

## **Decision of the European Ombudsman on complaint 1753/2002/GG against the European Commission**

Decision

**Case 1753/2002/GG - Opened on 16/10/2002 - Decision on 28/11/2003**

Strasbourg, 28 November 2003

Dear Mr X.,

On 7 October 2002, you lodged a complaint against the European Commission concerning the Commission's refusal to grant access to two letters sent by Ireland to the Commission under Article 27 (1) of the Sixth VAT Directive and to a notification by Ireland under Article 27 (5) of the said directive.

On 16 October 2002, the Ombudsman forwarded the complaint to the President of the European Commission.

In an e-mail sent on 16 October 2002, you informed the Ombudsman that you wished your complaint to be treated on a confidential basis. The Commission was informed accordingly by the Ombudsman on 18 October 2002.

On 1 November 2002, you submitted a number of documents concerning your complaint to the Ombudsman. A copy of this letter and of its enclosures was forwarded to the Commission on 13 November 2002.

The Commission sent its opinion on 9 January 2003. Given that this opinion appeared to deal only with the first of your two allegations, the Ombudsman asked the Commission, by letter of 13 January 2003, for a supplementary opinion on the second allegation. You were informed accordingly by a letter sent the same day. The Commission's first opinion was also forwarded to you on that occasion.

On 29 January 2003, you sent a further e-mail to the Ombudsman in relation to your complaint. The Ombudsman forwarded this message to the Commission on 10 February 2003, asking the latter to address its contents in its second opinion.

The Commission sent its second opinion on 27 February 2003. A corrigendum was sent on 4 March 2003. The Ombudsman forwarded the second opinion to you on 6 March 2003 with an invitation to make observations. The corrigendum was forwarded to you on 10 March 2003.



On 19 May 2003, you sent me your observations on the Commission's opinions.

On 4 June 2003, I wrote to the Commission in order to ask for further information regarding your complaint. A request for information was also sent to the Permanent Representation of Ireland to the EU the same day. A copy of this latter request was sent to the Irish Ombudsman for his information on 4 June 2003.

On 24 July 2003, the Commission sent its reply to my request for further information. I forwarded this reply to you on 4 September 2003 with an invitation to make observations by 31 October 2003 at the latest.

On 8 September 2003, I received the Irish authorities' reply (dated 28 July 2003) to my request for information. I forwarded this reply to you on 9 September 2003 with an invitation to make observations by 31 October 2003 at the latest.

No observations appear to have been received from you.

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

## THE COMPLAINT

The Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (1) ("the Sixth Directive") lays down uniform rules for the transactions that are subject to value added tax (VAT). However, according to Article 27 (1) of the Directive, the Council may, acting unanimously on a proposal from the Commission, authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. A Member State wishing to introduce such measures shall inform the Commission of them and shall provide the Commission with all relevant information (Article 27 (2) of the Directive). Article 27 (5) of the Directive provides that those Member States which applied such special measures on 1 January 1977 were allowed to retain them, provided inter alia that they notified them to the Commission before 1 January 1978.

On 15 March 2002, the complainant, an Irish citizen, applied to the Commission for access to certain documents 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 (2). The documents requested were supplied on 19 July 2002, with the exception of two letters sent by Ireland to the Commission under Article 27 (1) of the Sixth Directive and of a notification by Ireland under Article 27 (5) of the said directive.

The complainant took the view that the relevant documents formed the basis on which Ireland applied certain VAT legislation to property transactions in Ireland and that without access to



them, citizens could not be sure that the Irish legislation was in accordance with what had been applied for by Ireland and approved by the Commission. According to the complainant, the Irish tax authorities had denied having copies of the relevant documents when a request for access had been made under the Irish Freedom of Information Act.

On 19 July 2002, the Commission informed the complainant that in accordance with Article 5 of Decision 2001/937 it would consult the Irish tax authorities as to whether these documents could be provided. On 12 August 2002, the Commission informed the complainant that access could not be granted since the Irish tax authorities had requested that the documents should not be disclosed. The Commission explained that the Irish authorities had to be consulted because the relevant documents had been submitted to it before Regulation 1049/2001 entered into force (3). The applicant's confirmatory application was rejected by the Commission on 23 August 2003. In this letter, the Commission pointed out that it was unable to provide the relevant documents by virtue of Article 4 (5) of Regulation 1049/2001.

Regulation 1049/2001 provides that citizens shall have a right to have access to all the documents held by an institution, that is to say, documents drawn up or received by it, unless one of the exceptions set out in the Regulation applies.

Article 4 ("Exceptions") sets out two main exceptions. According to Article 4 (1), access shall be refused where disclosure would undermine the protection of the public interest or the privacy and integrity of the individual. Access shall also be refused where disclosure would undermine the protection of several other interests set out at Article 4 (2), unless there is an overriding interest in disclosure.

Article 4 also contains the following provisions:

"(4) As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

(5) A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement."

According to its Article 19, the Regulation was applicable as from 3 December 2001.

Article 18 (1) of Regulation 1049/2001 provides that each institution shall adapt its rules of procedures to the provisions of this Regulation.

In its Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (4), the Commission adopted detailed rules for the application of Regulation 1049/2001 by the Commission (the "Detailed Rules"). These rules are laid down in an annex to be added to the Commission's Rules of Procedure. Article 5 ("Consultations") of the Detailed Rules provides as follows:



“(1) Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 applies. (...).

(2) If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third party.

(3) The Directorate-General or department holding the document shall grant the application without consulting the third-party author where

(a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;

(b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Regulation (EC) No 1049/2001.

(4) In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

(a) the document was forwarded to the Commission before the date from which Regulation (EC) No 1049/2001 applies;

(b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4 (5) of Regulation (EC) No 1049/2001.”

The complainant considered that the Commission had failed to comply with the above-mentioned rules by consulting the third-party author without having carried out the examination provided for in Article 5 (3) of the Detailed Rules. He took the view that a consultation of the third-party author is only called for where the conditions of the said provision are not fulfilled. In this context, the complainant laid particular emphasis on the wording of Article 5 (4) of the Detailed Rules (“In all the other cases...”).

The complainant considered that none of the interests set out in Article 4 (1) and (2) of Regulation 1049/2001 would be compromised by the disclosure of the documents. He submitted that Regulation 1049/2001 did not envisage Article 4 (4) (5) as a means whereby Member States could frustrate access to documents the disclosure of which did not harm the interests set out at Article 4 (1) and (2) of the Regulation.

In his complaint to the Ombudsman, the complainant thus essentially made the following allegations:



(1) The Commission failed to comply with the procedural rules laid down in Decision 2001/937 when deciding to consult the Irish authorities before deciding on granting access to the relevant documents.

(2) The Commission was wrong to refuse access to the relevant documents since their disclosure would not have compromised any of the interests set out at Article 4 (1) and (2) of Regulation 1049/2001 and since Regulation 1049/2001 did not envisage Article 4 (4) as a means whereby Member States could frustrate access to documents the disclosure of which did not harm the interests set out at Article 4 (1) and (2) of the Regulation.

The complainant claimed that the Commission should therefore review its decision.

## THE INQUIRY

### **The Commission's opinions** *The first opinion*

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

Regulation 1049/2001 addresses the question of access to third-party documents in two ways: Article 4 (4) envisages the standard case, whilst Article 4 (5) lays down specific rules for documents originating from Member States.

The general principle set out in Article 4 (4) of Regulation 1049/2001 is that third-party authors shall be consulted on disclosure of documents originating from them, unless there is no doubt as to whether or not the document should be disclosed. In Decision 2001/937, the Commission had provided some criteria in order to determine whether or not a document should be disclosed without consultation of the author.

Article 4 (5) of Regulation 1049/2001 provides that a Member State has the right to request the Commission not to disclose a document sent to the Commission without its consent. This provision only made sense if the Member State had had an opportunity to state whether or not it agreed with the disclosure of its document.

Unless the document had already been released by the originating authority or had otherwise been made public in accordance with legal provisions, the Commission was therefore under an obligation to consult the national authorities concerned before deciding to grant access to a document received from a Member State. This was particularly required as regards documents forwarded to the Commission before the date on which Regulation 1049/2001 became applicable. At the time they had transmitted these documents to the Commission, the Member States did not consider the possibility of public access. They should therefore be consulted before a decision was taken on the disclosure of such documents.

The Commission had clarified this in Article 5 (4) (b) of its Detailed Rules.

On the basis of the above, the Commission expressed the view that it had followed correct procedures and that it had not only been entitled to decide to consult the originating national



authorities, but that it had even been under an obligation to do so.

#### *The second opinion*

Given that the Commission's opinion appeared to deal only with the first of the two allegations submitted by the complainant, the Ombudsman asked the Commission for a supplementary opinion on the second allegation. In this second opinion, the Commission made the following comments:

The Commission had been under an obligation to consult the Irish authorities. If the Commission had considered that disclosure would be harmful, it would not have consulted the Irish authorities and would have denied access. This followed from Article 4 (4) of Regulation 1049/2001 and Article 5 (2) of the Detailed Rules. It was precisely because the Commission had considered the possibility of releasing the documents that it had consulted the national authorities.

Article 4 (5) of Regulation 1049/2001 created a specific rule within the Community transparency rules for a particular group of "third parties", namely the Member States. If the institutions would have the possibility to overrule a Member State's request not to disclose a document, there would be no need for a specific provision governing documents originating from Member States and Article 4 (5) would be meaningless.

The right of Member States to refuse their permission to the disclosure by the institutions of documents originating from them was not intended to restrict access to the document as such but to restrict access to it *under the Community rules*. This restriction was designed to take into account the status of the document under national law and policy and thus avoid discrepancies between the Community and the various national systems of transparency.

This position had also been adopted by the Commission in case T-168/02 *Internationaler Tierschutz-Fonds GmbH v Commission*, which was pending before the Court of First Instance.

#### **The complainant's observations**

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

Article 4 (5) of Regulation 1049/2001 only authorised Member States to make a request. There was nothing to indicate that they should have a veto as to whether documents could be disclosed. A Member State could only make such a request where the release of a document could affect one of the interests set out in paragraphs 1 and 2 of Article 4 of Regulation 1049/2001. The word "prior" in Article 4 (5) would not be necessary and would in fact be meaningless if the Commission were to be obliged to refer all documents to Member States to ascertain their wishes in this regard.

#### **Further inquiries**

After careful consideration of the Commission's opinions and the complainant's observations, it appeared that further inquiries were necessary.

#### *Requests for further information*

The Ombudsman therefore asked the Commission to provide more specific information on whether it had invited or received from the Irish authorities an explanation of their reasons for



rejecting disclosure of the documents.

In accordance with Article 3 (3) (6) of the Statute of the European Ombudsman (7) , a request for information was also sent to the Irish authorities. The latter were asked (1) to explain the reasons on the basis of which they considered that the relevant documents should not be disclosed by the Commission and (2) to specify whether they were in possession of copies of the relevant documents.

*The Commission's reply*

In its reply, the Commission made the following comments:

The Irish authorities had not specified the reasons for their opposition to the disclosure of the relevant documents.

Article 4 (4) set out the general rule according to which a third party should be consulted if it was not clear whether the document should or should not be released. Article 4 (5) provided a specific rule for Member States. This provision stemmed from Declaration n° 35 attached to the Final Act of the Treaty of Amsterdam. It reflected the need to reconcile the Community and the national rules on transparency. To subordinate Article 4 (5) to Article 4 (4) would deprive this provision of all effective meaning. This had not been the intention of the legislator.

According to the complainant, the Commission had not assessed whether release of the requested documents would harm any of the interests protected under Article 4 (1) or 4 (2) of Regulation 1049/2001. This was not correct. The Commission would have been in breach of its own detailed rules for the application of the Regulation if it had acted as suggested by the complainant. When handling a request for access to a document originating from a third party, the Commission analyses the requested document in order to assess whether one of the exceptions applies. If the Commission concludes that disclosure would be harmful, it refuses access without consulting the author. In the present case, the Commission's analysis had not resulted in a denial of access. Consequently, the Commission had decided to consult the Irish authorities.

The Commission systematically consulted Member States on requests for access to documents received before the date (3 December 2001) when Regulation 1049/2001 became applicable (Article 5 (4) of Decision 2001/937). This provision was the logical consequence of the retroactive effect of the Regulation.

*The Irish authorities' reply*

In their reply to the Ombudsman's request for information, the Irish authorities made the following comments:

The release of official documents in Ireland was governed by the Freedom of Information Act 1997. The documents concerned by the present case had been the subject of a request for access under that Act. Under Section 6 (4) of the Freedom of Information Acts 1997 and 2003, in the case of non-personal and non-personnel records, a person had the right to request access to all records created after the commencement of the Acts, i.e. 21 April 1998. Earlier records could be requested only if they were needed to understand later records which are





accessed.

In the Irish authorities' view, there was no need to access information prior to 1998 in order to understand the workings of the particular VAT provision, and it had been on this basis that access to any information created prior to April 1998 was refused.

It would be inconsistent to refuse material under national Freedom of Information legislation, while agreeing to allow it to be released under similar EU legislation.

As part of a release of documents to another person, a document had been released which seemed relevant to the complainant's request. This was a copy of a letter which had been sent by the Irish Permanent Representative to the Commission on 22 December 1977 and which concerned the implementation of the Sixth VAT Directive in Ireland. This document had been released since it was part of a document produced after the Freedom of Information Act came into force.

A copy of this document was submitted by the Irish authorities.

#### *The complainant's observations*

The replies sent by the Commission and the Irish authorities were forwarded to the complainant for his observations. No observations were received from the complainant.

## **THE DECISION**

### **1 Allegedly wrongful failure to grant access to documents**

1.1 The complainant, an Irish citizen, applied to the Commission for access to certain documents 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 (8) . The documents requested were supplied on 19 July 2002, with the exception of two letters sent by Ireland to the Commission under Article 27 (1) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (9) and of a notification by Ireland under Article 27 (5) of the said directive. The complainant alleges that the Commission was wrong to refuse access to the relevant documents since their disclosure would not have compromised any of the interests set out at Article 4 (1) and (2) of the Regulation and since the Regulation did not envisage Article 4 (4) (10) as a means whereby Member States could frustrate access to documents the disclosure of which did not harm the interests set out at Article 4 (1) and (2) of the Regulation.

1.2 The Commission takes the view that it was unable to release the relevant documents by virtue of Article 4 (5) of the Regulation, given that the Irish authorities had requested it not to release these documents. In its view, Article 4 (5) of Regulation 1049/2001 creates a specific rule within the Community transparency rules for a particular group of "third parties", namely the Member States. To subordinate Article 4 (5) to Article 4 (4) would deprive this provision of all effective meaning. The Commission submits that this was not the intention of the legislator. It adds that if the institutions were to have the possibility to overrule a Member State's request not





to disclose a document, there would be no need for a specific provision governing documents originating from Member States and Article 4 (5) would be meaningless.

1.3 As the Court of First Instance has recently held (11) , it follows from Article 4 (5) of Regulation 1049/2001 “that, among third parties, the Member States are subject to special treatment. That provision confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement.” (12) The court also pointed out “that the power conferred on Member States to request the non-disclosure of their documents to third parties without their prior agreement is one of the exceptions to the right of access to documents of the institutions which are laid down in Article 4 of Regulation No 1049/2001.” (13) In view of this judgement, the complainant's arguments concerning the interpretation of Article 4 (5) and its relationship with Article 4 (4) do not appear to be sustainable.

1.4 The Ombudsman therefore considers that the complainant has not succeeded in showing that the Commission's decision to refuse access was wrong.

1.5 In these circumstances, the Ombudsman considers that there was no maladministration in so far as this aspect of the case is concerned.

## **2 Alleged failure to comply with the procedural rules laid down in Decision 2001/937**

2.1 The complainant alleges that the Commission failed to comply with the procedural rules laid down in Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (14) by consulting the third-party author (that is to say, the authorities of the Member State concerned) without having carried out the examination provided for in Article 5 (3) of the detailed rules introduced by Decision 2001/937.

2.2 The Commission points out that when handling a request for access to a document originating from a third party, it analyses the requested document in order to assess whether one of the exceptions applies. If the Commission concludes that disclosure would be harmful, it refuses access without consulting the author. According to the Commission, in the present case its analysis did not result in a denial of access. Consequently, the Commission decided to consult the Irish authorities. The Commission takes the view that it was under an obligation to consult the national authorities concerned, particularly as regards documents forwarded to the Commission before the date on which Regulation 1049/2001 became applicable.

2.3 The Ombudsman notes that Commission Decision 2001/937 establishes detailed rules for the application of Regulation 1049/2001 by the Commission (the “Detailed Rules”). These rules are laid down in an annex added to the Commission's Rules of Procedure. According to Article 5 (“Consultations”) of the Detailed Rules, the procedure to be followed by the Commission as regards requests for access to third-party documents is as follows: (1) The Commission checks whether one of the exceptions set out in Article 4 of Regulation 1049/2001 applies (Article 5 (1) of the Detailed Rules); (2) if that is the case, access is refused without consulting the third-party author of the document (Article 5 (2) of the Detailed Rules); (3) if the document has already been disclosed or if its disclosure would not obviously affect one of the interests set out in Article 4 of Regulation 1049/2001, access is granted without consulting the third-party author of



the document (Article 5 (3) of the Detailed Rules); (4) in all other cases, the third-party author is consulted (Article 5 (4) of the Detailed Rules).

2.4 The Ombudsman considers that both the wording and the structure of these provisions suggest that the Commission has to examine the possibility of disclosing the document *before* consulting the third-party author. In particular, the Commission has to check whether the document can be disclosed because its disclosure would not obviously affect one of the interests set out in Article 4 of Regulation 1049/2001 (Article 5 (3) of the Detailed Rules). The Ombudsman considers that the Commission has not established that it has complied with this obligation. (15) On the contrary, the Commission argues that it was obliged to consult the Irish authorities, particularly given that the relevant documents had been submitted before Regulation 1049/2001 became applicable. In its reply to the Ombudsman's request for further information, the Commission furthermore admits that it consults Member States systematically where access to such documents is requested.

2.5 The Ombudsman notes that such an obligation to consult Member States in the case of requests of access to documents submitted to the Commission before Regulation 1049/2001 became applicable is indeed foreseen in Article 5 (4) second sentence of the Detailed Rules. However, according to the wording and the arrangement of the provision concerned this obligation exists only in all the *other* cases, i.e. those where the Commission is unable to refuse or to grant access itself on the basis of Article 5 (2) and Article 5 (3) of the Detailed Rules. According to the rules adopted by itself, the Commission would thus have to check whether the document can be disclosed because its disclosure would not obviously affect one of the interests set out in Article 4 of Regulation 1049/2001 (Article 5 (3) of the Detailed Rules).

2.6 The Ombudsman thus arrives at the conclusion that the Commission has failed to comply with the procedural rules it had itself adopted in Decision 2001/937.

2.7 However, the Ombudsman considers that regard should also be had to the substance of the matter. As mentioned above (see point 1.3), Article 4 (5) of Regulation 1049/2001 authorises Member States to request the Community institutions not to release documents submitted by them to these institutions. If this right is to be exercised in a useful way, Member States must have had a chance to consider the question as to whether or not access to documents originating from them should be refused. Since the possibility that citizens might obtain access to documents originating from Member States under Community law was only created by Regulation 1049/2001, it appears both appropriate and fair to consult Member States in every case where access is requested to a document submitted to the Community institutions before this Regulation became applicable on 3 December 2001.

2.8 Regard should also be had to the above-mentioned judgement of the Court of First Instance. In the case before the Court, the plaintiff had requested access to documents which a Member State (Italy) had submitted to the Commission before Regulation 1049/2001 became applicable. The Commission rejected this request. After the plaintiff had brought an action before the Court of First Instance, the Commission asked the authorities of the Member State concerned whether they would agree with the disclosure of the documents. In their reply, the



authorities of the Member State informed the Commission that they agreed with the refusal to grant access. In its judgement, the Court held as follows: “In that regard, it is appropriate to note that the consultation of the Italian authorities was manifestly necessary, since the applicant’s application for access covered documents sent to the institution prior to the date on which Regulation No 1049/2001 entered into force.” (16)

2.9 In these circumstances, the Ombudsman considers that the Commission, whilst failing to comply with its own procedural rules, acted correctly as regards the substance of the case. As a matter of fact, it could well be argued that if the Commission had complied with its own procedural rules, it would have been guilty of maladministration. The Ombudsman considers that it would therefore not be appropriate to find, in the present case, that the Commission’s failure to comply with its own procedural rules constituted maladministration. (17) In order to help prevent similar situations arising in the future, the Ombudsman makes a further remark below.

2.10 In these circumstances, the Ombudsman considers that there was no maladministration in so far as this aspect of the case is concerned.

### **3 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.

## **FURTHER REMARKS**

On the basis of the Ombudsman’s inquiries, it appears that the procedural rules adopted by the Commission in its Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure, and in particular Article 5 (4) of these rules, are not drafted with the precision necessary to reflect the substantive provisions laid down in 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. The Ombudsman would therefore consider it useful if the Commission could review these provisions. The corresponding rules adopted by the Council in its Decision of 29 November 2001 amending the Council’s Rules of Procedure (18) (and in particular Article 2 (1) of Annex III added to the Council’s Rules of Procedure by this Decision) may serve as useful guidance in this context.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1977 no. L 145, page 1.



(2) OJ 2001 no. L 145, page 43.

(3) The expression used by the Commission does not appear to be entirely correct. What the Commission probably meant to say was that the documents had been submitted before Regulation 1049/2001 became applicable (see Article 5 (4) (a) of the "Detailed Rules" introduced by Decision 2001/937).

(4) OJ 2001 no. L 345, page 94.

(5) The complainant probably meant Article 4 (5) of Regulation 1049/2001.

(6) "The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it."

(7) 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, page 15.

(8) OJ 2001 no. L 145, page 43.

(9) OJ 1977 no. L 145, page 1.

(10) The complainant probably meant Article 4 (5) of Regulation 1049/2001.

(11) Judgement of 17 September 2003 in Case T-76/02 *Messina v Commission* .

(12) Loc. cit., paragraph 40.

(13) Loc. cit., paragraph 55.

(14) OJ 2001 no. L 345, page 94.

(15) All the Commission says in this context is that it checked whether access had to be denied on the basis of Article 5 (2) of the Detailed Rules and that it came to the conclusion that this was not the case.

(16) Loc. cit., paragraph 42. As to the reference to the entry into force of the Regulation, see footnote 3 above.

(17) It is not without interest to note that according to the established case-law of the Court of



Justice, where the grounds of a judgement of the Court of First Instance disclose an infringement of Community law but the operative part of the judgement is shown to be well founded for other legal reasons, the appeal must be dismissed (see for example Case C-30/91 *P Lestelle v Commission* [1992] ECR I-3755, paragraph 28, and Case C-320/92 *P Finsider v Commission* [1994] ECR I-5697, paragraph 37).

(18) OJ 2001 L 313, p. 40.