

Decision of the European Ombudsman on complaint 413/2004/(MF)PB against the European Personnel Selection Office

Decision

**Case 413/2004/(MF)PB - Opened on 30/03/2004 - Recommendation on 28/10/2004 -
Decision on 22/09/2005**

Strasbourg, 22 September 2005

Dear Ms D.,

On 13 March 2004, you made a complaint to the European Ombudsman concerning your participation in recruitment competition COM/LA/3/02.

On 30 March 2004, I forwarded the complaint to the Director of the European Personnel Selection Office ('EPSO'). EPSO sent its opinion on 29 June 2004, and I forwarded it to you with an invitation to make observations, if you so wished. No observations were received from you.

On 28 October 2004, I addressed a draft recommendation to EPSO, and I informed you about my draft recommendation on that same date. On 22 November 2004, I sent you a translation of my draft recommendation.

On 31 January 2005, EPSO sent me its opinion on my draft recommendation. The opinion was made jointly with the European Commission. I forwarded the opinion to you for observations, inviting you to submit observations by 31 March 2005. No observations were received from you by that date.

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

I apologise for the length of time it has taken to deal with your inquiry.

THE COMPLAINT

The complainant participated in open competition COM/LA/3/02 launched by the European Commission to constitute a reserve list of French language translators.

By letter dated 16 January 2004, the complainant was informed that she would not be admitted



to the oral tests because she had failed to obtain the minimum points required for written test c).

The complainant wrote to the Director of the newly established European Personnel Selection Office (EPSO) - which had taken over the organisation of the competition - requesting a copy of her marked examination paper. On 26 January 2004, EPSO sent the complainant an unmarked copy of her examination paper, together with the selection board's final evaluation sheet ("*fiche d'évaluation*").

The complainant wrote to the Ombudsman on 13 March 2004. On 30 March 2004, the Ombudsman asked EPSO to submit an opinion on the following allegations and claims:

"In her complaint, [the complainant] alleges that the Selection Board has failed to provide her with the information which would have enabled her to understand the errors she had made.

The complainant claims that the Selection Board should send her a copy of her marked examination paper and a detailed evaluation sheet."

THE INQUIRY

The Commission's opinion

The complaint was sent to EPSO for an opinion. The opinion received by the Ombudsman was written by the European Commission on behalf of EPSO.

The Commission outlined the facts of the case and stated that the complainant had made a complaint under Article 90(2) of the Staff Regulations and an application for access to documents under Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents (1) . Both procedures had been concluded at the time of the Commission's opinion. The Commission therefore enclosed its decisions on the Article 90(2) complaint and the confirmatory application for access to documents.

These are summarised in the following.

Decision on the confirmatory application

The complainant's confirmatory application for access to documents under Regulation 1049/2001 included a request for access to the marked examination paper in test c) and a "*grille d'évaluation détaillée*" .

In its decision on the confirmatory application, the Commission explained that the corrections had not been made directly on the examination paper. Instead, the corrections had been made on separate evaluation sheets filled in by the individual independent evaluators. These, according to the Commission, constituted preparatory documents that served as a basis for the selection board's internal deliberations. To make these evaluation sheets public would create a risk of external pressure and interference in the selection board's deliberations. Access to the separate evaluation sheets therefore had to be refused on the basis of the exception contained in Article 4(3)(ii) of Regulation 1049/2001.



The Commission also referred to Article 6 of Annex III of the Staff Regulations, which establishes the secrecy of the selection board's deliberations. The Commission stated that the provision in Article 6 effectively constituted a specific application of the exception contained in Article 4(3)(ii) of Regulation 1049/2001. The Commission also noted that the case-law of the Community courts had in several cases confirmed the secrecy of the selection board's deliberations. It referred to the Court's decision in the *Innamorati* case (2) .

As regards the claim for a "*grille d'évaluation détaillée*", the Commission's opinion clarified that a "*grille d'évaluation*" is a list of the detailed evaluation criteria established by the selection board. The Commission therefore responded to the claim as a claim for access to the evaluation criteria established by the selection board.

The Commission informed the complainant that it was established case-law that it would be contrary to the secrecy provided for in Article 6 of Annex III of the Staff Regulations to make the evaluation criteria public. It referred to the Court's decision in the *Innamorati* case, and stated that giving access would also be a breach of Article 4(3)(iii) of Regulation 1049/2001.

On the issue of partial access (which must be considered under Article 4(6) of Regulation 1049/2001), the Commission informed the complainant that the exceptions referred to above applied to the entire documents to which access was refused. Partial access was therefore not given.

On the issue of whether an "*overriding public interest in disclosure*" should have allowed the complainant access to the documents refused, the Commission stated (1) that the complainant's interest in obtaining access to the documents concerned was an individual interest rather than a public one and (2) that it had in any case not been able to identify any overriding public interest in disclosure.

Decision on the complainant's Article 90(2) complaint

In her complaint under Article 90(2) of the Staff Regulations, the complainant had challenged the selection board's decision to exclude her from further participation in the competition, and to deny her access to the evaluation criteria. The Commission rejected both parts of her complaint. With regard to the evaluation criteria, the Commission referred to the case-law according to which the evaluation criteria are covered by the secrecy pertaining to the deliberations of the selection board (*Innamorati* case).

The complainant's observations

The Commission's opinion was forwarded to the complainant, from whom the Ombudsman received no observations.

THE OMBUDSMAN'S DRAFT RECOMMENDATION

On 28 October 2004, the Ombudsman addressed the following draft recommendation to EPSO:

EPSO should reconsider its refusal to give the complainant access to a copy of the detailed evaluation sheet, and give access unless valid grounds prevent its disclosure.



This draft recommendation therefore concerned the issue of access to the detailed evaluation sheet, which had been dealt with as a claim for access to the evaluation criteria established by the selection board. The draft recommendation was based on the considerations below.

1 The Ombudsman had already examined the issue of access to evaluation criteria in his draft recommendation in complaint 2028/2003/(MF)PB, submitted to EPSO on 7 October 2004. In that case, EPSO and the Commission took the view that the decision in the *Innamorati* case obliged them to refuse access to the selection criteria under Article 4(3)(ii) Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (3) . In his draft recommendation in that case, the Ombudsman made the following comments:

"As regards the Commission's view that it had to refuse access in the light of the *Innamorati* case, the Ombudsman considers it useful to quote the following paragraphs of the judgement:

'29 The criteria for marking adopted by the selection board prior to the tests form an integral part of the comparative assessments which it makes of the candidates' respective merits. They are designed to guarantee, in the candidates' own interests, a certain consistency in the board's assessments, especially where there is a large number of candidates. Those criteria are therefore covered by the secrecy of the proceedings in the same way as the selection board's assessments.

30 The comparative assessments made by the selection board are reflected in the marks it allocates to the candidates. The marks are the expression of the value judgments made concerning each of them.

31 Having regard to the secrecy which must surround the proceedings of a selection board, communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based.' (Emphasis added.)

It is clear from the above that the *Innamorati* case only concerned the duty to state reasons for individual decisions taken specifically in the context of recruitment competitions. The decision in the *Innamorati* case does not, therefore, concern the issue of access to documents. In the Ombudsman's view, the decision in the *Innamorati* case cannot therefore be invoked as a legal precedent obliging the institutions to keep selection criteria secret under Regulation 1049/2001.

The Ombudsman notes that recent decisions of the Court of First Instance appear to support this finding. In the *Pyres* case (4) and the *Alexandratos and Panagiotou* case (5) , the Court of First Instance found that although the communication of the mark obtained by candidates in the various tests constitutes an adequate statement of the reasons on which the selection board's decision is based, this does not imply that a candidate who so requests cannot be informed about the selection board's selection criteria.

The Ombudsman furthermore notes that to allow access to selection criteria appears to be



consistent with the European Union's policy and legislation on transparency and public access to documents, which have developed significantly since the Court's decision in the *Innamorati* case in 1996.

In 1997, the Treaty of Amsterdam amended the Treaty on European Union, inserting the following principle into Article 1 of the Common Provisions of that Treaty:

'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen .' (Emphases added.)

The Treaty of Amsterdam also inserted Article 255 into the Treaty establishing the European Communities. Article 255 of the Treaty provides that:

'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined [...]'.

Article 255(2) provides that '[g]eneral principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.'

On the basis of this provision, the Council and the Parliament adopted Regulation 1049/2001 regarding public access on 30 May 2001 (6) .

The preamble of Regulation 1049/2001 confirms that 'openness [...] guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system' (recital 2, emphases added), and that 'in principle, all documents of the institutions should be accessible to the public' (recital 11). Article 1(b) expressly provides that Regulation 1049/2001 is intended to 'establish rules ensuring the easiest possible exercise of this right'.

In the light of the above, the Ombudsman considers that EPSO and the Commission were wrong to consider that the decision in the *Innamorati* case obliged them to refuse access to the selection criteria under Article 4(3)(ii) Regulation 1049/2001. EPSO and the Commission therefore failed to give adequate reasons for refusing access. This constitutes an instance of maladministration, and the Ombudsman therefore makes the draft recommendation below.

The Ombudsman furthermore wishes to add that the exception contained in Article 4(3)(ii) does not appear to apply to the kind of document here concerned. Article 4(3)(ii) applies to '*documents containing opinions*'. In the Ombudsman's view, a document containing selection criteria cannot be considered a 'document containing opinions'."

2 The Ombudsman considered that the findings in his draft recommendation to EPSO in the



case referred to above were equally relevant and applicable to the present case. The Ombudsman therefore considered that the reasons for not giving the complainant access to a copy of the detailed evaluation sheet were inadequate. This constituted an instance of maladministration, and the Ombudsman therefore made the draft recommendation referred to above.

EPSO's detailed opinion

In its opinion on the Ombudsman's draft recommendation, submitted jointly with the European Commission, EPSO stated inter alia that the selection criteria laid down by the selection board cannot be separated from the various instructions, recommendations and opinions that are given to the individual evaluators. It appeared to consider that all these documents form part of the preparatory works of the selection board and are therefore covered by the secrecy relating to the selection board's deliberations. EPSO also stated that all the documents are connected, and that partial access could therefore not be granted.

However, in order to allow the complainant better to understand the marks that she had been given, EPSO enclosed a document containing various detailed clarifications of the test and of the errors made by the complainant.

EPSO furthermore stated that it had started to examine the possibility of providing candidates with a more detailed evaluation sheet in future competitions, in order to allow them better to understand their marks. This detailed evaluation sheet would be provided with the copy of the examination paper.

The complainant's observations

EPSO's detailed opinion was forwarded to the complainant with an invitation to make observations. No observations were received from the complainant.

THE DECISION

1 Alleged failure to give access to the information requested

1.1 Following her exclusion from competition COM/LA/3/02, the complainant requested information from EPSO. EPSO sent her an unmarked copy of her examination paper and the selection board's final evaluation sheet. The complainant did not consider this information satisfactory. In her complaint to the Ombudsman, she alleged that the selection board had failed to provide her with information which would have enabled her to understand the errors she had made. She claimed that the selection board should send her a copy of her marked examination paper and a detailed evaluation sheet ("*grille d'évaluation détaillée*").

1.2 In the opinion on the complaint, the Ombudsman was informed that the complainant had submitted similar claims in a request for access to documents under Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents (7) , and in a complaint under Article 90(2) of the Staff Regulations. The respective procedures had been concluded at the time of the opinion, which therefore basically consisted of the Commission's conclusions (8) in those procedures. The complainant had been informed that no access could be given to the "*grille d'évaluation détaillée*" because this would effectively imply giving access to the selection criteria adopted by the selection board. The complainant was also informed that



the individual evaluators had made their remarks on separate evaluation sheets, and that the examination paper itself had therefore remained unmarked.

1.3 The Ombudsman received no observations from the complainant.

1.4 On 28 October 2004, the Ombudsman addressed a draft recommendation to EPSO, recommending that it should reconsider its refusal to give the complainant access to a copy of the detailed evaluation sheet, and give access unless valid grounds prevented its disclosure.

1.5 In its detailed opinion on the Ombudsman's draft recommendation, EPSO enclosed a document containing various detailed clarifications of the tests and of the errors made by the complainant, in order to allow her better to understand the result that she had obtained. EPSO furthermore stated that it had started to examine the possibility of providing candidates with a more detailed evaluation sheet in future competitions, in order to allow them better to understand their marks. This detailed evaluation sheet would be provided with the copy of the examination paper.

1.6 The Ombudsman received no observations from the complainant.

1.7 The Ombudsman has thoroughly examined the document enclosed in EPSO's detailed opinion on the draft recommendation. That document contains precise clarifications as regards the errors made by the complainant. It appears that these clarifications are likely to enable the complainant better to understand the selection board's marking of her tests. The Ombudsman therefore considers that there appears to be no maladministration with regard to the complainant's allegation.

1.8 With regard to the complainant's claim for access to an examination paper containing the marks of the evaluators, it appears that the selection board did not write its marks on the examination paper. In his draft recommendation, the Ombudsman noted that he was not aware of any rule that would oblige the selection board to write its comments relating to the assessment of a candidate on the examination paper itself. This, however, does not remove the selection board's obligation to provide the candidate concerned with information that enables him or her to understand its marking. In the light of the finding in paragraph 1.7 above, the Ombudsman considers that there are no grounds for making further inquiries into the complainant's claim here concerned.

1.9 With regard to the complainant's second claim, it emerges from EPSO's opinions that the complainant originally asked to be sent a "*grille d'évaluation détaillée*", and that EPSO accordingly responded to the claim as a claim for access to the selection criteria adopted by the selection board. The Ombudsman accepted to review the claim accordingly. It appears that the complainant made this claim in order to obtain more detailed information on her marks. In the light of the finding in paragraph 1.7 above, the Ombudsman considers there are no grounds for making further inquiries into the complainant's claim here concerned.

1.10 The Ombudsman notes, however, that EPSO's detailed opinion raises important factual



and legal issues of a more general nature. The Ombudsman has therefore decided to launch an own-initiative inquiry into the issue of granting candidates access to the selection criteria established by selection boards. Information on the outcome of the Ombudsman's own-initiative inquiry will be published on the Ombudsman's homepage (<http://www.ombudsman.europa.eu> [Link]).

2 Conclusion

The Ombudsman considers that there appears to be no maladministration regarding the complainant's allegation that she had not been provided with information which would have enabled her to understand the errors she had made. With regard to the complainant's claims, the Ombudsman concludes that there appear to be no grounds for making further inquiries.

The Ombudsman furthermore points out that he has decided to launch an own-initiative inquiry into the issue of granting candidates access to the selection criteria established by selection boards.

The Director of EPSO will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

- (1) Official Journal 2001 L 145, p 43.
- (2) Case C-254/95 *P Innamorati v Parliament* [1996] ECR I-3423.
- (3) Official Journal 2001 L 145, p. 43.
- (4) Case T-72/01, *Pyres v Commission* , judgement of 25 June 2003, paragraphs 70 - 71.
- (5) Case T-233/02, *Alexandratos and Panagiotou v Council* , judgement of 17 September 2003, paragraph 31.
- (6) Official Journal 2001 L 145, p. 43.
- (7) Official Journal 2001 L 145, p 43.
- (8) The complainant made her confirmatory application under Regulation 1049/2001 to the Commission, and her complaint under Article 90(2) of the Staff Regulations to EPSO and the selection board. The Commission formulated the replies in both procedures.