

Decision of the European Ombudsman on complaint 1402/2002/GG against the European Commission

Decision

Case 1402/2002/GG - Opened on 30/08/2002 - Decision on 26/11/2003

Strasbourg, 26 November 2003

Dear Mr T.,

On 30 July 2002, you made a complaint to the European Ombudsman concerning the European Commission's alleged refusal to provide you with information.

On 30 August 2002, the Ombudsman forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 12 December 2002. The Ombudsman forwarded it to you on 16 December 2002 with an invitation to make observations, which you sent on 14 January 2003.

On 24 January 2003, the Ombudsman forwarded a copy of your observations to the Commission and asked the latter to comment thereon. The Commission sent its further opinion on 25 February 2003. The Ombudsman forwarded it to you on 4 March 2003 with an invitation to make observations, which you sent on 5 March 2003.

On 21 May 2003, I submitted a proposal for a friendly solution to the Commission. The Commission sent its reply on 14 July 2003. I forwarded it to you on 21 July 2003 with an invitation to make observations. On 25 July 2003, I sent you the translation into German of the Commission's reply.

On 19 August 2003, you sent me your observations on the Commission's reply.

On 3 September 2003, I asked the Commission for further information in relation to your complaint. The Commission sent its reply on 29 September 2003, and I forwarded it to you on 6 October 2003 with an invitation to make observations by 15 November 2003 at the latest.

No observations were received from you. In a telephone conversation with my office on 17 November 2003, you stressed that you found it regrettable that you had had to turn to me in order to obtain the relevant information. You confirmed, however, that a friendly solution had been brought about.



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

THE COMPLAINT

The complainant is the Brussels correspondent of the “Stern”, a German weekly. Since February 2002, the publication has covered a number of alleged financial irregularities concerning the European Commission, particularly at Eurostat, the Statistical Office of the European Communities (one of the Directorates-General of the Commission). The complainant submitted copies of written questions and letters that he had sent to the Commission on 12 March 2002, 26 March 2002, 28 March 2002, 5 April 2002, 8 July 2002, 22 July 2002, 26 July 2002 and 7 August 2002 as well as some replies from the Commission. Several of these questions concerned the contracts that a company called Eurogramme had concluded with Eurostat.

The complainant alleged that time and again the Commission had refused to provide information on the grounds that the relevant questions concerned ongoing investigations by OLAF, the European Anti-Fraud Office. According to the complainant, the Commission on occasions even refused to provide basic information such as what contracts the Commission had entered into with a particular company. The complainant considered that the Commission’s behaviour was incorrect and impeded the publication’s efforts to inform the public about the relevant issues.

The complainant put forward a number of arguments to support his case. First, he took the view that the Commission had given no explanations as to how providing the information requested could affect the investigations carried out by OLAF. In his view, publications in the press would on the contrary rather appear to have speeded up such investigations. Second, the complainant submitted that there was no evidence to suggest that OLAF had asked the Commission to withhold the relevant information. Third, the complainant argued that investigations by OLAF sometimes took an extraordinary amount of time. According to him, some of the allegations concerning Eurostat were being investigated since 1998. The complainant stressed that the Commission would thus be able to withhold basic information for years, not to mention subsequent criminal or administrative investigations that could also be used as a reason for not disclosing information. Fourth, the complainant argued that the Commission behaved in an arbitrary way, given that on occasions it answered questions relating to issues that were the subject-matter of investigations by OLAF whilst on other occasions it refused to do so. Finally, the complainant argued that the Commission sometimes arbitrarily changed the reasons it gave for refusing to provide the information requested. According to the complainant, in one case the Commission had first informed him that the relevant issues were being verified, then written that the relevant questions could not be answered “at present” before finally informing him that it could not provide the relevant information “as it partly relates to an ongoing OLAF investigation”.

The complainant claimed that the Commission should answer the questions that had been submitted to it without success since March 2002.



THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The Commission's Code of good administrative behaviour applied equally to requests for information by citizens and to requests for information by the media. Media (i.e. journalists) were not entitled under the present Code to any particular and/or additional rights beyond what the Code foresees for dealing with inquiries from the general public.

The Press and Communication Service had been scrupulous in adhering to the deadlines stipulated, that is to say, a reply has to be sent within fifteen working days of the receipt of inquiries. However, the Commission acknowledged that no reply had been given to the complainant's message of 5 April 2002 and apologised for this omission.

The perception that the Commission had been arbitrary in its decisions regarding requests for sensitive information arose from the fact that there had to be a case by case approach. The inquiries of the complainant for factual information had been properly answered by the Commission. However, most of the inquiries cited in the complaint did not relate to straightforward existing information, but required that the Commission in its reply take formal positions on very specific issues. In this respect the Commission had a discretionary power over the position it wanted to take and when to take it and could, therefore, reserve the right not to make statements on an issue.

In respect of the allegation that the Commission had refused to answer questions on the grounds that the information related to an OLAF investigation, the Commission wished to note that questions concerning a matter under such investigation should be directed to OLAF.

All requests for documents were dealt with under Regulation No. 1049/2001 on access to documents. The Commission was of the opinion that the specific inquiry by the complainant – requesting a list of all existing contracts concluded with a specific company – fell within the remit of this regulation. There was no database which provided a comprehensive list of contracts. A list of “commitments” to companies called “Eurogramme” did however exist, and this had been used to produce the contract list manually, in co-operation with the different Directorates-General. The Commission considered that in this specific case, the requested list did not constitute a document that would fall under one of the exceptions provided under the regulation and could therefore be released to the complainant.

A copy of the list of contracts with Eurogramme was attached to the Commission's opinion.

The complainant's observations

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

The duty of public authorities to provide information was enshrined in the press law of the Member States and had its foundation also in the principle of the freedom of the press



recognised throughout the Union. The Charter on Fundamental Rights also mentioned the right to “freedom of information”.

The Commission was of course free to decide as to how and when it should take a position. The questions put to the Commission however did not concern any expressions of opinion by the Commission but were aiming at facts such as Commission decisions, administrative acts and allegations that had been made in public or in documents and in respect of which a confirmation or rebuttal was asked for. The question as to what conclusions the Commission had drawn from cases of bad management of Community funds was not a question aiming at an expression of opinion but had the purpose of finding out what the Commission had in fact done. If the Commission should have done nothing, this was also a fact the public was entitled to learn about.

The Commission’s suggestion that inquiries could be put directly to OLAF was misleading. OLAF practically always refused to provide information in relation to pending investigations. Moreover the relevant questions did not concern investigations by OLAF but facts within the sphere of the Commission.

It was also misleading to allege that the Commission had, apart from one exception, always complied with its Code of good administrative behaviour. As a matter of fact, the Commission often left questions concerning sensitive issues (like the Commission’s accounting system or legally disputed elements of the remuneration of members of the Commission) unanswered. This applied to the inquiries of 7 June 2002, 16 June 2002 and 22 July 2002 (concerning the submission of a report) in their entirety and to part of the inquiry of 2 June 2002.

The complainant claimed that the Commission should change its administrative practice and answer his questions.

Copies of the questions of 2 June 2002, 7 June 2002, 16 June 2002 and 22 July 2002 (1) were attached to the complainant’s observations.

Further inquiries

After careful consideration of the Commission’s opinion and the complainant’s observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Commission to comment on the complainant’s observations.

The Commission’s second opinion

In its second opinion, the Commission made the following comments:

The complainant did not specify to which article of the Charter he referred by mentioning the right to “freedom of information”. The Commission nevertheless presumed that the complainant referred to article 11 (“freedom of expression and information”) and article 42 (“right of access to documents”) of the Charter.

Article 42 of the Charter had exactly the same wording as Article 255 of the EC Treaty. The principles and limits of the public’s right of access to European Parliament, Council and Commission documents had been laid down in Regulation No. 1049/2001.



The Commission's Code of good administrative behaviour contained a commitment to answer inquiries in the most appropriate manner and as quickly as possible. It did not oblige Commission staff to provide all the information requested. According to the Code, a member of staff could consider that it was not in the Community interest for the information to be disclosed. In this case, the refusal to provide information should be justified.

Concerning the alleged lack of reasoning for the refusal to provide information, the Commission was of the opinion that both the existence of ongoing OLAF and Commission-internal investigations represented sufficient grounds for the refusal.

All inquiries by the complainant for purely factual information had been properly answered or had been referred to as currently being the object of an investigation and that, therefore, the Commission could not answer at that specific point in time.

Questions relating to issues under investigation by OLAF should be addressed to OLAF. It should be stated, however, that it was OLAF's policy never to comment on ongoing investigations. Likewise the Commission considered that it was not appropriate to provide information that could prejudice the proper conduct of investigations. Moreover, the protection of the purpose of investigations was a specific exception to the right of access to documents under Regulation No. 1049/2001.

With regard to the inquiries of 2 June 2002, 7 June 2002, 16 June 2002 and 22 July 2002, the first of these had been answered in writing on 5 June 2002. The questions raised in the notes of 7 June and 22 July 2002 had been answered orally by telephone. In so far as the note of 16 June 2002 was concerned, the complainant had been asked to address the questions relating to corrective coefficients to Mr M., the spokesman responsible. Mr M. had not received the questions and had been personally unaware of them. This was the reason why no response had been sent. The Commission noted, however, that the complainant's questions were almost identical to some of the questions raised by Mrs Gabriele Stauner MEP in questions P-1805/02 and E-2807/02.

Excerpts from the Commission's answer to Mrs Stauner's questions were enclosed with the Commission's second opinion.

The complainant's observations

In his observations on the Commission's second opinion, the complainant made the following comments:

If the Commission should be of the opinion that on the European level there was no duty to provide information to journalists, it would point at a notable gap in Community law and the Commission would be called upon to submit a legislative proposal to stop that gap. On the other hand, this would not free the Commission of its obligation to act on the basis of clear and coherent principles when it did provide information.

However, this was not the case at present. The Commission used the reference to



investigations by OLAF in an arbitrary manner. On occasions, the Commission did provide information, on others it did not. This was done not because of ongoing investigations by OLAF but for reasons that were not explained.

The Commission was of course entitled to refuse to provide information in certain clearly defined cases (for example, disciplinary proceedings) in order to protect for example personality rights. However, detailed reasons should be given for such refusals instead of a mere reference to an investigation by OLAF.

It was pleasing to note that one of the questions – the one concerning Eurogramme – had been answered. It was however a reason for criticism that a complaint to the Ombudsman had been necessary to achieve this outcome.

Neither the questions of 7 June 2002 nor those of 22 July 2002 had been answered, either in writing or orally. It was telling that the Commission had neither submitted any evidence to prove that it had answered these questions nor named the person who had answered them or the day when this had happened. In his note of 22 July 2002, he had referred to the fact that the inquiry of 7 June 2002 had not yet been answered. At the time, the Commission had not denied this.

Regarding the inquiry of 16 June 2002, he had assumed that the relevant questions would be passed on to Mr M.

The inquiry of 2 June 2002 had indeed been replied to. However, the reply had left open most of the questions. He had pointed this out in his messages of 7 June 2002 and 22 July 2002.

The complainant concluded by claiming that written replies should be sent to the relevant questions.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the opinions and observations, 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 (2) 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. The Ombudsman's provisional conclusion was that the Commission's refusal to answer the complainant's questions, in so far as the latter requested the Commission to provide information, could be an instance of maladministration.

The Ombudsman therefore made the following proposal for a friendly solution to the Commission:

The European Commission should consider providing the information requested by the



complainant, unless there are valid reasons for not doing so.

This proposal was based on the following considerations:

1 On the basis of the complainant's comments and the Commission's opinions, the Ombudsman assumes that the complainant still wishes to receive a reply to questions 6 to 9 of the inquiry of 12 March 2002, questions 1 to 8 and 10 of the inquiry of 26 March 2002, questions 1 to 4 of the inquiry of 28 March 2002, questions 2 to 8 of the inquiry of 2 June 2002, to the inquiry of 7 June 2002 and to the inquiry (concerning the submission of a report) of 22 July 2002.

2 The Ombudsman considers that it is good administrative practice for the administration to provide information that has been requested by citizens, unless there are valid reasons for refusing to do so. It appears useful to recall that Article 1 of the Treaty on European Union stipulates that decisions should be taken as openly as possible and as closely as possible to the citizen. The Ombudsman takes the view that only a transparent and service-minded administration will do justice to this requirement. Account should furthermore be taken in this context of the vital role of the media in informing citizens about the work of the EU, thus allowing citizens to hold the institutions and bodies of the EU to account.

3 The Ombudsman considers that a distinction has to be drawn in this context between a request for information and a request to take a position on a certain issue. Given that the complainant accepts that the Commission is free to decide as to how and when it should take a position on a specific issue, only the Commission's alleged failure to reply to requests for information needs to be discussed here. The Commission argues that many of the questions did not relate to straightforward existing information but required it to take a position on very specific issues. An examination of the documents submitted by the complainant shows that this argument is not without merit. The Ombudsman notes, however, that there are also various questions asking for straightforward information, for example question 10 of the inquiry of 26 March 2002 (in which the complainant asked whether it was true that tasks previously carried out by a certain company for 1.5 Mio € a year had now been entrusted to another company for 500 000 € a year) or question 3 of the inquiry of 28 March 2002 (asking what the Commission had done to recover a debt owed to it by a certain company).

4 If a citizen asks for information that the administration considers cannot be given to him, it is good administrative practice to inform the applicant of the reasons why the information that he has requested cannot be provided to him. In the present case, the Commission has limited itself to stating that the relevant information cannot be provided since it concerned a matter under investigation by OLAF.

5 The Ombudsman considers that it is legitimate for the administration to refuse to provide information that could prejudice the proper conduct of investigations, be they carried out by OLAF or the Commission itself. He is not convinced, however, that the Commission has shown that it was entitled to refuse to provide all the information requested by the complainant on the basis of this consideration. To cite only one example in addition to those already mentioned in



point 1.5 above, question 8 of the inquiry of 2 June 2002 asks the Commission to specify how many persons are authorised to handle the Sincom system and what their names are. It has not been explained how answering such questions could prejudice the proper conduct of the investigation carried out by OLAF. The Ombudsman accepts that there may be cases where the administration cannot provide more detailed reasoning because doing so would already jeopardise the aim which justifies the refusal of information. It does not appear, however, that this would be the case with all the requests for information submitted by the complainant in the present case.

6 In his observations on the Commission's second opinion, the complainant accepted that there may be other reasons that could justify a refusal to provide information. The Ombudsman notes, however, that the Commission has not relied on any other reasons in order to justify its refusal to provide the information that had been requested.

The Commission's reply

In its reply, the Commission stated that it appreciated the proposal for a friendly solution. The Commission noted that it had reviewed all the questions that had been addressed to it by the complainant and that a complete list of the Commission's replies thereto was enclosed.

The complainant's observations

In his observations, the complainant noted that he regretted the fact that many of his questions had been answered only now. The complainant stressed that this had seriously impeded his work as a journalist. He also listed a number of questions that in his view had still not been answered.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary. The Ombudsman therefore asked the Commission to comment on the complainant's view that some questions had still not been answered.

The Commission's reply

In reply to the Ombudsman's letter, the Commission submitted an amended list of its replies to the complainant's questions.

The complainant's observations

No written observations on this reply were received from the complainant. In a telephone conversation with the Ombudsman's office on 17 November 2003, the complainant stressed that he found it regrettable that he had had to turn to the Ombudsman in order to obtain the relevant information. The complainant confirmed, however, that a friendly solution had been brought about.

THE DECISION

1 Failure to provide information requested by the complainant

1.1 The complainant, the Brussels correspondent of the "Stern", a German weekly, alleged that the Commission had refused to provide information that he had requested on a number of occasions on the grounds that the relevant questions concerned ongoing investigations by OLAF, the European Anti-Fraud Office. In his observations on the Commission's opinion, the complainant further alleged that some inquiries had not been answered at all.



1.2 The Commission took the view that it had complied with its Code of Good Administrative Behaviour and that its Press and Communication Service, which was responsible for contacts with the media, had been scrupulous in answering within the deadline stipulated, that is to say within fifteen working days of the receipt of inquiries. It admitted, however, that no reply had been given to a message sent by the complainant on 5 April 2002 and apologised for this omission. The Commission further provided the complainant with a list of contracts it had entered into with a company called Eurogramme that the complainant had requested.

1.3 The Ombudsman came to the conclusion that the Commission's refusal to answer the complainant's questions, in so far as the latter requested the Commission to provide information, could be an instance of maladministration. On 21 May 2003, he therefore submitted a proposal for a friendly solution to the Commission according to which the latter should consider providing the information requested by the complainant, unless there were valid reasons for not doing so.

1.4 In its reply to this proposal and in its reply to a subsequent request for further information, the Commission submitted an amended list of its replies to the complainant's questions.

1.5 In a telephone conversation with the Ombudsman's office on 17 November 2003, the complainant stressed that he found it regrettable that he had had to turn to the Ombudsman in order to obtain the relevant information. The complainant confirmed, however, that a friendly solution had been brought about.

2 Conclusion

Following the Ombudsman's initiative, it appears that a friendly solution to the complaint has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) It should be noted that this question is not identical with the question of the same date mentioned in the complaint.

(2) 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.