

## **Decision on how the European Commission handled a request for public access to documents concerning EU-funded projects in Morocco (case 1420/2021/DL)**

Decision

**Case 1420/2021/DL - Opened on 20/08/2021 - Decision on 07/01/2022 - Institution concerned** European Commission ( No maladministration found ) |

The complainant sought public access to the full list of projects funded by the EU that fall within the framework of the National Sanitation Program in Morocco ('the program').

The European Commission provided some information and documents concerning the EU's financial contribution to the program. However, the Commission said that it did not hold the list requested by the complainant.

The Ombudsman inquired into the issue and confirmed that the Commission did not hold the list of projects. Since the right of public access to documents applies only to documents in the possession of the institution, the Ombudsman closed the inquiry finding no maladministration by the Commission.

## **Background to the complaint**

1. In 2006, Morocco launched its National Sanitation Program ('the program') that aims at improving access to water sanitation services throughout the country. The program refers to generalising the connection to the sewerage network in urban areas and to reducing pollution rates. The European Union has financially contributed to the program since 2010.
2. In April 2021, the complainant, a civil society organisation, asked [1] the European Commission to provide it with an exhaustive list of projects funded by the EU that fall within the framework of the program.
3. In the course of May and June 2021, the Commission provided the complainant with information concerning the EU's contribution to the program. The Commission explained that, since 2010, it co-financed with the French Development Agency (AFD) the first phase of the program. In 2016, the Commission signed a financial agreement with AFD concerning the implementation of the second phase of the program. Since the AFD is responsible for managing



the EU's contribution, as well as for validating the choice of projects and monitoring their implementation, the Commission advised the complainant to address to it any request for technical information. It provided the complainant with a link to the AFD's webpage, as well as to the webpage of the Moroccan Ministry of Interior, which supervises the projects. The Commission said that it would publish a final report summarizing the projects and results of the EU's contribution at the end of the implementation period.

4. The complainant replied twice that the Commission failed to provide the list requested, and reiterated that it made its request under the EU rules on public access to documents [2] .

5. The Commission then registered the complainant's letter as a request for public access to documents and adopted a decision in June 2021. The Commission identified three documents [3] as falling within the scope of the complainant's request and disclosed them in full. The Commission repeated that the complainant should contact the AFD or the Moroccan authorities for more information concerning the specific EU projects.

6. The complainant asked the Commission to review its decision (by making what is known as a 'confirmatory application') [4] .

7. The Commission reiterated that the complainant should contact the AFD or the Moroccan authorities for more information concerning the projects.

8. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman in August 2021.

9. The Commission adopted its final decision on the public access request in November 2021. The Commission confirmed that it does not hold a list as requested by the complainant and, consequently, that it was not in a position to fulfil its request.

## The inquiry

10. The Ombudsman opened an inquiry into how the Commission had handled the request for public access. The Ombudsman's inquiry team met with the Commission's representatives to obtain further clarifications on which information the Commission held in relation to the specific projects.

## Arguments presented to the Ombudsman

11. The **complainant** argued that the Commission should be in the possession of the exhaustive list of projects in line with the EU budgetary rules [5] . The complainant considered that the first phase of the program had already been finalised, and that the AFD should have sent to the Commission the final report for this period. The complainant also considered that the AFD should periodically report to the Commission in relation to the second phase of the



program.

12. The complainant also said that, while it had already requested the Commission to review its initial decision on its request in July 2021, the Commission registered its request over a month later, which is not in compliance with the EU rules on public access to documents.

13. During the meeting with the Ombudsman's inquiry team, the **Commission** representatives explained that the EU's contribution to the program, which is co-financed by the AFD, takes the form of 'blending'. This means that EU grants are combined with loans or equity from public and private financiers. The Moroccan National Office of Electricity and Drinking Water (ONEE) and the AFD implement the EU's contribution and are responsible for identifying and selecting new projects in Morocco eligible to receive funding under this loan.

14. The representatives said that the Commission does not hold an *"exhaustive list of projects funded by the EU"*, since the selection and funding of projects unfolds gradually throughout the years. Even though there is a list of projects available on the website of the Moroccan Ministry of the Environment [6], this list is dynamic, since projects to which the EU contributes are not selected in advance and can be modified by the AFD and the ONEE over time. The list is finalised at the end of the implementation period [7], and the Commission then publishes a final report summarizing the activities and results of the EU's contribution.

## The Ombudsman's assessment

15. The right of public access to documents applies only to documents in the possession of the institution concerned [8]. Institutions are not obliged to create a document which they have been asked to grant access to but which does not exist. [9]

16. In this case, the Commission said that it could not fulfil the complainant's request since it does not hold the list requested by the complainant.

17. The Ombudsman sought clarifications from the Commission on the information it holds concerning the EU's contribution to the program. She asked the Commission to confirm that it does not hold the exhaustive list of projects. The Ombudsman considers the Commission's explanations to be reasonable, especially since the implementation of the EU's contribution falls within the responsibility of the AFD and the Moroccan authorities. She also notes that the Commission publishes a final report at the end of the implementation periods.

18. Given that the right of public access to documents applies only to documents in the possession of the institution, the Ombudsman considers that the Commission's position that it could not fulfil the complainant's request was justified and in line with the EU rules on public access to documents.

19. In addition, when an institution receives a request for public access to a document which does not exist, but is in the possession of information that is relevant to the citizen's request,



the Ombudsman considers it good administrative practice to respond under the Code of Good Administrative Behaviour and to provide citizens with the information accordingly [10] .

**20.** In this case, the Ombudsman welcomes the flexible approach adopted by the Commission. It granted public access to other documents that could be of use to the complainant and provided, on several occasions, detailed information concerning the EU's contribution. The Commission also provided links to the websites of the responsible authorities where the complainant could ask for additional information in relation to the projects. There is nothing to indicate that the Commission is in possession of further information relevant to the request.

**21.** In light of the above, the Ombudsman concludes that there was no maladministration by the Commission.

**22.** The Ombudsman, however, regrets that it took the Commission a substantial amount of time to register the complainant's 'confirmatory application' and to reply to it. The Ombudsman has been monitoring this issue of delays for some time now and expects to follow up on it in the coming months.

## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

**There was no maladministration by the European Commission as regards its substantive reply to the complainant's public access request.**

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

Emily O'Reilly European Ombudsman

Strasbourg, 07/01/2022

[1] The complainant referred to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:  
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049>.

[2] Regulation 1049/2001.

[3] 1) a fact sheet concerning the EU's contribution to phase 1 of the program, 2) a copy of the Commission implementing decision approving the EU's contribution and 3) the summary of phase 2 of the program.



[4] In line with Article 7 of Regulation 1049/2001.

[5] The complainant refers to Article 60 of Regulation 966/2012 on the financial rules applicable to the general budget of the Union:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0966> [Link] (no longer in force).

[6] <http://www.environnement.gov.ma/fr/eau?id=425> [Link].

[7] For the first phase of the program, the Commission said that the implementation period would officially end in December 2021. The second phase is planned to run until 2025.

[8] In accordance with Article 2(3) of Regulation 1049/2001.

[9] Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, paragraph 46.

[10] For example, see decision of the Ombudsman in case 541/2008/VIK against the Commission: <https://www.ombudsman.europa.eu/en/decision/en/4223> [Link].