

Decision of the European Ombudsman on complaint 412/2003/GG against the European Commission

Decision

Case 412/2003/GG - Opened on 11/03/2003 - Decision on 21/07/2003

Strasbourg, 21 July 2003

Dear Mr B.,

On 24 February 2003, you made a complaint to the European Ombudsman concerning the European Commission's refusal to grant you access to an opinion of its Legal Service.

On 11 March 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 12 May 2003. I forwarded it to you on 20 May 2003 with an invitation to make observations, which you sent on 24 June 2003.

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

THE COMPLAINT

The complainant, a researcher at the Center for European Integration Studies (University of Bonn), requested access to an opinion of the Commission's Legal Service on the relationship between the Euratom Treaty and the EC Treaty in so far as state aids rules are concerned.

The application was rejected on 23 July 2002 on the grounds that the exception set out at Article 4 (2), second indent of Regulation (EC) no. 1049/2001 was applicable. The confirmatory application was rejected on the same grounds on 4 October 2002. In the latter decision, the Commission explained that the relevant opinion dealt with the legal aspects of the applicability of the state aids rules of the EC Treaty to nuclear power plants. The Commission added that it was not possible to grant partial access either, because all the parts of the opinion were indissolubly linked to each other.

In his complaint to the Ombudsman, the complainant argued that the Commission's position was incompatible with both Article 255 of the EC Treaty and Article 4 (2) of Regulation 1049/2001. In his view, the citizens' right of information enshrined in Article 255 of the EC Treaty and in Article 42 of the Charter of Fundamental Rights of the EU is a constitutional right, which gives effect to the principle of transparency mentioned in Article 1 of the Treaty on



European Union. The complainant submitted that the exceptions set out in Regulation 1049/2001 ought to be interpreted narrowly. In the complainant's view, the Commission infringed this principle if it refused to grant access to the document concerned without examining the reasons put forward by the applicant and without weighing these reasons against its own reasons. The complainant alleged that the Commission had failed to assess properly whether there was an overriding public interest in disclosure. In this context, he referred to the fact that he needed the document for his scientific work covered by Article 13 of the Charter of Fundamental Rights of the EU. In the complainant's view, this fact in itself established a public interest in disclosure. He also referred to the interest in disclosure on the part of potential readers of his work. The complainant also relied on the fact that his institute was funded by the tax-payer and that its purpose was to provide an international forum for all issues related to European integration. In his view, his institute by necessity depended on the widest-possible access to documents in order to fulfil this mission. The complainant further submitted that it was hard to imagine how the disclosure of a document that was more than two years old could jeopardise legal certainty and the stability of the legal order of the Community. Finally, the complainant took the view that there was nothing to suggest that partial access should be impossible in the present case.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The Commission did not dispute the complainant's arguments that the citizens' right of information is a constitutional right and that exceptions to the right of access have to be applied strictly. However, these arguments were not specific for this case. The Commission had applied the exception provided for in Article 4 (2), second indent of Regulation (EC) no. 1049/2001, in accordance with the general principles governing the public right of access to Commission documents. The Commission had refused to disclose the relevant document in order to protect the independence of its Legal Service when it provides legal advice to the institution. The European courts had recognised the need to grant particular protection to Legal Service opinions in an order made in case T-610/97 R *Carlsen a.o. v. Council* (1) , in the judgement in case T-44/97, *Ghignone a.o. v. Council* (2) and in an order in case C-445/00 *Austria v. Council* (3) .

The Regulation clearly stipulates that an applicant does not have to give reasons for his request for access. Furthermore, a person who has obtained access to a document following a request under Regulation 1049/2001 may use it – within the limits set by Article 16 of the Regulation – for all purposes, including publication. Consequently, once a document has been released to one person, it is considered to be in the public domain. For these reasons, the Commission was under no obligation to weigh the complainant's interest in obtaining the document against the protection of legal advice. The Regulation does not provide for such a balancing of particular interests.

Article 4 (2) of the Regulation stipulates that the institution "shall refuse access to (...) legal



advice (...) unless there is an overriding public interest in disclosure". In other terms, the overriding public interest in disclosure is an exception to the exception and not a general rule. The Commission fully appreciated the quality of the publications of the complainant's institute. However, the public interest of disclosure of this particular legal opinion had to be balanced against the interest of protecting the proper functioning of the Commission based on the independent advice of its Legal Service. On balance, the Commission had concluded that there was no overriding public interest which would outweigh the protection of the effectiveness of its work in this case.

In conclusion, the Commission maintained its view that disclosure of the requested legal opinion would adversely affect the proper functioning of the Commission based on the independent advice of its Legal Service. The public interest in non-disclosure clearly outweighed the public interest in disclosure of the relevant document. Since the whole document dealt with legal issues, it was not possible to disclose parts of it.

The complainant's observations

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

Comprehensive access to documents was the rule, and each exception had to be construed narrowly. In both the Carlsen and the Ghignone cases, access had not been denied automatically by the courts but on the grounds of a specific need for protection of the documents concerned that arose from pending legislation and pending litigation respectively. This case-law was in conformity with the position adopted by the European Ombudsman (4) according to which an exception from access could be contemplated only for those legal opinions that concerned a legislative process that was still ongoing or that had been prepared with a view to pending litigation.

There were however no concrete grounds in this case that would establish a specific need to protect the relevant document. The Commission had not argued that this document was needed for pending litigation or legislation.

THE DECISION

1 Failure to grant access to opinion of Legal Service

1.1 The complainant, a researcher at the Center for European Integration Studies (University of Bonn), requested access to an opinion of the Commission's Legal Service on the relationship between the Euratom Treaty and the EC Treaty in so far as state aids rules are concerned. The application was rejected on the grounds that Article 4 (2), second indent of Regulation (EC) no. 1049/2001 applied. The complainant argued that this decision was incorrect, relying in particular on the fact that he needs the relevant document for scientific purposes.

1.2 The Commission takes the view that disclosure of the requested legal opinion would adversely affect the proper functioning of the Commission based on the independent advice of its Legal Service. It further argues that the public interest in non-disclosure clearly outweighs the public interest in disclosure of the relevant document and that since the whole document dealt



with legal issues, it was not possible to disclose parts of it.

1.3 Article 4 (2) of the Regulation stipulates that the institution "shall refuse access to (...) legal advice (...) unless there is an overriding public interest in disclosure". In a Special Report submitted to Parliament in December 2002 (5) , the Ombudsman has taken the view that this exception to the right of public access to documents should not be interpreted as extending to all opinions drawn up by the Legal Service of an institution. As explained in that special report, such an indiscriminate approach would fail to do justice to the need, acknowledged by Article 207 (3) of the EC Treaty, to grant greater access to documents relating to the EU's legislative activity. The Ombudsman added that this did not mean that legal opinions relating to the EU's legislative activity would always have to be disclosed, given that these documents could still qualify for protection under Article 4 (3) of Regulation 1049/2001 (6) .

1.4 The Ombudsman notes that the document to which the complainant wishes to be granted access does not appear to have been drawn up as part of the EU's legislative process. The main reason for the Ombudsman's view that Article 4 (2) of Regulation 1049/2001 should not apply to all opinions of a Legal Service of an institution is thus not applicable in the present case. In these circumstances, the Ombudsman considers that the Commission's view according to which access to the relevant document should only be granted if there is an overriding public interest in disclosure does not appear to be unreasonable.

1.5 The Ombudsman takes the view that it follows from the structure and the wording of the provision concerned that the presence of such an "overriding public interest" normally has to be established by the person seeking access. In the present case, the complainant has mainly relied on the fact that he needs the document concerned for scientific purposes. The Ombudsman agrees that this fact in itself establishes a public interest in disclosure. However, Article 4 (2) of Regulation 1049/2001 makes access to legal advice conditional upon the presence of an "overriding" public interest in disclosure. If the interest to use a document for scientific purposes was regarded as being sufficient to entitle a person to claim access to a legal opinion, the purpose of Article 4 (2) would arguably be rendered obsolete. The fact that the relevant document was drawn up back in 2000 does not in itself prove that there is an overriding public interest in disclosure. However, the complainant has not put forward any other arguments to support his case that would be linked to the contents of the relevant document itself. The Ombudsman considers, therefore, that the complainant has not established, in the present case, that his interest (and the interest of his institute and of his possible future readers) is such as to override the general interest in maintaining the confidentiality of legal opinions upon which Article 4 (2) appears to be based.

1.6 In these circumstances, the Ombudsman concludes that there appears to be no maladministration on the part of the Commission.

2 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 Commission will also be informed of this decision.



Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) [1998] ECR II-485.

(2) [2000] ECR SC I-A-223; II-1023.

(3) [2002] ECR I-9151.

(4) Special Report submitted by the European Ombudsman to the European Parliament on 12 December 2002 following a draft recommendation to the Council of the EU in complaint 1542/2000/(PB)/SM.

(5) Special Report submitted by the European Ombudsman to the European Parliament on 12 December 2002 following a draft recommendation to the Council of the EU in complaint 1542/2000/(PB)/SM; available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(6) According to this provision, access to documents drawn up for internal use shall be refused if disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.