents.
- b) Council Regulation 1468/81 Art. 19, replaced by Regulation (EC) 515/1997 Art. 45, which provides that any information communicated in whatever form pursuant to the Regulation shall
 - a) be of a confidential nature, b) shall be covered by the obligation of professional secrecy, and
 - c) may not be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it.

The Ombudsman's inspection of the document confirmed that the document contains details of the opinions of the Community delegation that visited Bangladesh in July 1996 and it also refers to earlier missions of 1992 and 1994. The subject matter concerns investigation of suspected fraud.



The complainant's observations

The complainant maintained its complaint, and added that it considered the Commission's refusal to constitute a breach of the right to a fair trial. It stated that the customs inspector of the Customs district Arnhem had asked the opinion of the European Commission in the appeal procedure in the Bangladesh case and had denied the appeal after having received the document in question.

Further inquiries

The Ombudsman asked the Commission to comment on the complainant's allegation that the refusal of access constituted a breach of the right to a fair trial.

The Commission stated that recovery procedures fall under the responsibility of the Member States, and that it is a question for a Dutch court, if the complainant were to go to court, to consider whether it is necessary and relevant to request production of the document.

THE DECISION

1 The refusal of access to the document

1.1 The complainant alleged that the Commission had acted unlawfully by refusing access to the document requested. It considered that this refusal constituted a breach of the Commission's public access legislation as well as a breach of the right to a fair trial. The Commission has explained its refusal by referring to, first, the Community regulation which contains rules on access to the type of information here concerned, i.e. Regulation 1468/81, replaced by Regulation 515/97, and, second, exceptions in the Commission's Decision on public access to Commission documents.

1.2 Article 19 of the Regulation 1468/81, now substantially reproduced in Article 45 Regulation 515/97, provides that

1. Any information communicated in whatever form pursuant to this Regulation shall be of a confidential nature. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member State which received it and the corresponding provisions applying to the Community authorities.

The information referred to in the first subparagraph may not in particular be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it. Nor may it be used for purposes other than those provided for in this Regulation, unless the authority supplying it has expressly agreed and in so far as the provisions in force in the Member State where the authority which received it is situated do not preclude such communication or use.

1.3 The Ombudsman does not consider that the Commission was wrong in concluding that this provision contains a prohibition against disclosing the document to the complainant. As regards the complainant's allegation that the failure to disclose the document was nevertheless a breach of the right to a fair trial (1) , a fundamental right which may override provisions of secondary Community legislation, the Ombudsman notes that Article 19 (2) provides, in part, that:



2. Paragraph 1 shall not impede the use, in any legal actions or proceedings subsequently instituted in respect of non-compliance with the law on customs or agricultural matters, of information obtained pursuant to this Regulation.

1.4 In view of this safeguard, the Ombudsman considers that the Commission acted properly by referring to the complainant's possibility of taking legal action.

1.5 As regards the Commission's Decision on public access to Commission documents, it shall be noted that a Community regulation possesses a higher rank than a decision adopted by a Community institution. Therefore, in so far as the Commission was obliged to refuse access on the basis of Regulation 1468/81, as concluded above, the exceptions contained in the Commission's Decision on public access to documents are not relevant in this case.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN

(1) Article 6, European Convention on Human Rights. Cf. also The EU Charter of Fundamental Rights, Article 47 (1).