

Decision of the European Ombudsman on complaint 3732/2005/JMA against the European Commission

Decision

Case 3732/2005/JMA - Opened on 19/12/2005 - Decision on 12/12/2006

Strasbourg, 12 December 2006

Dear Mr O.,

On 5 December 2005, you lodged a complaint with the European Ombudsman on behalf of the Spanish environmental organisation "WWF/Adena", against the European Commission. The complaint concerned a request for access to the reasoned opinion which the Commission delivered to the Spanish authorities in September 2004, in the framework of an infringement proceeding resulting from a complaint that you had submitted to the Commission (reference N° 2002/4677, SG (2002) A/5976 2001/2263).

On 19 December 2005, I informed the President of the European Commission of your complaint and asked him to submit an opinion on it by 28 February 2006. On 4 January 2006, you sent additional information to me which I forwarded to the Commission on 19 January 2006.

On 2 March 2006, the Commission sent its opinion in English. On 10 March 2006, the Commission sent a translation of its opinion into Spanish, which was forwarded to you on 21 March 2006, with an invitation to make observations, if you so wished.

On 29 March 2006, you submitted your observations to me. On 9 June 2006, you sent additional information to me.

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

THE COMPLAINT

According to the complainant, the facts of the case are, in summary, as follows:

In 2002, the complainant lodged a complaint with the Commission on behalf of the Spanish environmental organisation "WWF/Adena". The complainant complained against the development of a number of projects near several coastal regions in Spain (Valencia and the Balearic Islands) which, in the complainant's view, were having a very negative impact on the



local environment. The complainant alleged that these projects had not been preceded by the necessary environmental impact assessment, in breach of EU environmental law, in particular of Directives 92/42/EEC for the protection of habitats, and Directive 85/337/EEC on environmental impact assessment.

The Commission registered the complaint under reference 2002/4677, SG (2002) A/5976 2001/2263, and started an investigation of the problem. As a result of its enquiries, the Commission decided to start infringement proceedings against Spain pursuant to Article 226 EC. In the framework of these proceedings, the Commission issued in September 2004 a reasoned opinion addressed to the Spanish authorities.

The complainant requested access to the text of the reasoned opinion on 19 January 2005. Not having received a reply to his first request, the complainant submitted a new one on 29 April 2005, which did not receive a reply either. On 20 September 2005, the complainant wrote to the Commission, recalling his previous letters, and demanding a written reply to his requests for access.

Not having received a reply to any of his letters, the complainant lodged a complaint with the European Ombudsman against the European Commission. On 4 and 23 January 2006, the complaining submitted additional information in which he explained that the construction of the projects he had complained against had not been interrupted, and that their development was having a negative impact on the environment of the affected coastal areas.

The allegation on which the Ombudsman asked the Commission to submit an opinion was the following:

The complainant alleges that the Commission has failed to reply to three letters dated 19 January, 29 April and 20 September 2005, in which he requested access to the reasoned opinion delivered by the Commission in the framework of an infringement proceeding concerning case 2002/4677, SG(2002) A/5976 2001/2263.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the factual background to the case. It explained that, having, through a Parliamentary written question (E 3431/01) submitted by Mr Pere Esteve Abad MEP, received information on the incorrect application of environmental EU law by the Spanish authorities in relation to various sand extraction and beach regeneration projects, its services decided to start an own-initiative inquiry (ref.: 2001/2263).

At a later date, the Commission received a number of citizens' complaints regarding the same situation, which were dealt with jointly with its own-initiative inquiry. The complainant had submitted one of these complaints on 26 May 2002.

The Commission decided to open infringement proceedings against Spain on 23 October 2002,



in the course of which the Commission addressed a reasoned opinion to the Spanish authorities on 3 September 2004. The complainant was duly informed of these developments.

On 19 January, 29 April and 20 September 2005, the complainant wrote to the Commission, requesting a copy of the reasoned opinion sent to the Spanish authorities. In its reply of 16 January 2006, the Commission explained that it could not grant access to the request on the basis of Article 4.2 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, which establishes that the institutions have to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The Commission pointed out that its position followed the case-law of the Community courts, which have stated that documents concerning an investigation into a possible breach of Community law by a Member State capable of resulting in the bringing of infringement proceedings under Article 226 EC come within the exception based on the protection of public interest, in order not to affect adversely the proper conduct of the infringement proceedings, in particular its purpose, which is to allow the Member State to comply voluntarily with the Treaty requirements or to justify its position. The Commission concluded that, on the basis of these rulings, the defence of this objective justifies that, for the sake of the protection of the public interest, the institutions may deny access to documents relating to investigations undertaken in the framework of the procedure established by Article 226 EC.

Having carefully examined the complainant's request in the light of Article 4.2 of Regulation 1049/2001 as well as the relevant case-law, the Commission concluded that it was not possible to identify an overriding public interest which might justify the disclosure of the requested document. The Commission considered that access to the requested documents might have harmed any eventual action to be taken in the course of the infringement proceedings.

As regards the handling of the complainant's infringement complaint against Spain, the Commission explained that the complainant had been properly informed of all the relevant decisions taking in the course of the inquiry into his complaint. The Commission stated that, prior to its letter of 16 January 2006, the complainant had already been informally informed of the impossibility of granting his request for access. Nevertheless, the Commission regretted the delay that occurred in replying formally to the requests made by the complainant and noted that it had put in place mechanisms to ensure a timely reply to all requests for access to documents. It acknowledged, however, that these mechanisms had not worked properly on this occasion, although appropriate measures have been adopted to prevent similar problems in the future.

The complainant's observations

In his observations, the complainant repeated the allegations made in his complaint. He contested the Commission's reasoning for not granting him access, on the grounds that the overreaching principle of Regulation (EC) No 1049/2001, as laid down in Articles 1, 2 and 4, was that of public accessibility, as supported by the established case-law of the Community courts (1) .

The complainant argued that the principle of public accessibility to any EU document has also



been embodied in EU legislation, in particular in Directive 4/2003/EC regarding public access to environmental information and 35/2005/EC which provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

THE DECISION

1 The Commission's reply to the complainant's request for public access

1.1 The complainant alleges that the Commission failed to reply to three letters dated 19 January, 29 April and 20 September 2005, in which he requested access to the reasoned opinion delivered by the Commission in the framework of an infringement proceeding concerning case 2002/4677, SG(2002) A/5976 2001/2263.

1.2 The Commission argues that it replied to the complainant's requests on 16 January 2006, and explains that it could not grant access to the request on the basis of Article 4.2 of Regulation (EC) No 1049/2001, which establishes that the institution has to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The Commission pointed out that its position followed the case-law of the Community courts. It also argues that it was not possible to identify an overriding public interest which might justify the disclosure of the requested document.

The Commission regrets the delay that occurred in replying formally to the complainant's requests and notes that the existing mechanisms to ensure a timely reply to all requests for access to documents had not properly worked on this occasion, although appropriate measures have been adopted to prevent similar problems in the future.

1.3 In his observations the complainant contests the Commission's reasoning and notes that that the overreaching principle of Regulation (EC) No 1049/2001, as laid down in Articles 1, 2 and 4, is that of public accessibility, as supported by the established case-law of the Community courts and by EU legislation.

1.4 The Ombudsman notes that the allegation made by the complainant in the original complaint only involved the Commission's failure to reply to his requests for access. The Ombudsman is mindful of the fact however that the Commission has also explained in its opinion the substantive reasons which justified its decision, which the complainant commented upon in his observations. The Ombudsman will therefore examine both aspects of the case in the present decision.

Alleged failure to reply to the complainant's requests for access

1.5 The Ombudsman notes that the legal framework governing access to Commission documents is provided by Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ["the Regulation"] (2) .

The procedure for processing of requests for access is laid down in Article 7 of the Regulation which, in its paragraph 1, establishes that,



"An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application [...]"

1.6 In view of the available information, it appears that the complainant made three successive requests for access on 19 January, 29 April and 20 September 2005, which the Commission only replied to on 16 January 2006, once the Ombudsman had started his inquiry. The Ombudsman finds it regrettable that the Commission only dealt with the complainant's applications for access several months after they had been made, and therefore well beyond the time limit set out in the Regulation. The Ombudsman notes, however, that the Commission has acknowledged the delay, has apologised for it and has also undertaken to adopt appropriate measures to prevent similar problems in the future. The Ombudsman therefore considers that no further inquiries appear to be necessary as regards this aspect of the case. Commission's decision to refuse access to a reasoned opinion

1.7 The Ombudsman notes that Article 4 (2) of Regulation 1049/2001 provides that,

" The institutions shall refuse access to a document where disclosure would undermine the protection of:

[...]

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure."

1.8 The Ombudsman also notes that the Community courts have upheld the application of the above exception to documents relating to an investigation into a possible breach of Community law by a Member State capable of resulting in the bringing of infringement proceedings under Article 226 EC , exempting therefore letters of formal notice and reasoned opinions from public access (3) . The Ombudsman is mindful of the fact that, in a judgement concerning Commission Decision 94/90 (which Regulation 1049/2001 replaced) the Court of First Instance held that the preservation of the objective of an amicable resolution of the dispute between the Commission and the Member State justified the Commission's decision to refuse access to reasoned opinions drawn up in connection with Article 226 proceedings (4) .

1.9 The Ombudsman therefore takes the view that, in light of the above-mentioned case law, the Commission could reasonably conclude that it was justified in refusing public access to the reasoned opinion in question. The Ombudsman therefore considers that the information and arguments put forward by the complainant in his observations do not provide sufficient grounds for further inquiries into this aspect of the case.

1.10 Even though, in the present stage of EU law, the Commission appears to be entitled to



refuse access to the reasoned opinion in question, the Ombudsman wishes to point out that the complainant has the possibility to address his request to the Spanish authorities, which might consider granting him access to the document if such course of action is compatible with the relevant national rules.

2 Conclusion

For the reasons stated above, the Ombudsman finds that no further inquiries are necessary into the present complaint. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Case T-14/98 and case T-191/99.

(2) OJ L 145, 31.5.2001, p. 43–48.

(3) Case T-191/99 *Petrie and Others v Commission*, 2001 ECR II-3677, pp. 64-71; c ase T-105/95 *WWF UK v Commission* [1997] ECR II-313, par. 63.

(4) See supra case T-191/99 *Petrie*, par. 68.