

Decision of the European Ombudsman on complaint 1693/2005/PB against the European Commission

Decision

Case 1693/2005/PB - Opened on 13/05/2005 - Decision on 10/12/2007

In order to find out who are the beneficiaries of EU agricultural subsidies, the complainant asked the Commission for public access to the annual accounting reports sent by the Member States to the Commission in relation to the Common Agricultural Policy under Regulation 2390/1999.

The Commission stated that the accounting information provided to it by the Member States was confidential under Regulation 2390/1999. It also stated that the reports no longer existed as "documents" since their content had been loaded onto a very large database (Regulation 1049/2001 [1] provides for public access to 'documents', not information).

In a proposal for a friendly solution, the Ombudsman suggested to the Commission that it could provide the information concerned to the complainant as a matter of good administration. This was rejected.

In his closing decision, the Ombudsman found that the Commission had failed to give valid reasons for its reliance on the confidentiality provision in Regulation 2390/1999. The Commission had only referred in general terms to the interests protected and had not given adequate explanations about the applicability of a relevant exception. The Ombudsman noted in this context that the new Financial Regulation [2] and a recent political agreement of the Council on a new Regulation obliging Member States to publish national lists of beneficiaries [3] undermined the Commission's arguments as regards confidentiality.

With regard to the non-existence of the reports as "documents", the Commission conceded that it was problematic to generally exclude the very large amounts of information in public databases from public access. Outputs of "routine operations" were therefore dealt with as "documents". However, the information requested by the complainant in this case could not be retrieved through a "routine operation", but would require complex new programming of the database.

The Ombudsman concluded that the Commission's general position regarding public access to information in databases was not satisfactory. The Ombudsman refrained, however, from pursuing this issue further, pointing out, in particular, that this was a complex general new legal issue that the Community legislator could examine in the context of the reform of Regulation



1049/2001. The Ombudsman therefore closed the case with a critical remark. However, the Ombudsman also stated that he would consider consulting the members of the European Network of Ombudsmen to find out what answers had been given to these problems at the national level and to be made aware of the best practices. The results of such a consultation would be made available to the Commission and published on the Ombudsman's website.

[1] 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, OJ 2001 L 145, p. 43.

[2] Articles 53b(2)(d) of the amended Financial Regulation.

[3] See press release of the Agriculture and Fisheries Council, 22-23 October 2007 (available at: <http://www.eu2007.pt/NR/rdonlyres/948633D2-DCD5-4413-AFCD-86688D5161F3/0/96806.pdf>).

Strasbourg, 10 December 2007

Dear Ms A.,

On 28 April 2005, you made a complaint to the European Ombudsman concerning an application for public access to documents that you had made to the European Commission under Regulation 1049/2001.

On 13 May 2005, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 8 November 2005. I forwarded it to you with an invitation to make observations, which you sent on 30 December 2005.

On 18 December 2006, I made a proposal for a friendly solution to the Commission, and informed you accordingly. The Commission sent its reply on 3 April 2007. I forwarded it to you with an invitation to make observations, which you sent on 30 April 2007.

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

THE COMPLAINT

The complaint concerned the European Commission's rejection of a confirmatory application under Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (1) (Regulation 1049/2001), submitted by the complainant to the Commission's Secretariat-General on 12 August 2004.

On 26 June 2004, the complainant had asked the Commission's Directorate-General for Agriculture ("DG AGRI") for access to "*reports provided to the Commission by national administrations regarding the payments made to national recipients of EU-funding through CAP*



and any other EU-funded agriculture and fishery programs. I would like particularly to see the reports for 2002 and - if ready - for 2003. "

On 28 July 2004, DG AGRI informed the complainant that the information she had asked for did not exist in the form of country reports but only in a database. It also noted that requests for access to information contained in a database are treated in the same way as requests for access to documents *if* the request concerned could be dealt with through 'routine operations', and that this was not possible in this case.

In her confirmatory application of 12 August 2004, the complainant requested "*the information asked for in my initial request*". She added that "[i]n order to facilitate your work in providing the information to me, I suggest that you send me the database as such rather than creating new documents according to 1049/01 § 6.3. Should there be information contained, that is affected by article 4 of 1049/01, it will not be very labour-intensive to delete the columns in question. Of course, I would like to know the headlines of the deleted columns. "

In its decision of 21 September 2004 on the complainant's confirmatory application, the Commission confirmed this position of DG AGRI. It stated the following:

" Access to documents and databases

In accordance with Article 2 of Regulation 1049/2001, the Regulation applies to all documents held by an institution, i.e. documents drawn up or received by it and in its possession, in all areas of activity of the European Union. However, the right of access under this Regulation does not imply an obligation to create a new document that contains the information requested, but applies to existing documents.

A database as such is not a document. However, considering the importance of databases and the amount of information they hold, it would, for obvious reasons, be difficult to justify an exclusion from the right of access under Regulation 1049/2001 of all information contained in databases.

Therefore, a practice has evolved according to which the result of a normal search in the database ("routine operations" as Directorate-General for Agriculture put it) is considered a document in the sense of Regulation 1049/2001. However, the Commission will not modify the existing search parameters of the database in order to be able to retrieve the information requested.

The CATS database

[T]he agricultural aid payments financed by the EAGGF Guarantee Section are managed by the Member States under the provisions of shared management. The accounting information concerning these aid payments is held by the Member States and transmitted to the Commission in accordance with Regulation (EC) No 2390/1999 (2) which, under Article 2(3), obliges the Commission to ensure that the information received is kept confidential.

Concerning the awarded aid under programmes co-financed by EAGGF Guidance Section, the



rural development measures are incorporated in operational programmes in accordance with the Objectives 1 programming rules laid down in the regulations on the Structural Funds. In accordance with these regulations the programmes in question do not contain financial information at the level of the final recipient of the aid. Article 18 of Regulation (EC) No 438/2001 concerning the management and control systems for assistance granted under the Structural Funds lays down the form and content of the accounting information the Member States must hold.

The Commission is therefore unable to provide details of the amounts received by the beneficiaries under EAGGF Guarantee and Guidance. "

The Commission made additional comments on the complexity of the database concerned, the Clearance Audit Trail System ("CATS") database, and noted that it would not be feasible to grant the complainant access to the information requested as this information did not correspond to excerpts to be taken from the database.

The Commission also noted that the complainant had asked to be sent the entire CATS database, and noted that this was not possible as the database is not a document as such.

The Commission finally noted that it had submitted, to the European Parliament, aggregate figures, extracted from the CATS database, which concerned the distribution of aid received by the beneficiaries in the context of direct aids to the producers. In an attempt to satisfy the complainant's request in part, the Commission provided her with the indicative financial figures for 2000 and 2001.

In her complaint to the Ombudsman, the complainant referred to her access application to the Commission, which she had made " *in order to find out who are the recipients of EU agricultural subsidies* ". She noted that a similar application in Denmark had given a detailed and useful insight into how the system works, and who benefits from it (3) . In her view, it was of crucial importance to the public to obtain similar information from the EU level, given that a very considerable proportion of the EU's budget is spent on agricultural subsidies.

The complainant alleged that the Commission's reply to her confirmatory application was in breach of Regulation 1049/2001. She argued, in the first place, that the Commission's view that a database was not 'a document' within Regulation 1049/2001 was wrong. She also stated that *even if* Commission Regulation (EC) No 2390/1999 of 25 October 1999 laying down detailed rules of the application of Regulation (EC) No 1663/95 as regards the form and content of the accounting information that the Member States must hold at the disposal of the Commission for the purposes of the clearance of the EAGGF Guarantee Section accounts (4) ("Regulation 2390/1999"), containing the confidentiality clause referred to by the Commission, were to be applied as a *lex specialis* , it could not be interpreted in a way that is inconsistent with Regulation 1049/2001.

The complainant furthermore alleged that the Commission had not respected the deadline of 15 working days contained in Article 8(1) of Regulation 1049/2001.



THE INQUIRY

The Commission's opinion

The complaint was forwarded to the Commission, which submitted the following opinion.

Reasons for the Commission's decision of 21 September 2004

In its decision of 21 September 2004 to the complainant, the Commission explained that a database as such is not a document. However, considering the importance of databases and the amount of information they hold, it would, for obvious reasons, be difficult to justify an exclusion from the right of access under Regulation 1049/2001 of all information contained in them. Therefore, the Commission explained that the result of a normal search in a database (a "routine operation") is considered to be a document in the sense of Regulation 1049/2001. The Commission indicated that it would not modify the existing search parameters of the database so as to be able to retrieve the information requested. This assessment is based on Article 10(3) of the Regulation, according to which the Institutions have no obligation to create new documents that do not exist at the time of the request. Therefore, it did not feel obliged to modify the existing search parameters of a database so as to be able to retrieve the information requested.

With regard to the CATS database, the Commission further explained that the agricultural aid payments financed by the EAGGF Guarantee Section are managed by the Member States under the provisions of shared management. The accounting information concerning these aid payments is held by the Member States and transmitted to the Commission in accordance with Regulation 2390/1999, which under Article 2(3) obliges the Commission to ensure that the information received is kept confidential.

As regards the request for having access to the entire database in which the accounting information of EAGGF Guarantee Section payments is stored, the Commission explained that the accounting information submitted by the Member States under the EAGGF Guarantee Section is loaded onto the CATS database, which contains a large and very detailed database of EAGGF Guarantee payments. It includes comprehensive annual data relating to payments, beneficiaries, declarations and applications, products, inspections and export refunds. At the time of the Commission's decision, it contained over 176 million data records and around 4.23 billion fields in relation to more than 6 million beneficiaries. These figures evolve constantly. The CATS database was created to assist the Commission services in undertaking audit missions. It is therefore primarily, and above all, an audit tool assisting auditors in the clearance of accounts.

Any access to the CATS database needs very specific research and very complex computerised operations. This is due to the technical specifications of CATS, which is in reality not only a database but a large data-warehouse (5). Considering the above, it was not feasible to grant access to the entire database.

Concerning the awarded aid programmes co-financed by the EAGGF Guidance Section, the rural development measures are incorporated in operational programmes in accordance with



the Objective 1 programming rules laid down in the Regulations on the Structural Funds. In accordance with these Regulations, the programmes in question do not contain financial information at the level of the final recipient of the aid. Article 18 of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds (6) lays down the form and the content of the accounting information the Member States must hold. The Commission was therefore unable to provide details of the amounts received by the beneficiaries under the EAGGF Guidance Section.

Characteristics of the CATS database

The database at issue in the present case, that is, the CATS database, includes all the individual components of millions of data records for the last five years of EAGGF Guarantee Section payments and receipts, which make up around 4.97 billion fields in relation to more than 6.1 million concerned beneficiaries.

The accounting information contained in the CATS database has to be submitted by the Member States by using the STATEL/STADIUM software and a specific file format, which is described in Annex II of Regulation 2390/1999. The data files are loaded automatically onto CATS, which is an ORACLE database that can only be used with ACL (Audit Command Language) software or with the database tool ORACLE-SQL. Because of these characteristics of CATS, any access to the database needs very specific research and very complex computerised operations.

As an example, the beneficiaries (farmers) are identified in the files by identification codes, names and address. In order to make totals, by beneficiary, these identification codes should be "unique" within each Member State, i.e., a beneficiary's 'identification code' should correspond to only one beneficiary's name and vice-versa. In order to obtain the information concerning an individual beneficiary a SQL-script including the search parameters has first to be written and tested for each request, following the analysis of the requirement. The outcome is then stored in a text file and has to be analysed with the software tool ACL. These verifications and related cross-checks have to be done manually.

As indicated to the complainant, the extraction of the requested information from the CATS database would require considerable new programming which is not necessary for the performance of the Commission's tasks. Therefore, the Commission considers that the information requested by the complainant is not available in existing documents. Consequently, the request does not fall within the scope of Regulation 1049/2001.

In her confirmatory application, the complainant suggested that the whole database could be made available to her. It would not be possible to grant her access online or in an electronic support, since this would enable her to access data, the disclosure of which would be contrary to the provisions of Article 4 of Regulation 1049/2001 and to the provisions of Regulation 2390/1999.

Applicability of Regulation 1049/2001 to databases

As the complainant correctly points out, Article 3(a) of the Regulation defines a "document" as "any content whatever its medium", which clearly includes data recorded in electronic form.



However, the Regulation can only apply to existing, well-defined individual documents.

The basic principle of Regulation 1049/2001 is that documents are accessible to the public unless the disclosure of their content would undermine the protection of certain public or private interests (see recital 11). This requires a harm test to be carried out on the requested documents. However, such a harm test can only be performed on an identified, well-defined and fixed set of information.

Several provisions of the Regulation confirm that it is meant to apply to existing, well-defined individual documents. Article 6(1) stipulates that applications should be made "*in a sufficiently precise manner to enable the institution to identify the document*". Pursuant to Article 10(3) documents "*shall be supplied in an existing version and format*". A register of documents as defined in Article 11 of the Regulation can only contain references to existing and well-defined documents and direct access in electronic form (Article 12) can only be granted to documents with a clearly defined and stable content. The same rule applies to documents identified as "sensitive" within the meaning of Article 9.

A database is not a document in electronic format such as a file in word processing or in PDF format. It is a collection of data in constant evolution, rather than an identified, well-defined and individual set of information. A database is the electronic equivalent of an archive or a filing system, not of a document.

In order to be able to carry out the necessary harm test, the Commission handles requests for access to information contained in a database on the basis of Regulation 1049/2001 to the extent that the requested information can be extracted from the database as part of its normal operations, i.e., operations developed for its own needs. When the request cannot be satisfied through normal operations on the database, the Commission considers that the requested information does not exist as a "document" within the meaning of the Regulation. A request for information which is not contained in existing documents does not fall within the scope of Regulation 1049/2001. This is clearly the case as regards the complainant's request.

The complainant also refers to Case C-353/99 P *Council v Hautala* (7) , in particular, to paragraph 23 thereof. According to this judgment of the Court of Justice and to the contested judgment of the Court of First Instance in the same case (8) , the institutions have an obligation to grant access to those parts of the requested documents which are not covered by an exception to the right of access. This case-law, which preceded Regulation 1049/2001 and has been incorporated into its Article 4(6), can only apply, as was the case with the decision of the Court of First Instance in the above case, to an identified and well-defined document, since partial access can only result from a harm test performed on the content of a document.

When the object of a request does not qualify as an application for access to documents under Regulation 1049/2001, the Commission examines the possibility to provide the information requested, in accordance with the provisions of its Code of Good Administrative Behaviour. Therefore, in order to satisfy the request at least partly, the Commission has, as indicated above, provided the complainant with existing aggregated figures for two years. The



complainant was informed that figures for subsequent years were under preparation.

Even if the complainant's request were to be considered under the provisions of Regulation 1049/2001, the accounting information held by the Commission is subject to rules of confidentiality, which are covered by the exceptions laid down in Article 4 of that Regulation and by specific provisions.

The Commission's reasons

The complainant contends that the Commission has refused access without giving reasons for its refusal on the basis of the exceptions laid down in Article 4 of Regulation 1049/2001. She further argued that even if an exception were to apply, partial access should have been considered. The Commission takes the view that references to Article 4 of Regulation 1049/2001 should only be made if access to an identified document is refused and after a concrete harm test has been applied to it. The same is true as regards partial access. In this case, as explained above in section 5, the request could not be handled under Regulation 1049/2001, since the requested information was not available in existing documents.

The confidentiality clause in Regulation 2390/1999

The complainant contends that, if considered as a *lex specialis*, Regulation 2390/1999 cannot be interpreted in a way that is contrary to Regulation 1049/2001.

The Commission would like to clarify that all existing confidentiality clauses have to be interpreted in light of Regulation 1049/2001. They provide for concrete instances of application of the exceptions laid down in Article 4. Indeed, Article 4 of the Regulation contains the limits to the right of access by laying down general rules. These general rules have the same objective of protecting private or public interests - as the case may be - as confidentiality clauses (*lex specialis*) in legislation in specific areas (9) .

Regulation 2390/1999 lays down the form and content of the accounting information to be submitted to the Commission for purposes of clearing the EAGGF Guarantee Section accounts. Article 2(1) of the Regulation provides that the Commission may use the information for the sole purpose of carrying out its audit functions in the clearance of accounts, of monitoring developments and of providing forecasts in the agricultural sector. In the latter case, the data shall be anonymised and processed in aggregated form only.

Article 2(3) of Regulation 2390/1999 obliges the Commission to ensure that the accounting information it receives is kept confidential and secure. The Commission considers this clause to be fully compatible with the exceptions provided for in Article 4 of Regulation 1049/2001.

The data received from the Danish authorities

According to the complainant, she received the data regarding Denmark directly from the Danish authorities and thereby implicitly alleges that the Commission should make the data available as well.

In this respect it should be noted that the Court of Justice has ruled, in Joined Cases C-465/01, C-138/01 and C-139/01 *Oesterreichische Rundfunk and Others* (10) , that it is a matter for the national courts to ascertain whether disclosure of the names of the recipients of monies paid by public bodies is necessary for, and appropriate to, the objective of proper management of public



funds. As a result of the Court's ruling, the Constitutional Court of Austria decided that publishing individual salaries and names of beneficiaries would be disproportionate and, therefore, not permissible.

Delay in replying to the confirmatory application

Finally, the complainant points out that it is not clear from the Commission's letter of 21 September 2004 when the confirmatory application of 12 August 2004 was registered. It therefore seemed that the Secretary-General did not respect the time-limit of 15 working days laid down in the Regulation.

The complainant first sent an e-mail on 30 July 2004, in which she acknowledged receipt of DG AGRI's reply of 28 July 2004 and stated that she would appeal. This e-mail was registered on 9 August 2004 and the time-limit for the reply was set at 30 August 2004. When the Commission received the complainant's more detailed confirmatory application, dated 12 August 2004, the time-limit was not changed. In view of the complexity of the case and due to the absence of many members of staff during the summer break, on 30 August 2004 the Commission extended the time-limit with 15 working days until 20 September 2004.

The reply was signed on 20 September 2004 but registered in the outgoing mail the next morning. The date stamped on the letter is 21 September 2004.

Conclusions

For the reasons set out above, the Commission considers that the contested decision was correct.

(1) The CATS database as described above is not a document in the sense of Article 3(a) of the Regulation 1049/2001. This Regulation applies to the information contained in databases in so far as the requested information can be extracted from the database by routine operations, i.e., using existing search criteria without having recourse to new programming to create documents that would contain the requested information.

(2) The complainant's request for access to accounting information communicated to the Commission by the Member States with regard to agricultural expenditure therefore clearly exceeds the scope of Regulation 1049/2001. The information requested cannot be considered to be available in existing documents.

(3) The Commission provided aggregated figures for the financial years 2000 and 2001, which were available. The Commission is willing to provide similar data for the years 2002 and 2003, when they become available.

(4) The contested decision is correctly reasoned. References to Article 4 of Regulation 1049/2001 should only be made when access to an identified document is partly or entirely refused.

(5) The Commission regrets that its reply to the confirmatory application was sent out one day after the expiry of the time-limit laid down in the Regulation.

Letter concerning the "European Transparency Initiative"



Following the Commission's opinion, Commissioner Boell, who is responsible for Agriculture and Rural Development, and Commissioner Kallas, who is responsible for Administrative Affairs, Audit and Anti-Fraud and is also one of the Vice-Presidents of the Commission, informed the Ombudsman, in a separate letter dated 9 December 2005, of the Commission's "European Transparency Initiative". They stated the following:

" As a follow-up to Vice-President Kallas' letter to you of 10 May 2005 and the Commission's reply in the A. case (ref. 1693/2005/PB) we would like to inform you of the latest developments in the European Transparency Initiative as regards the publication of information on end beneficiaries in agriculture (and other expenditure under shared management).

On 9 November 2005 the Commission decided on its European Transparency Initiative. Through this initiative, the Commission states its intention to promote transparency on end beneficiaries of all EU funds.

As a first step, the Commission has decided to establish a central web portal to access information on end beneficiaries of EU funds. From this central site, we will establish links to the websites of the Member States, where data on end beneficiaries under shared management can be found. To make the data comparable across Member States, we will propose a common methodology for making this information available.

Obviously, for legal and other issues that are specific to each Member State, this first step taken by the Commission would not necessarily lead all Member States to provide access to all the data in their possession. Therefore, as a next step, the Commission will adopt a Green Book in early 2006, covering further ideas on how to improve the transparency at EU level. Among the issues that will be raised in this Green Book is a proposal to introduce a legal obligation for Member States to publish the information about the end beneficiaries of funds under shared management. While adopting such a proposed legal obligation is of course a decision for Council, we hope the debate around the Green Book will clarify whether there is broader public support and interest in taking such a step. Consultations on this will take place during the spring of 2006. " (11)

The complainant's observations

The Commission's opinion was forwarded to the complainant who, in summary, submitted the following points:

The Commission's practice of considering the search results of "routine operations" in databases as 'documents' under Regulation 1049/2001 is not legitimate under Regulation 1049/2001, which seeks to ensure the widest possible access to documents.

The central issue in the present case is whether databases are covered by Regulation 1049/2001. Article 3(a) of Regulation 1049/2001 provides that a document is " *any content whatever its medium* ". Even if a database contains very *large amounts* of information, this has no significance for its nature as a 'document'.

The Commission's point that the information in a database changes continuously has no



relevance to the present case. The complainant asked for concrete factual information submitted by the Member States to the Commission. It must be presumed that this information is not changed in the CATS database.

With regard to the Commission's view that Regulation 2390/1999 in any case contains a confidentiality provision prohibiting disclosure of the information concerned, the Commission has entirely failed to point out exactly which exception in Regulation 1049/2001 is reflected in the confidentiality provision in Regulation 2390/1999. This is a breach of Regulation 1049/2001.

With regard to the delay in making the reply to the confirmatory application, the complainant accepts the Commission's explanation.

The ombudsman's efforts to achieve a friendly solution

After careful consideration of the opinions and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complaint. In accordance with Article 3(5) of the Ombudsman's Statute (12), the Ombudsman therefore wrote to the President of the Commission to propose a friendly solution. The Ombudsman proposed to the Commission that it could consider re-examining the complainant's application of 12 August 2004 and provide her with the sets of data she was seeking, unless it invoked valid and adequate grounds for not doing so.

The Commission's reply to the Ombudsman's friendly solution proposal

In its reply, the Commission rejected the Ombudsman's proposal for a friendly solution. It stated that the confidentiality provision in Article 2 of Regulation 2390/1990 obliged it to keep the type of information that had been requested confidential and secure.

The Commission furthermore provided certain comments regarding "future transparency objectives", as follows:

- The Commission had stated its intention to seek greater transparency as regards disclosure of beneficiaries of EU funds. To facilitate public access to information on beneficiaries of the common agricultural policy payments under shared management, the Commission already maintains a webpage with links to websites of the Member States.
- For the future, the transparency provisions introduced into the Financial Regulation by Council Regulation (EC, EURATOM) 1995/2006 of 13 December 2006 (13) provide for an annual ex post publication of beneficiaries of agricultural funds from the Communities' general budget. This new transparency obligation would apply to expenditure from the European Agricultural Fund for Rural Development (EAFRD) incurred as from the financial year 2007 and to expenditure from the European Agricultural Guarantee Fund (EAGF) incurred as from financial year 2008 (14).
- Publication shall be done in accordance with the relevant sector-specific regulations. For the EAGF and the EAFRD, Council Regulation (EC) 1290/2005 on the financing of the common agricultural policy (15) does not yet provide for transparency and therefore needs to be amended in order to implement the new transparency obligation. It is expected that the proposal for doing so will be adopted by the Commission in February 2007 and then be sent to the European Parliament and the Council. Thereafter, implementing rules will have to be adopted by the Commission in accordance with its declaration made at the request of Parliament at the time of the adoption of the revision of the Financial Regulation by the Council, which reads: " ...



the disclosure of information of beneficiaries of funds deriving from the Agricultural Funds (EAFRD and EAGF) [will be] comparable to that provided in the sector-specific implementing Regulations for the Structural Funds. In particular, adequate annual ex post publication, for each beneficiary, of the amounts received from these funds, subdivided by main categories of expenditure, will be ensured " (16) .

The complainant's observations

In her observations on the Commission's reply to the Ombudsman's friendly solution proposal, the complainant essentially maintained and developed her position.

THE DECISION

1 The alleged breach of Regulation 1049/2001

1.1 On 26 June 2004, the complainant asked the Commission's DG AGRI for access to "*reports provided to the Commission by national administrations regarding the payments made to national recipients of EU-funding through CAP and any other EU-funded agriculture and fishery programs.*" Since the request was not granted, the complainant submitted, on 12 August 2004, a confirmatory application, under Regulation 1049/2001. The case concerns the Commission's rejection of this application (17) .

1.2 As the Ombudsman explained in his friendly solution proposal concerning the present case, the complainant initially asked, in essence, for the documents containing the accounting information submitted by Member States to the Commission, under Commission Regulation 2390/1999 (18) . The Commission noted, in particular, that "[t]he data files [sent by the Member States in accordance with Regulation 2390/1999] are loaded automatically onto CATS, which is an ORACLE database." In the context of the inquiry, the Commission confirmed the Ombudsman's understanding that it has not stored as such (in the CATS database or somewhere else) the electronic files transferred to it by the Member States in accordance with Regulation 2390/1999.

1.3 In her confirmatory application, the complainant asked to get access to "*the database, as such*", according to article 6(3) of Regulation 1049/2001, which provides that "[i]n the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution." In her complaint to the Ombudsman, the complainant argued that the Commission's view (expressed in its decision on her confirmatory application) that the database was not a 'document' within the meaning of Regulation 1049/2001 was wrong. In her observations, the complainant clarified that, although she does not contest that the database at issue is not, in itself, a 'document', she considers that this database is a '*medium*' and '*the content*' of the database is a '*document*', in the sense of article 3(a) of the Regulation. Relatedly, the Commission stated in its decision on the complainant's confirmatory application that "[a] database as such is not a document. However, considering the importance of databases and the amount of information they hold, it would, for obvious reasons, be difficult to justify an exclusion from the right of access under Regulation 1049/2001 of all information contained in databases. Therefore, a practice has evolved according to which the result of a normal search in the database ('routine operations' as Directorate-General for Agriculture put it) is considered a



document in the sense of Regulation 1049/2001. However, the Commission will not modify the existing search parameters of the database in order to be able to retrieve the information requested. The Commission has also stressed that " *the information requested [by the complainant] [...] does not correspond to excerpts to be taken from the database* " following a normal search in the database and that it " *will not modify the existing search parameters in the database in order to be able to retrieve the information requested.* " Moreover, it has argued, pursuant to Article 2(3) of Regulation 2390/1999, that the relevant accounting data sent by the Member States is confidential, and that this confidentiality clause is fully compatible with the exceptions provided for in Article 4 of Regulation 1049/2001.

1.4 The Ombudsman notes that, according to principles of good administration, the Commission had to provide valid and adequate grounds for the rejection of the complainant's application.

1.5 The Ombudsman understands that the Commission considers that what the complainant requested was a 'document', within the meaning of Regulation 1049/2001, if it could be retrieved from the CATS database through a "normal search" or "routine operations." Moreover, it has stated that the provision of what the complainant wanted would require a modification of the existing search parameters in the database and would necessitate considerable new programming, which was not necessary for the performance of the Commission's tasks.

The Ombudsman finds that, by making these statements, the Commission failed to properly discharge its duty indicated in point 1.4 above. The statements in question may be considered as amounting to *valid and adequate grounds* to the extent that they pertain to the unreasonableness of the administrative burden that the provision of what the complainant asked for would impose on the institution (19) . Nevertheless, the Commission has failed to put forward sufficiently specific and duly substantiated arguments to the effect that retrieval of what the complainant had requested presupposed the imposition of an unreasonable administrative burden upon it. The Commission's references to the need for modification of the existing search parameters or of new programming were formulated in general terms and thus do not constitute such arguments.

1.6 The Commission's second explanation refers to the confidentiality clause of Article 2(3) of its implementing Regulation 2390/1999. Relatedly, the Commission has stated the following in its opinion: all existing confidentiality clauses have to be interpreted in light of Regulation 1049/2001, they provide for concrete instances of application of the exceptions laid down in Article 4 in the Regulation. Indeed, Article 4 of the Regulation contains the limits to the right of access by laying down general rules. These general rules have the same objective of protecting private or public interests - as the case may be - as confidentiality clauses in legislation in specific areas. Article 2(3) of Regulation 2390/1999 obliges the Commission to ensure that the accounting information it receives is kept confidential and secure. The Commission considers this clause to be fully compatible with the exceptions provided for in Article 4 of Regulation 1049/2001.

The Ombudsman finds that, by making these statements, the Commission has failed to properly discharge its duty indicated in point 1.4 above. Indeed, the Commission referred only in general



terms to the interests protected by the exceptions laid down in article 4 of Regulation 1049/2001. It did not specify which one of these exceptions was relevant to the confidentiality clause of article 2(3) of Regulation 2390/1999 and thus underpinned its position that this clause was compatible with Regulation 1049/2001. Additionally, it did not give adequate explanations about the applicability of such an exception.

Moreover, the argument made by the Commission is clearly undermined by Articles 53b(2)(d) of the amended Financial Regulation and the Commission's announced policy to promote transparency on end beneficiaries of all EU funds (20). Such a commitment by the Commission to promote transparency on end beneficiaries of all EU funds and the recent relevant agreement of the EU agriculture ministers on a set of rules introducing the obligation to publish the list of recipients of EU farm subsidies on national level (21) evidently undermine the Commission's argument that the confidentiality clause of Article 2390/1999 was compatible with Regulation 1049/2001.

Under these circumstances, the Ombudsman concludes that the Commission failed to properly discharge its duty to provide valid and adequate grounds for the rejection of the complainant's application. This is an instance of maladministration.

1.7 Having carefully studied the legal arguments brought forward by the Commission, the Ombudsman concludes that the Commission's position as regards the application of Regulation 1049/2001 to databases in general is not satisfactory. Pursuing the present inquiry would however require the Ombudsman either (i) to formulate a general position as regards the application of Regulation 1049/2001 to databases and seek to persuade the Commission to accept it by making a relevant draft recommendation, or (ii) to recommend that the Commission should itself formulate such a position. Either possibility would require the Ombudsman to prolong his inquiry in order to deal with a complex, general and new legal issue brought up by technological developments, which the legislator will anyway have the opportunity to address in the course of the ongoing reform of Regulation 1049/2001. The Ombudsman has already presented his views on the general problem (see footnote 19). This decision and its rationale could also be adequately taken into account by the Commission when presenting its final proposal for amendment. The Ombudsman will also actively consider consulting the national ombudsmen's offices in the European Network of Ombudsmen in order to try to find out what answers have been given to these new kinds of problems and to be made aware of the "best practices" followed at the national level with an eye to guaranteeing an adequate level of public access to information stored in databases. The results of such consultation will of course be made available to the Commission and published on the Ombudsman's website.

Moreover, and as regards access to information relating to the specific policy area of the common agricultural policy, as mentioned in point 1.6 above there have been important legal and political developments concerning the publicity of information of the kind the complainant had requested, which appear to meet the complainant's interest in having access to that kind of information in the future.

Under these circumstances, the Ombudsman does not consider it justified to pursue the matter



further. He will accordingly close the case with a critical remark.

2 Conclusion

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

According to principles of good administration, the Commission had to provide valid and adequate grounds for the rejection of the complainant's application. On the basis of his findings in points 1.5 and 1.6 above, the Ombudsman concludes that the Commission failed to properly discharge this duty. This constitutes an instance of maladministration.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2001 L 145, p. 43.

(2) Commission Regulation (EC) No 2390/1999 of 25 October 1999 laying down detailed rules of the application of Regulation (EC) No 1663/95 as regards the form and content of the accounting information that the Member States must hold at the disposal of the Commission for the purposes of the clearance of the EAGGF Guarantee Section accounts, OJ 1999 L 295, p. 1.

(3) The complainant provided a relevant website (<http://www.farmsubsidy.org> [Link]).

(4) OJ 1999 L 295, p. 1.

(5) A description of such data warehouses is found on, inter alia, the Wikipedia website (http://en.wikipedia.org/wiki/Data_warehouse [Link]).

(6) OJ 2001 L 63, p. 21.

(7) Case C-353/99 P *Council v Hautala* [2001] ECR I-9565.

(8) Case T-14/98 *Hautala v Council* [1999] ECR II-2489.

(9) The Commission referred to Case T-376/03 *Hendrickx v Council* , judgment of 5 April 2005, not yet reported, concerning secrecy under Annex III, Article 6, of the Staff Regulation (proceedings of the Selection Board):

" Comme toute norme de caractère général, le droit d'accès aux documents du Conseil prévu par les dispositions précitées peut être limité ou exclu - selon le principe suivant lequel la règle spéciale déroge à la règle générale (lex specialis derogat legi generali) - lorsqu'il existe des



normes spéciales qui régissent des matières spécifiques. " (paragraph 55).

Note that in this case, the claimant had not made use of the procedure under Regulation 1049/2001, and this part of the case before the court was therefore inadmissible.

(10) Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989.

(11) The Ombudsman sent a copy of the letter to the complainant for information.

(12) 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, Official Journal 1994 L 113, p. 15.

(13) Official Journal 2006 L 390, p. 1, Article 53b(2)(d) of the Financial Regulation now reads : "*To this end, [the Member States] shall in particular [...] ensure, by means of relevant sector-specific regulations and in conformity with Article 30(3), adequate annual ex post publication of beneficiaries of funds deriving from the budget.* "

(14) See Article 181(4) of the revised Financial Regulation.

(15) OJ 2005 L p. 1.

(16) See Council Document 15638/06 of 29 November 2006.

(17) With regard to the complainant's allegation that the Commission had not respected the deadline of 15 working days contained in Article 8(1) of Regulation 1049/2001, the complainant stated in her observations that she accepted the Commission's relevant explanations. Hence no further examination of that aspect of the case is necessary.

(18) It is not clear whether the complainant also wanted to obtain access to accounting records, referred to by the Commission, that might have been made available to the Commission, under Regulation 438/2001. In any event, the complainant (a) did not contest, in her observations relating to the Ombudsman's friendly solution proposal, the Ombudsman's conclusion that she had initially asked, in essence, for the documents containing the accounting information submitted by Member States to the Commission, under Commission Regulation 2390/1999; (b) does not appear to have specifically contested the propriety of the Commission's reply to her confirmatory application, to the extent this reply referred to Regulation 438/2001 and to information obtained thereunder.

(19) Relatedly, the Ombudsman recalls his position that to limit the right of access to information that can be extracted using existing search tools would risk undermining the usefulness of the right of access, because such tools will normally have been developed only with the needs of internal information management in mind. See the Ombudsman's response of the European Ombudsman to the Commission's green paper "Public Access to Documents held



by institutions of the European Community: a review", published on the Ombudsman website (Part 3, reply to seventh question):

<http://www.ombudsman.europa.eu/letters/en/20070711-1.htm> [Link]

(20) See the relevant web-page on Commissioner Kallas' website:

http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm [Link]

(21) See press release of the Agriculture and Fisheries Council, 22-23 October 2007 (available on

<http://www.eu2007.pt/NR/rdonlyres/948633D2-DCD5-4413-AFCD-86688D5161F3/0/96806.pdf> [Link]).