

## Decision of the European Ombudsman on complaint 322/2003/IP against the European Commission

Decision

**Case 322/2003/IP - Opened on 18/03/2003 - Decision on 26/11/2004**

Strasbourg, 26 November 2004

Dear Mr X.,

On 16 October 2002, you made a complaint to the European Ombudsman concerning the European Commission's refusal to grant you access to a State aid file. It appeared that you sent this same letter simultaneously to the Ombudsman and to the Secretary General of the Commission. On 25 November 2002, the Commission forwarded to the Ombudsman a copy of the reply to your letter of 16 October 2002 that the institution had sent to you on 11 November 2002. On 27 November 2002, you sent to the Ombudsman further documents to support your complaint. On 11 December 2002, the Ombudsman sent you his decision on your complaint.

On 13 December 2002, you sent a further letter to the Ombudsman, which was registered on 6 January 2003. You acknowledged receipt of the Ombudsman's reply of 11 December 2002 and asked him to reconsider your complaint. This letter was followed by further correspondence from you of 13 and 31 December 2002, 10 and 20 January 2003. On 20 February 2003, the Ombudsman informed you of his decision to consider your letter of 13 December 2003 and the further correspondence as a new complaint under the reference number 322/2003/IP.

On 18 March 2003, the Ombudsman forwarded the complaint to the President of the Commission. The Commission sent its opinion on 10 June 2003. On 26 June 2003, I forwarded it to you with an invitation to make observations, if you so wished. You sent your observations on 18 July 2003. I received further correspondence from you on 30 September 2003, 19 May, 30 July, 7 and 13 September 2004.

On 23 July 2004, I sent you a holding letter in which I informed you that I would communicate to you the actions I would take concerning your case by the end of October. However, on 28 October 2004, I sent you a further letter by which I informed you that some extra time would be necessary to conclude the inquiry into your complaint, and that I would communicate to you the action I would take by the end of November 2004.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the time it has taken to conclude these inquiries.



## THE COMPLAINT

### Background

On 16 September 2001, the complainant had asked the European Commission for access (1) to the exchange of correspondence between the Commission and the Italian authorities prior to the Commission's decision of 12 July 2002, by which the Commission had agreed to extend the State aid foreseen by Italian law n° 488/1992 for the period 2000-2006.

On 27 September 2001, the Commission had rejected the complainant's request and stated that the complainant should address his request directly to the Italian authorities. The institution had however pointed out that it had no objections to disclosing to the complainant the documents of which it was the author.

On 6 October 2001, the complainant had made a confirmatory request to the Secretariat General of the Commission against the institution's refusal to grant him access to the requested documents. On 7 November 2001, the Commission had acknowledged receipt of the complainant's letter. The complainant had been informed that it would not be possible to take a final decision on his request within the one-month deadline.

On 10 December 2001, the complainant had written to the Commission stating that in its letter of 7 November 2001, the institution had postponed sine die its decision on his request. He had therefore asked the Commission to indicate a possible date for its reply, in accordance with Article 4 of the Code of Conduct adopted by the Commission on 17 October 2000.

On 1 February 2002, the Commission had sent a holding letter to the complainant, informing him that due to the questions of principle raised in the complainant's request, the file was still under investigation by the Commission's services.

According to the complainant, on 12, 18 and 21 March 2002, telephone calls had taken place between himself and the Commission official responsible for his case who had assured him that he would receive a written reply. However, it appeared that no reply was forwarded to the complainant.

### Previous complaint to the Ombudsman

On 16 October 2002, the complainant had made a complaint to the Ombudsman concerning the Commission's handling of his request for access to documents.

On 25 November 2002, the Ombudsman had received a copy of the letter sent by the Commission to the complainant in reply to his letter of 16 October 2002 which had been addressed simultaneously to both the Commission and the Ombudsman. In its letter, the Commission had recalled that on 27 September 2001, Directorate-General Competition had refused to grant to the complainant access to those documents which had been drafted by the Italian authorities, in accordance with the provisions laid down in Decision 94/90 which was the legislation in force at the time of the request. The complainant had been invited to address his request directly to the Italian authorities. On 6 October 2001, the complainant had made a



confirmatory application for access to documents and in a further letter of 10 October 2001, he stated that he had addressed his request for access to documents to the Italian authorities as suggested by the Commission and that the latter had refused access.

As regards the complainant's point made in his letter of 16 October 2002 that the Commission's failure to reply in due time to his request for access to documents had prevented him from bringing the case before the Court of First Instance, the Commission stated that both Decision 94/90 and Regulation 1049/2001 which had since entered into force, foresaw that the absence of an explicit reply had to be considered as a rejection. The Commission also referred to the fact that each request for access to documents was dealt with individually. The reference made by the complainant to the fact that an Italian company had asked for and obtained access to certain documents which were similar to those requested by him was therefore not relevant. The institution finally referred to the fact that the Court of First Instance was dealing with case Y in which the plaintiff, represented by the complainant, had asked the Court to annul the Commission's decision to refuse her access to the same documents as those requested by the complainant. Once the Court had taken a decision on the case, the Commission would follow the Court's indications.

In a further letter to the Ombudsman of 27 November 2002, the complainant alleged that the Commission's agents representing the institution in case Y had infringed Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (2) , when disclosing his personal data in the rejoinder in case Y.

On 11 December 2002, the Ombudsman closed the case. As regards the allegation concerning the Commission's refusal to grant access to the documents requested by the complainant, the Ombudsman took the view that, on the basis of the content of the Commission's letter received on 25 November 2002, an inquiry on his part was not justified as far as this part of the complaint was concerned. As regards the allegation made by the complainant in his letter of 27 November 2002 concerning the behaviour of the Commission's agents representing the institution in case Y, the Ombudsman noted that no prior administrative approaches had been made by the complainant and he therefore decided to close the case on the basis of Article 2(4) of his Statute.

On 6 January 2003, a further letter sent by the complainant on 13 December 2002 was registered by the Ombudsman's services. In his letter, the complainant acknowledged receipt of the Ombudsman's letter of 11 December 2002 and asked the Ombudsman to reconsider his complaint. This letter was followed by further correspondence from the complainant of 13 and 31 December 2002, 10 and 20 January 2003. On 20 February 2003, the Ombudsman informed the complainant that he had decided to register his letter received on 6 January 2003 as a new complaint with reference 322/2003/IP.

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In his complaint, the complainant took the view that the Commission had not followed the principle of good administrative behaviour when dealing with his request for access to



documents made in September 2001, since it had failed to provide him with an explicit reply to his request.

He furthermore alleged that in the proceedings in case Y that was pending before the Court of First Instance, the Commission's agents representing the institution had disclosed information concerning his person (the complainant was the legal representative of the plaintiff in this case) which was not relevant to the purpose of the case. In the complainant's view, the Commission's agents had thereby infringed Article 4 letter c) and d), of Regulation 45/2001 according to which:

*"Personal data must be:*

*c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*

*d) accurate and, where necessary, kept up to date (...)"*.

The complainant took the view that the disclosure of his and his client's personal data were not necessary for the purpose of the case.

He furthermore alleged an infringement of Article 5 a) on the basis of which:

*"personal data may be processed only if (a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties (...)"*

According to the complainant, the disclosure of his personal data concerning his name, the bar association to which he was registered, the reference to some cases in which he had taken part as legal representative, the names of some of his clients as well as the outcome of certain legal proceedings had been unnecessary for the purpose of the case.

The complainant finally alleged an infringement of Article 7 (1) which states that *"(...) [p]ersonal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"* .

According to the complainant, these points had already been the objects of a complaint made by him to the Commission on 27 November 2002 and for which the Commission had sent an acknowledgement of receipt on 18 December 2002. On 19 December 2002, the complainant wrote a further e-mail to the Commission asking when his complaint had been registered by the competent services (3) . Later the same day, the Commission replied to the complainant by e-mail signed by the Head of Unit SG/B/2. In this reply, the Commission stated that the institution had already replied to the complainant's allegations in its letter of 11 November 2002, signed by Secretary-General, and that in view of the fact that he had lodged a complaint with the Ombudsman, the Commission considered it not to be appropriate further to correspond with the complainant.

In his letter of 18 March 2003 addressed to the President of the European Commission, the



Ombudsman asked the Commission to provide an opinion on the following allegations:

- the complainant alleged that the Commission failed to follow principles of good administrative behaviour when dealing with his request for access to documents.
- infringement of Regulation (EC) No 45/2001 by the Commission's agents representing the institution in case Y. According to the complainant, this allegation had been the object of a letter of 27 November 2002 which he sent to the Commission and to which the institution did not reply.

In his opening letter to the Commission, the Ombudsman pointed out that, as regards the first allegation, since the Court of First Instance was dealing with a case (Y) (4) concerning a request for access to the same documents, the Ombudsman's inquiry was limited to the Commission's administrative handling of the complainant's request, and did not concern the substantive question of whether the Commission's refusal of access was justified. The complainant was informed accordingly.

## **THE INQUIRY**

### **The European Commission's opinion**

In its opinion on the complaint, the Commission recalled the facts at the origin of the complaint. The institution pointed out that when the complainant had made his request for access to documents on 16 September 2001, Regulation 1049/2001 had not yet been in force and that in accordance with the Code of conduct annexed to Decision 94/90, documents of third parties could not be disclosed. In its further letters dated 7 November 2001, 20 December 2001 and 1 February 2002, the Commission informed the complainant that his request raised questions of principle relating to the implementation of the rules on access to documents which the institution was reviewing at that moment. It was therefore not possible for the Commission at that time to give him a reply different from the one that had been given to him on 27 September 2001 by Directorate-General Competition when it had rejected the complainant's request for access to documents.

The Commission also referred to the fact that on 4 December 2001, a request for access to the same documents requested by the complainant had been made by one of his clients, Ms M., who had based her request on Regulation 1049/2001. Directorate-General Competition refused her access to the requested documents by letter of 19 December 2001. On 14 January 2002, Ms M. made a confirmatory request to the Secretary-General of the Commission. A holding reply had been sent to her by the Commission's services on 1 February 2002. On 11 March 2002, the complainant, in his capacity as legal representative of Ms M. made an application for annulment of the Commission's decision refusing her client access to the requested documents before the Court of First Instance.

In a letter sent to both the European Commission and the Ombudsman on 16 October 2002, the complainant complained against the Commission's handling of his request for access to documents. The Commission replied to the complainant's points by letter of 11 November 2002,



a copy of which was sent to the Ombudsman, for information. On 27 November 2002, the complainant sent a further letter to the Secretary-General of the Commission. Since the Commission considered that the complainant had not put forward new elements with respect to his previous correspondence with the institution it informed him, by letter of 19 December 2002, that it considered it not to be appropriate to continue corresponding with him, also in view of the fact that he had lodged a complaint with the Ombudsman.

As regards the allegation made by the complainant in his complaint that the Commission had not followed principles of good administrative behaviour when dealing with his request for access to documents since the institution had failed to provide him with an explicit reply to his request, the Commission stressed that, when the complainant made his request, the applicable legislation was Decision 94/90. On 3 December 2001, Regulation (EC) 1049/2001 entered into force and since then it was the legal basis for the exercise of the right of public access to documents. In accordance with Article 2 (4) of Decision 94/90, *"failure to reply within one month of an application for review being made constitutes a refusal"*. A similar provision was, however, laid down in Article 4 (8) of Regulation (EC) 1049/2001 which established that *"failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty"*. The Commission therefore took the view that the fact that it had not provided the complainant with an explicit reply to his confirmatory request could not be considered as an instance of maladministration.

Furthermore, the Commission referred to the point made by the complainant that, in his view, the Commission's agent representing the institution in case Y had infringed Regulation (EC) No 45/2001. The Commission stated that this point had been addressed for the first time in the complainant's letter of 27 November 2002 to the Ombudsman and that the Commission had not been aware of it. Furthermore, the Commission took the view that it was for the Court of First Instance to deal with his point, since it concerned a proceeding before the Court. The Commission took the view that the Ombudsman was not competent to deal with this aspect of the case.

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

In his observations on the Commission's opinion, the complainant stressed that the description of the facts made by the institution was incorrect as far as it concerned the Commission's point that Directorate-General Competition had rejected the complainant's request for access to documents made on 16 September 2001. The complainant pointed out that, in its reply of 27 September 2001, Directorate-General Competition had stated that it had no objections to disclosing the documents which it had sent to the Italian authorities and of which it therefore was the author to the complainant. Furthermore, the complainant considered that the Commission's letters of 7 November 2001, 20 December 2001 and 1 February 2002 did not contain a rejection of his confirmatory application but they were only holding replies the meaning of which was not clear.

The complainant basically maintained his point that, in spite of the fact that the Commission had assured him that he would receive a reply, the institution had not acted in accordance with its statements and had failed to follow principles of good administration.



As regards the aspect of the case concerning the behaviour of the Commission's agents during the proceedings before the Court of First Instance in case Y, the complainant took the view that the Ombudsman could deal with this point. He furthermore stated that, on the basis of Article 32 of Regulation (EC) 45/2001, it seemed that it would be for the Court of Justice and not the Court of First Instance to deal with similar cases.

## THE DECISION

### **1 The Commission's handling of the complainant's request for access to documents**

1.1 On 16 September 2001, the complainant made a request for access to documents to the Commission. In his complaint to the Ombudsman, he alleged that the Commission had failed to follow principles of good administrative behaviour when dealing with his request for access to documents.

In view of the fact that, when the complainant complained to the Ombudsman, the Court of First Instance was dealing with a case concerning a request for access to the same documents, the Ombudsman's inquiry was limited to the Commission's administrative handling of the complainant's request and did not concern the substantive question of whether the Commission's refusal of access was justified.

1.2 In its opinion on the complaint, the Commission pointed out that the legislation in force when the complainant made his request on 16 September 2001 was Decision 94/90 on public access to documents. On 27 September 2001, Directorate-General Competition informed the complainant of its decision to reject his request. On 6 October 2001, the complainant made a confirmatory application to the Secretariat-General of the Commission against the institution's refusal to grant him access to the requested documents. In its letters dated 7 November 2001, 20 December 2001 and 1 February 2002, the Commission informed the complainant that the complainant's request raised questions of principle relating to the implementation of the rules on access to documents which the institution was reviewing at that moment. It was therefore not possible for the Commission at that time to give him a reply different from the one that had been given to him on 27 September 2001 by Directorate-General Competition.

In a further letter sent to both the European Commission and the Ombudsman on 16 October 2002, the complainant complained (5) against the Commission's handling of his request for access to documents. The Commission replied to the complainant's points by letter of 11 November 2002. On 27 November 2002, the complainant sent a further letter to the Secretary-General of the Commission, to which the institution replied on 19 December 2002.

The Commission considered that when dealing with the complainant's request, it had acted in accordance with the relevant legislation. In accordance with Article 2 (4) of Decision 94/90, *"failure to reply within one month of an application for review being made constitutes a refusal"*. The fact that the Commission had not provided the complainant with an explicit reply to his confirmatory request could not be considered as an instance of maladministration.



1.3 In his observations, the complainant maintained his point of view that the Commission had failed to follow principles of good administrations when dealing with his request for access to documents.

1.4 The Ombudsman notes that when the complainant made his request for access to documents to the Commission in September 2001 and his confirmatory application in October 2001, the relevant legislation in force was Decision 94/90. According to Article 2(4) of this decision the failure by the institution concerned to reply within one month to a confirmatory application constituted a refusal (6) .

1.5 The rule that the lack of a reply to a confirmatory application constitutes a negative decision has the purpose of protecting the person concerned from further delay in case the authority fails to act within the time-limit foreseen. The Ombudsman considers, however, that principles of good administration require that the institutions reply to requests made by citizens and give reasons for their decisions. The above-mentioned rule does not entitle the authority to depart from its obligation to follow principles of good administrative behaviour (7) .

1.6 The Ombudsman furthermore considers that, although a failure to reply to a confirmatory application does not prevent an applicant from instituting court proceedings or from pursuing his application before the Ombudsman, the complainant would in such a case be unable to know on what substantive reasons the refusal to grant access was based. The failure to reply to a confirmatory application would therefore be likely to impair the applicant's capacity to pursue his case.

1.7 The Ombudsman therefore takes the view that the Commission's failure to provide a reasoned reply to the complainant's confirmatory application constitutes an instance of maladministration.

1.8 The Ombudsman furthermore notes that the complainant has argued that on several occasions the Commission had promised to provide him with a written reply to his confirmatory request of 6 October 2001. The documentary evidence in the Ombudsman's possession confirms that this was indeed the case. The Ombudsman further notes that the Commission has not contested this point. The Ombudsman therefore takes the view that the fact that the Commission failed to reply to the complainant's confirmatory application although it had promised to do so constitutes an instance of maladministration.

1.9 The Ombudsman will therefore make a critical remark as regards the instances of maladministration described in points 1.7 and 1.8.

## **2 Alleged infringement of Regulation 45/2001 by the Commission's agents**

2.1 In his complaint, the complainant alleged that the Commission's agents representing the institution in case Y had infringed Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. According to the complainant, this allegation had been the object of a letter of 27 November 2002 which he had sent to the Commission and to which the institution had not replied.



2.2 In its opinion, the Commission put forward that this point had been addressed by the complainant for the first time in his letter of 27 November 2002 to the Ombudsman and that the Commission had not been aware of it. Furthermore, the Commission took the view that it was for the Court of First Instance to deal with this point, since it concerned proceedings before the Court. The Commission took the view that the Ombudsman was not competent to deal with this aspect of the case.

2.3 In his observations, the complainant maintained his position concerning this aspect of the case and expressed the view that the Ombudsman was competent to deal with this allegation.

2.4 Article 195 of the Treaty empowers the European Ombudsman to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

As regards the present case, it appears that the allegation made by the complainant does not concern the judicial activity of the Court but the behavior of the Commission's representatives in the framework of the relevant proceedings. The Ombudsman therefore considers that the exception laid down in Article 195 of the Treaty does not apply to the present case.

2.5 As regards the Commission's point that it was not aware of the letter sent by the complainant on 27 November 2002, it appears from the information in the Ombudsman's possession that this letter was addressed to both the Ombudsman and the Commission. The Ombudsman therefore assumed that the Commission had received the letter. On this basis, the Ombudsman considered this aspect of the case to be admissible when opening his inquiry into the present complaint. In any event, the Commission was informed of the complainant's allegation by the Ombudsman through his letter of 18 March 2003.

2.6 The Ombudsman notes that the Commission has not yet addressed the substance of the issue. This issue therefore still needs to be examined. It should be noted, however, that the European Data Protection Supervisor, an independent supervisory body provided for in Article 286 of the EC Treaty, has been appointed by decision of the European Parliament and of the Council on 22 December 2003 (8), after, that is, the present complaint was lodged. In accordance with Article 1 of Regulation (EC) 45/2001, the European Data Protection Supervisor is responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies with respect to the processing of personal data.

In view of the circumstances of the present case, the Ombudsman considers that the European Data Protection Supervisor is the most appropriate authority to deal with the complainant's allegation.

On this basis, the Ombudsman takes the view that there are no grounds for pursuing his inquiry



into this aspect of the case. The complainant could therefore address the European Data Protector Supervisor as regards this aspect of the case.

## **2 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remarks:

1 The rule that the lack of a reply to a confirmatory application constitutes a negative decision has the purpose of protecting the person concerned from further delay in case the authority fails to act within the time-limit foreseen. The Ombudsman considers, however, that principles of good administration require that the institutions reply to requests made by citizens and give reasons for their decisions. The above-mentioned rule does not entitle the authority to depart from its obligation to follow principles of good administrative behaviour.

The Ombudsman furthermore considers that, although a failure to reply to a confirmatory application does not prevent an applicant from instituting court proceedings against the institution or from pursuing his application before the Ombudsman, the complainant would in such a case be unable to know on what substantive reasons the refusal to grant access was based. The failure to reply to a confirmatory application would therefore be likely to impair the applicant's capacity to pursue his case.

The Ombudsman therefore takes the view that the Commission's failure to provide a reasoned reply to the complainant's confirmatory application constitutes an instance of maladministration.

2 The Ombudsman furthermore notes that the complainant has argued that on several occasions the Commission had promised to provide him with a written reply to his confirmatory request of 6 October 2001. The documentary evidence in the Ombudsman's possession confirms that this was indeed the case. The Ombudsman further notes that the Commission has not contested this point. The Ombudsman therefore takes the view that the fact that the Commission failed to reply to the complainant's confirmatory application although it had promised to do so constitutes an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) The request was made under the Commission's decision 94/90/CECA, EEC, Euratom of 8 February 1994, which was the legislation in force at the time.



(2) Official Journal L 8 of 12 January 2001, pp. 1 - 22.

(3) In a letter of 14 January 2003 to the Ombudsman, the complainant explained that this request had been made with an eye to determining the period within which the Commission should have replied to his complaint.

(4) (not yet published in ECR).

(5) This letter was registered as a complaint with the reference 1810/2002/IP, which the Ombudsman closed on 11 December 2002 (pp. 2 and 3 of the present decision).

(6) A similar provision is contained in Article 8(3) of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31 May 2001, pp. 43-48), according to which a failure by the institution to reply within the prescribed time-limit shall be considered as a negative reply.

(7) The Ombudsman has taken a similar position in cases 1479/99/(OV)MM and 729/2000/OV concerning the failure to reply to a complaint made under Article 90(2) of the Staff Regulations.

The texts of these decisions can be found at the Ombudsman's website:

<http://www.ombudsman.europa.eu/decision/en/991479.htm> [Link]

<http://www.ombudsman.europa.eu/decision/en/000729.htm> [Link]

(8) OJ L12 of 17 January 2004, p. 47.