

Decision of the European Ombudsman on complaint 1834/2001/(SM)/GG against the European Commission

Decision

Case 1834/2001/SM/GG - Opened on 07/02/2002 - Decision on 27/10/2003

Strasbourg, 27 October 2003

Dear Mr R.,

On 18 December 2001, you made a complaint to the European Ombudsman concerning the European Commission's refusal to pay Ms Samar Daoud monies that the latter considers due to her in relation to the production of a film for the Commission.

On 7 February 2002, the Ombudsman forwarded the complaint to the President of the European Commission.

On 25 February 2002, you sent further information in relation to your complaint which the Ombudsman forwarded to the Commission on 11 March 2002.

The Commission sent its opinion on 29 May 2002. The Ombudsman forwarded it to you on 13 June 2002 with an invitation to make observations, which you sent on 26 July 2002.

On 10 December 2002, the Ombudsman asked the Commission to submit copies of two documents. These copies were to be provided by 31 January 2003 at the latest. You were informed accordingly in a letter sent the same day.

On 7 February 2003, and in the absence of a reply to this request for information, the Ombudsman informed the Commission that he considered it necessary to inspect the Commission's file. You were informed accordingly in a letter sent the same day. The inspection of the Commission's file was carried out on 13 February 2003. On 20 February 2003, the Ombudsman forwarded a copy of the report on the inspection to the Commission. A copy was also forwarded to you the same day for your information.

On 18 March 2003, the Ombudsman submitted a proposal for a friendly solution to the Commission, asking for a reply by 31 May 2003. In its letter of 2 June 2003, the Commission asked for an extension of this deadline. On 5 June 2003, I wrote to the Commission to inform the latter that I had decided to grant an extension until 30 June 2003.



The Commission sent the French version of its opinion on the proposal for a friendly solution on 1 July 2003, and I forwarded it to you on 7 July 2003 with an invitation to make observations. The English translation of the Commission's opinion was received on 11 July 2003 and forwarded to you on 21 July 2003. On 15 September 2003, you sent me your observations on the Commission's opinion.

On 25 September 2003, I informed the Commission that I considered it necessary to inspect the Commission's file again. You were informed accordingly in a letter sent the same day. The inspection of the Commission's file was carried out on 9 October 2003. On 16 October 2003, the Ombudsman forwarded a copy of the report on the inspection to the Commission. A copy was also forwarded to you the same day for your information.

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

THE COMPLAINT

The complaint that was submitted by a British barrister concerns a dispute between Ms D., a Palestinian film maker, and the European Commission.

By a letter of engagement (no 10/CCM/07/97) that was signed on 14 May 1997, Ms D. was engaged by CEPT, a framework contractor of the European Commission, to produce a documentary film entitled "European Union Aid to the Palestinians 1987-1997" for the European Commission. According to this contract, the complainant was to be paid a sum of 38 062 Ecu (payable in instalments of 15 225 Ecu, 7 612 Ecu and 15 225 Ecu) and a further sum of up to 4 673 Ecu on account of contingencies upon the approval of the Commission. These figures were based on Ms D.'s costs proposal (which was annexed to the contract) according to which filming was to last 8 days and the producer and director would be required for 20 days. The terms of reference provided that the film should provide information concerning the activities of the EU in the West Bank and the Gaza Strip and that it should cover all the areas of EU activity (education, agriculture, health, accommodation etc.). It was foreseen in the terms of reference that the contractor to be chosen should begin his work "as soon as possible (if possible in December)" and that the film should be produced within one or two months. It appears, however, that the production of the film could only start in late July 1997.

According to the complainant, it had been agreed that the film should be of 15 minutes duration. The complainant submitted that the project had been greatly altered on the direct orders of the EU Commission Representative Office in the West Bank and Gaza (ECRO) and that, as a result of ECRO's intervention, Ms D. had incurred substantial extra costs which the original contract did not cover.

According to the complainant, Ms D. had sought immediate contact with the Commission after having signed the contract but had been instructed to await the arrival of Mrs K., the then Cultural and Press Attaché of ECRO. The complainant submitted that on meeting Mrs K. at the end of July 1997, Ms D. had been asked to draw up an amended proposal regarding the project



that had entailed much more work than had originally been agreed. According to the complainant, changes had also been requested by Mr B., the then Head of ECRO, and by various other members of ECRO's staff (Mr H., Mrs M., Mr M., Mr N. and Mr C.). All this had been done orally. The complainant submitted that Ms D. had made ECRO fully aware that such changes would result in extra time expended and therefore extra costs. Still according to the complainant, ECRO had never formally registered these changes with CEPT but had assured Ms D. that the extra costs would be paid. The complainant alleged that Ms D. had at all stages informed CEPT of changes to the project through reports.

According to the complainant, the film that was finally produced and submitted in early 1998 had a length of 45 minutes. The complainant submitted that it had taken 22 days to film and that the total costs amounted to \$ 155 598. According to the complainant, ECRO had confirmed that the work carried out by Ms D. had been more than satisfactory.

The complainant submitted a copy of a declaration by Mrs K. that was dated 11 August 2001. In this declaration, Mrs K. stated that the film had been produced in accordance with the Commission's wishes and in close co-operation with the latter's services. Mrs K. further stated: "Un dépassement budgétaire pour le retard de la production avait été pris en charge par [Ms D.] en attendant que Bruxelles après, l'accord de [the Head of ECRO], prenne en charge ce dépassement" (a budgetary overrun for delays in production had been taken care of by [the complainant] until Brussels would, after [the Head of ECRO] had agreed, take into charge this overrun"). She added that the Head of ECRO had "à notre grande surprise" (to our great surprise) denied Ms D. her rights. Mrs K. concluded by saying that she supported the steps taken by Ms D. with a view to recovering her material rights and her dignity.

The complainant submitted further documents to show that the Commission had been satisfied with the film and argued that if the project had not been extended at the request of ECRO and with the knowledge of CEPT, they would have shown some criticism or reserved their praise. He also submitted a copy of a letter to the then Head of ECRO dated 8 December 1998 in which CEPT had offered to cover the extra work done by Ms D. In order to do so, CEPT had invited the Head of ECRO to send a letter to the Commission in which he was to explain that all the work done by Ms D. had been carried out on the instructions of ECRO. The Head of ECRO did not however accept this suggestion.

According to the complainant, on the occasion of a meeting with Commission officials on 30 January 2001, one of his assistants was told that mistakes had been made at ECRO and that decisions had been taken there without proper regard to procedure. Still according to the complainant, this assistant had been informed that the Commission's Directorate-General (DG) External Relations had recommended that the complainant be paid. The complainant pointed out that he and his assistant had been led to believe that the Commission's services recognised that they had authorised the extensions to the project and that the extra money would be paid.

Further to these discussions and other correspondence, the complainant wrote to the Commission on 31 August 2001, including inter alia a copy of the statement by Mrs K. In its reply of 24 October 2001, the EuropeAid Co-operation Office of the Commission explained that



upon an analysis of this letter and its own file it had come to the conclusion that there was no material element to show that the Commission's services had given instructions to modify the production of the film foreseen in the contract between itself and CEPT. The complainant replied by fax of 26 October 2001, asking for an answer to several questions. He also asked for access to the Commission's file, in particular the letter from DG External Relations recommending that the complainant be paid and an opinion by the Legal Service confirming that payment was owed. The complainant further pointed out that at every point in pursuing this matter so far he had encountered unnecessary delay and an unwillingness to resolve the issue in accordance with the Commission's Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public. As an example, the complainant mentioned the fact that the deadline of 15 working days for replying to his letter of 31 August 2001 had been well surpassed. On 7 November 2001, the Commission acknowledged receipt of the complainant's letter of 26 October 2001 and explained that a detailed answer was being prepared that should be sent within one month. The reply was ultimately sent on 6 December 2001. In this reply, the Commission informed the complainant that after having consulted its Legal Service and its Financial Control service, it was of the opinion that there was "no material element according to which Commission Services have given instruction to CEPT to modify the realisation of the film". The Commission concluded that it was therefore unable to accept Ms D.'s claim for further payments.

In his complaint to the Ombudsman, the complainant alleged that Ms D. had so far only been paid 22 837 Ecu and that a sum of \$ 129 687.73 remained to be paid.

The complainant made in substance the following allegations:

- (1) Commission officials had failed to follow internal procedures to gain authorisation for the changes made which were not covered under the original contract,
- (2) The Commission had failed to grant access to the complainant's file,
- (3) The Commission had failed to answer the complainant on time.

The complainant claimed (1) that the Commission should pay Ms D. extra expenses in the amount of \$ 129 687.73 incurred for making the film, (2) that it should pay interest on account of late payment, (3) that it should reimburse Ms D.'s legal adviser's fees and (4) that it should grant access to the file.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

Background

The result of Ms D.'s work had been a film of 45 minutes duration that had been presented to CEPT in February 1998. On 31 August 1998, CEPT had written to the Head of ECRO, proposing a retroactive extension of the activities performed by the complainant under the initial



contract and enclosing a letter from Ms D. to CEPT dated 18 December 1997 that had requested the reimbursement of extra costs “[a]s per the instruction of the European Commission office in Jerusalem”. This letter had presented an invoice that went far beyond the estimated costs (extra budget of 94 477 Ecu); it had contained no evidence of the request for extra work.

Replying to CEPT’s letter, the Head of ECRO had indicated that his services had neither received any request to amend the contract’s financial provisions nor given any instruction to CEPT to that end. He had therefore refused to accept CEPT’s proposal. In the absence of new elements, the Head of ECRO had also rejected CEPT’s requests to the same end that had been submitted on 23 October and 8 December 1998. This refusal had been communicated to the Commission in Brussels by a note dated 24 January 1999.

Complaint

In his complaint to the Ombudsman, the complainant had claimed the payment of \$ 114 028.73 and requested access to documents in the Commission’s file.

Given that the Commission was not a party to the contract, there was no ground for a dispute between the complainant and the Commission. In spite of this position, the Commission had carefully analysed the complaint and come to the conclusion that it contained no new element in relation to the file.

The letter of engagement had clearly stated that “the agreed timing can only be altered upon written request from the EC Commission”. In spite of several requests, the complainant had never been able to provide any written information evidencing the alleged modification to the initial agreement. The statement by Mrs K. could not be interpreted as a reference about instructions to increase the length or scope of the film. It had to be recalled that the total price of the final result was almost three times higher than the contracted price. In any case, Mrs K. had had no authority to accept or modify a contract.

Furthermore, the Commission had taken into account several other elements. Primarily, Ms D. had, when presenting her film script to ECRO on behalf of CEPT on 14 September 1997, stressed “that all expenses have been calculated from the budget of the film”. Then, the former Head of ECRO had submitted a statement dated 26 October 2001 (a copy of which was enclosed with the Commission’s opinion) according to which he had neither instructed the complainant on behalf of CEPT to go beyond the terms of her contract nor had he been informed by her on behalf of CEPT (or by his collaborators) that the realisation of the film was going to exceed the budget foreseen.

All these elements (absence of a rider to the initial contract, lack of written instructions from a Commission official or employee entitled to do so, statement of the Head of ECRO) made the complainant’s claim, from a legal and a financial point of view, totally unjustified.

In so far as access to documents was concerned, the complainant had not followed the procedure foreseen in the relevant rules. As to substance, the first document requested was a legal opinion from the Commission’s Legal Service which fell under the exception foreseen by



Article 4 (2), point 2 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) The second document was an in-house note containing an opinion for internal use, the disclosure of which would seriously undermine the Commission's decision-making process. For this reason, the document fell under the exception set out in Article 4 (3), point 2.

The Commission expressed its regrets for the time taken by its services in responding to some of the correspondence, due to the careful investigations of the file as well as the necessary internal contacts between the Commission services involved that had slowed down the process.

Conclusion

The Commission had always shown its willingness to achieve a satisfactory result for all parties involved but had also continuously repeated that it could not override its legal and financial rules to propose a financial settlement of the present dispute. In the absence of new factual elements or evidence, the claims raised by the complainant could not be met.

The complainant's observations

In his observations on the Commission's opinion, the complainant maintained his complaint and made the following comments:

Whilst the then Head of ECRO in his statement categorically denied that he had personally authorised any modification to the contract, he did not rule out the possibility that one of his colleagues had done so. Indeed, Ms D.'s point of contact had not been the then Head of ECRO, but Mrs K. to whose written testimony credence should therefore be given. Mrs K. had confirmed that the complainant had been given permission for an extension to the original budget.

According to the terms of reference, work on the film should have begun as soon as possible, if possible in December, which presumably meant December 1996. However, Ms D. had had to wait for the arrival of Mrs K. and work did not commence until the end of July 1997. According to the statement of the former Head of ECRO, this would have meant that such a variation of the contract should have given rise to a formal variation thereof.

Most astonishingly, the Commission had omitted to refer to the meeting on 30 January 2001 although it appeared that an agreement to solve the complainant's problem had been reached on that occasion.

The Commission's letter to the complainant of 24 October 2001 referred to information given by the former Head of ECRO. However, the latter's statement was dated 26 October 2001, i.e. after the said letter had been sent. Furthermore, this statement did not chime in with the letter of 24 October 2001 according to which neither the then Head of ECRO nor his services had ever instructed the complainant to go beyond the terms of the contract. These two key points taken together completely undermined the Commission's decision.

The reply that the Commission had finally sent on 6 December 2001 to the letter of the complainant's legal representative of 26 October 2001 did not in any meaningful way respond to



the points that had been raised.

No written proof to demonstrate an agreed variation of the contract existed since there had only been an oral agreement.

It was surprising that the Commission was willing to rely on a document from the complainant written in November 1997 (2) , but not on her letter of 18 December 1997 in which she had sought an increase in the budget. Furthermore, the term “expenses” used in that document should be taken as covering the items set out in Clause 4 of Annex 1 to the letter of engagement, i.e. flights and other transport costs.

The final instalment of the original monies owed to the complainant had only been paid in November 1999, 20 months after the film had been delivered.

As to access to documents, all exceptions to rights arising under EU law had to be interpreted restrictively. Even if the complainant should not be entitled to see the relevant documentation, there was no reason why it should not be sent to the Ombudsman. In the circumstances, and given the appalling delays that had been caused by the Commission, the Ombudsman was therefore asked to request access to the documents in question.

Further inquiries

After careful consideration of the Commission’s opinion and the complainant’s observations, it appeared that further inquiries were necessary. By letter of 10 December 2002, the Ombudsman therefore asked the Commission to provide him with copies of the documents in its file to which the complainant had referred. The Commission was requested to provide these copies by 31 January 2003 at the latest.

In the absence of a reply by the appointed date and with a view to speeding up procedures, the Ombudsman wrote to the Commission on 7 February 2003 in order to ask for access to the Commission’s file. On 13 February 2003, the Ombudsman’s services inspected the Commission’s file.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinion and observations and the results of his further inquiries, the Ombudsman was not satisfied that the Commission had responded adequately to all the complainant’s allegations.

The proposal for a friendly solution

Article 3 (5) of the Statute of the Ombudsman (3) directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complaint.

On 18 March 2003, the Ombudsman therefore made the following proposal for a friendly solution to the Commission:



The European Commission should consider compensating Ms D. for the extra expenses she incurred in making the film that was used by the Commission.

This proposal was based on the following considerations:

1 First, the film that was produced was three times as long and three times as expensive to make than had been envisaged by the contract signed in May 1997. It was therefore extremely unlikely that Ms D. should have made these changes of her own accord without having received any instructions or authorisation by ECRO's staff to do so.

2 Second, the statement of Mrs K. that had been submitted by the complainant appeared to support the complainant's case.

3 Third, the evidence submitted to the Ombudsman appeared to imply that the Commission considered that the agreed timing could be changed informally and without any need for a written request. In the Ombudsman's view, this lent further credibility to the complainant's argument that such an "informal" approach was also adopted by ECRO's staff in relation to the length and the contents of the film.

4 Fourth, the terms of reference annexed to the contract were very short and general in nature, providing that the film should provide information concerning the activities of the EU in the West Bank and the Gaza Strip and that it should cover all the areas of EU activity. The Ombudsman considers that in these circumstances the production of the film required close co-operation between Ms D. and ECRO's staff. These officials therefore had to be aware of the fact that the film that was produced by Ms D. substantially exceeded what was envisaged in the contract.

5 Finally, the Ombudsman noted that the Commission had never raised any objections concerning the length or the quality of the film that was produced.

The Commission's opinion

In its opinion, the Commission informed the Ombudsman that it had identified new elements concerning the case and made the following comments:

As regards the length of the film, the Commission had so far neither confirmed nor challenged the complainant's statement that the film had been planned to last 15 minutes and that the final result had been 45 minutes. The first reason for this was that no known document in the file had provided any basis for a reply. Neither the letter of engagement nor the terms of reference contained any information concerning the length of the film. There were however two documents which led the Commission to state that, right from the beginning, the plan had been to produce a film of more than 15 minutes. In a letter to the European Commission's Technical Assistance Office ("ECTAO") in Jerusalem dated 5 September 1996, Ms D. had proposed "to produce a 30 to 40 minute film exposing all the work of the EU before Oslo and after". An internal ECTAO note of 28 October 1996 contained remarks on the terms of reference for the film production, indicating clearly the planned length of the film: "production of a 43 minute film (minimum length)" and "production of film, at least 43 minutes long". The second reason was



that the letter of engagement required Ms D. to fulfil her contractual obligations for an overall lump sum. The nature of the contract implied an obligation to produce the desired result, meaning that Ms D. was required to supply the film, regardless of the resources she had recourse to in achieving the stipulated final result. In other words, the contract in no way linked the price of the film to its duration, but to a required minimum quality standard.

In a bid to establish the facts as accurately as possible, the Commission had conducted inquiries among the staff of ECRO (and among staff formerly employed by ECRO), but had been unable to contact the persons mentioned by Ms D. who had left the Commission. Testimonies of persons who had been contacted had yielded no elements of evidence to back up Ms D.'s assertions. None of them had been direct witnesses to verbal exchanges on this point between Ms. D., Mrs K. and/or the Head of Delegation.

In the light of this, the Commission had contacted Mrs K. to ask her to clarify her declaration and if possible to give her testimony on the case. Mrs K. had thereupon sent an e-mail dated 24 June 2003 in which she contested the use that had been made of her declaration and stated: "(...) When I next saw [Ms. D.] two years later, she had still not recovered the remaining amount payable under the initial budget for the film, and it was to help her to recover this money (the remainder of the initial budget) that I wrote that letter. (...) I undertook to support her only to recover the amount on which the contract partners had agreed and which was covered by the contract between them." As regards the question of the budget overrun, Mrs K. added: "I had indeed warned [Ms D.] that any amount exceeding the budget had not been taken into account and that, since she had already exceeded the initial budget, she must refer back to the Commission in Brussels or to [Mr B.], its erstwhile representative in Jerusalem. (...) I also told her when I was in post in Jerusalem that the budget overrun was a matter for her alone and that she was responsible for it. For administrative and contractual reasons, we were in no position to pay for this overrun. To do that, we would have needed the agreement of the European Commission and of [Mr B.]" (4)

It was evident from this testimony that Mrs K. had not required from Ms. D. any changes which had caused the budget overrun, nor had she condoned any such overrun. That being so, there was no element which would support Ms D.'s allegations.

The need for an amendment to the contract under point 2 of Annex 1 of the letter of engagement, which stated that "the agreed timing can only be altered upon written request from the EC", did not cover the start-up date of the project but merely governed changes to the payment regime provided for in this letter. On the other hand, the terms of reference had stipulated that the project should start "as soon as possible", thus introducing an element of flexibility which rendered superfluous any request for an amendment of the contract in the event of circumstances delaying the start-up.

The Commission concluded that it would therefore not be legally justified to accept the Ombudsman's proposal for a friendly solution.

The complainant's observations

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



comments:

Regarding the length of the film, the critical point was that the two documents to which the Commission had referred comprised proposals which had clearly not been taken up in the eventual contract. Instead, in the actual contract the parties had agreed that the filming should take 8 days. There could be no dispute that the filming took nearly three times as long as originally agreed. Ms D. strongly disagreed with the Commission's view that the nature of the contract implied an obligation to produce the desired result, meaning that Ms D. was required to supply the film, regardless of the resources she had recourse to in achieving the stipulated final result. However, even if this point were correct, it would not deal with the key point of Ms D.'s case which was that there had been an agreed modification of the agreement, at the insistence of the relevant Commission officials.

In a letter to Mrs K. dated 14 September 1997 Ms D. had pointed out: "Attached, please find a copy of the amended synopsis that includes a *modified list of projects and people to be interviewed and recommended by your office* . From the approved list, the most impressive projects (...) will be filmed and the best persons will be picked for [an interview]." This clearly demonstrated that the modification of the project came at the behest of ECRO. In these circumstances, the offer of the modification together with its acceptance constituted a binding modification of the original agreement.

Regarding Mrs K.'s e-mail of 24 June 2003, neither the Ombudsman nor the complainant had seen a transcript of the telephone conversation that preceded this message. This lacuna in the evidence was important, as the resulting response from Mrs K. appeared to contradict her earlier evidence. The contents of the e-mail of 24 June 2003 did not confirm the Commission's view that it emerged therefrom that Mrs K. had not required from Ms. D. any changes which had caused the budget overrun. Mrs K.'s latest e-mail did not contradict the argument that ECRO had been closely connected with the film project and that its officials had been responsible for the lengthening of the project. Ms D. furthermore did not accept Mrs K.'s e-mail in so far as it sought to state that the budgetary overrun was a matter solely for Ms D to address.

Ms D. had met Mr B., the present head of ECRO, on 26 August 2003 who had informed her that he had been asked to send all the relevant papers concerning the matter to Brussels. These included a letter from Mr E., at the time deputy head of ECRO, in which he supported Ms D.'s case, and a note of Mr B. himself in which he stated that in his opinion there was merit in Ms D.'s claim. The Ombudsman should seek to see these documents.

The Ombudsman's appraisal

In the light of the above, the Ombudsman concluded that no friendly solution was possible in the present case.

FURTHER INQUIRIES

After careful consideration of the Commission's opinion and the complainant's observations regarding the Ombudsman's proposal for a friendly solution, it appeared that further inquiries



were necessary. By letter of 29 September 2003, the Ombudsman therefore asked the Commission for access to its file. This second inspection was carried out on 9 October 2003.

On the occasion of these two inspections, the Ombudsman inspected in particular the following documents: 1) An opinion from the Commission's Legal Service of 30 November 2000; 2) an e-mail message sent on 30 May 2000 by Mr E. from the Commission's Delegation in Jerusalem; 3) a note from DG External Relations of 29 January 2001; 4) a note dated 28 September 2001 from Mr. B, the Head of the Commission's Delegation in Jerusalem; 5) an e-mail from the Commission's Legal Service of 6 December 2001 and 6) an e-mail from Mrs. K. of 25 June 2003.

THE DECISION

1 Alleged failure by Commission officials to follow internal procedures to gain authorisation for changes to original contract

1.1 By a letter of engagement signed on 14 May 1997, Ms D., a Palestinian film maker, was engaged by CEPT (a framework contractor of the European Commission) to produce a documentary film entitled "European Union Aid to the Palestinians 1987-1997" for the European Commission. According to this contract, the complainant was to be paid a sum of 38 062 Ecu for her services. The complainant, Ms D.'s lawyer, alleged that the project had been greatly altered on the direct orders of the EU Commission Representative Office in the West Bank and Gaza (ECRO) and that as a result of ECRO's intervention, Ms D. had incurred substantial extra costs which the original contract did not cover. According to the complainant, the total cost of the film amounted to \$ 155 598. In the complainant's view, the Commission officials concerned had failed to follow internal procedures to gain authorisation for the changes made which had not been covered under the original contract.

1.2 In its opinion, the Commission basically took the view that there was no evidence to support the complainant's allegation.

1.3 The Ombudsman carried out a thorough examination of all the arguments and the evidence submitted to him. He also proceeded to an inspection of the file. These inquiries led him to the preliminary conclusion that there could be maladministration on the part of the Commission and to submit a proposal for a friendly solution. The Ombudsman's view was based on five considerations. Of these considerations, the first two were of particular importance. The Ombudsman considers that the last three of his considerations would, taken on their own or taken together, not suffice to support the complainant's case.

1.4 The first consideration was based on the assumption that the film that was actually produced was three times as long and three times as expensive to make than had been envisaged by the contract signed in May 1997. The Ombudsman therefore considered it extremely unlikely that Ms D. should have made these changes of her own accord, without having received any instructions or authorisation by ECRO's staff to do so. However, in its reply to the Ombudsman's proposal for a friendly solution the Commission submitted documentary evidence to show that, right from the beginning, the plan had been to produce a film of more



than 15 minutes. The Commission also pointed out that the nature of the contract implied an obligation to produce the desired result, meaning that Ms D. was required to supply the film, regardless of the resources she had recourse to in achieving the stipulated final result. In other words, the contract in no way linked the price of the film to its duration, but to a required minimum quality standard.

1.5 The Ombudsman considers that the Commission's arguments are pertinent and that the complainant has been unable to refute them with documentary evidence.

1.6 The second consideration on which the Ombudsman relied when submitting his proposal for a friendly solution was a statement of Mrs K. that had been submitted by the complainant which appeared to support the complainant's case. This statement was of particular relevance since Mrs K. appeared to have been the most important contact person for Ms D. among the Commission's staff in Jerusalem in so far as the production of the film was concerned. However, in its reply to the Ombudsman's proposal for a friendly solution the Commission submitted a new statement from Mrs K. (of 24 June 2003) that it had obtained.

1.7 In the Ombudsman's view, this new statement from Mrs K. removes most of the probative value Mrs K.'s earlier statement may have had for the complainant's case. The complainant is correct in pointing out that Mrs K.'s e-mail of 24 June 2003 does not state that Mrs K. had not required from Ms. D. any changes which had caused the budget overrun. However, the complainant had relied on Mrs K.'s earlier message to establish Ms D.'s case. It was for the complainant to prove that Mrs K. had required from Ms. D. any changes which had caused the budget overrun, and not for the Commission to prove that this was not the case. In any event, any doubts regarding Mrs K.'s position are in the Ombudsman's view dissipated by a further e-mail she sent to the Commission on 25 June 2003. In this document, which the Ombudsman's services examined on the occasion of the inspection of the file, Mrs K. categorically excludes that any Commission agent might have pushed Ms D. into incurring supplementary expenses.

1.8 In his observations on the Commission's opinion regarding the proposal for a friendly solution, the complainant referred to two documents drafted by two Commission officials which in his view supported Ms D.'s case and asked the Ombudsman to consider these documents. The Ombudsman thereupon proceeded to a second inspection of the Commission's file as a result of which it appeared that the documents to which the complainant had referred were likely to be the e-mail message sent on 30 May 2000 by Mr E. from the Commission's Delegation in Jerusalem and the note dated 28 September 2001 from Mr. B, the Head of the Commission's Delegation in Jerusalem. It appears that these documents (and a number of other documents on the Commission's file that were examined by the Ombudsman's services) constitute an expression of the views of Commission officials who do not themselves appear to have been directly involved in the project that has given rise to the present complaint, but not first-hand evidence. In the Ombudsman's view, these documents thus only show that some officials or services of the Commission sympathise with Ms D.'s claims but do not prove that Ms D.'s allegation was well-founded.

1.9 The Ombudsman notes, however, that Mr E.'s e-mail message of 30 May 2000 refers to and



quotes from a note that according to him was signed by a member of the Commission's local staff. Judging from the quotation of this note in Mr E.'s e-mail, the said note could constitute evidence supporting Ms D.'s case. (5) It is therefore surprising that this document was not on the Commission's file inspected by the Ombudsman. (6) However, even if this document should have been drafted by a Commission official who was familiar with the project and if it should indeed constitute evidence supporting Ms D.'s case (7) , any such evidence would be contradicted by the statements made by Mrs K. in June 2003.

1.10 In these circumstances, establishing the truth of the matter would require hearing at least these two persons as witnesses. In the Ombudsman's view, however, such an examination could only be carried out by a court of competent jurisdiction. It should be noted that Article 3 (2) of the Statute of the Ombudsman provides that officials and other servants of the Communities must testify at the request of the Ombudsman. The Ombudsman has not been given the power to hear other witnesses.

1.11 In these circumstances, the Ombudsman considers that there are no grounds to pursue his inquiry regarding the first allegation submitted by the complainant.

2 Failure to grant access to the file

2.1 The complainant alleged that the Commission had failed to grant him access to its file.

2.2 In its opinion, the Commission took the view that this allegation concerned two documents. According to the Commission, the first document was a legal opinion from the Commission's Legal Service which fell under the exception foreseen by Article 4 (2), point 2 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. (8) The second document was an in-house note containing an opinion for internal use, the disclosure of which would seriously undermine the Commission's decision-making process. For this reason, the document fell under the exception set out in Article 4 (3), point 2.

2.3 The Ombudsman carried out an inspection of the Commission's file on two occasions. It appeared that the first document referred to above is an opinion from the Commission's Legal Service dated 30 November 2000. Given that this document contained legal advice concerning the dispute between the Commission and the complainant, the Ombudsman considers that the Commission was entitled to refuse to grant access to it pursuant to Article 4 (2), point 2 of Regulation (EC) no. 1049/2001. The second document appears to be a note from DG External Relations of 29 January 2001. Having inspected this document, the Ombudsman takes the view that the Commission's decision not to grant access to this document pursuant to Article 4 (3), point 2 of Regulation (EC) no. 1049/2001 does not appear to be unreasonable.

2.4 In these circumstances, there appears to be no maladministration on the part of the Commission in so far as the complainant's second allegation is concerned.

3 Failure to answer the complainant on time

3.1 The complainant alleged that the Commission had failed to answer his letters on time.

3.2 In its opinion, the Commission expressed its regrets for the time taken by its services in



responding to some of the correspondence.

3.3 The Ombudsman considers that the Commission does indeed appear to have failed to answer some of the complainant's letters within a reasonable period of time. However, given that the Commission has expressed its regrets for these delays and that this aspect of the case appears to be of secondary importance, the Ombudsman considers that there is no need for him to pursue his inquiry regarding the complainant's third allegation.

4 The complainant's claims

4.1 In her complaint, the complainant claimed (1) that the Commission should pay Ms D. extra expenses in the amount of \$ 129 687.73 incurred for making the film, (2) that it should pay interest on account of late payment, (3) that it should reimburse Ms D.'s legal adviser's fees and (4) that it should grant access to the file.

4.2 In the light of the above considerations, there are no grounds further to consider these claims.

5 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appear to be no grounds for the Ombudsman to pursue his inquiry regarding the first and third allegations submitted by the complainant. It further appears that there has been no maladministration by the European Commission in so far as the second allegation is concerned. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2001 L 145 page 43.

(2) It appears that the complainant here refers to the document that according to the Commission is dated 14 September 1997.

(3) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(4) Commission's translation of the French original.

(5) Article 4 (1) of the Ombudsman's Statute provides that the Ombudsman and his staff "shall be required not to divulge information or documents which they obtain in the course of their inquiries". In view of this provision, and in the light of the considerations set out at point 1.10 of the decision, the Ombudsman considers that it would not be appropriate to quote the relevant



passage of Mr E.'s e-mail in the present decision.

(6) Mr E. had pointed out in his e-mail of 30 May 2000 that the relevant document would be sent to the Commission in Brussels by separate mail.

(7) Mr E.'s e-mail of 30 May 2000 indicates neither the name of the official nor the date of the document.

(8) OJ 2001 L 145 page 43.