

Decision of the European Ombudsman on complaint 723/2006/(WP)PB against the European Commission

Decision

Case 723/2006/(WP)PB - Opened on 31/03/2006 - Decision on 17/12/2007

Strasbourg, 17 December 2007

Dear Mr S.,

On 9 March 2006, you submitted a complaint to the European Ombudsman concerning the European Commission's handling of a request for access to certain documents.

On 31 March 2006, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 26 June 2006. On 28 June 2006, I forwarded it to you with an invitation to make observations, which you sent on 1 July 2006.

On 10 August 2006, I asked the Commission for further information in relation to your complaint and for a supplementary opinion on a new allegation you had made in your observations. Both were to be submitted by 30 September 2006. I informed you accordingly on the same day.

By letter of 14 September 2006, the Commission asked for an extension of the deadline until 31 October 2006. I granted the Commission an extension of the deadline until 15 October 2006, and informed you accordingly.

On 27 November 2006, the Commission sent its reply to my request for further information and for a supplementary opinion. I forwarded it to you on 30 November 2006 with an invitation to make observations, which you sent on 10 December 2006.

Due to special circumstances relating to your present and other complaints submitted by you, the inquiry was discontinued between 14 May and 6 September 2007.

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

THE COMPLAINT

The complainant is a former Commission official, who retired with effect from 1 April 2005. On 25 November 2005, he asked for access (1) to all personal and medical files concerning him



that were held by the Commission, its medical service and sickness insurance service and (2) to all documents in relation to his application for the recognition of an occupational disease, in particular to the files concerning the examination carried out by Commission services in this respect. He based his application on the relevant provisions of the Staff Regulations and on Regulation 1049/2001 (1) .

The Commission's first response of 29 November 2005 - formulated by its Secretariat-General - contained the following points:

- (a) the complainant's application had a "*personal character*";
- (b) granting the complainant access under Regulation 1049/2001 would be equal to making the documents concerned "public";
- (c) for these reasons , the Commission had decided not to deal with the complainant's application under Regulation 1049/2001;
- (d) instead, the Commission considered that the "*relevant*" legal bases for responding to the complainant were the Staff Regulations and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies (2) .

The Secretariat-General therefore decided to forward the access request to the Commission's DG Personnel.

The complainant replied, arguing that Regulation 1049/2001 was applicable.

On 1 December 2005, the Commission's Secretariat-General made a reply that contained the following points:

- (a) Regulation 1049/2001 was not a "*suitable/fitting*" legal basis for his access request, *because* the assessment under that Regulation centres around the question of whether the documents concerned could be made *public* , and the information contained in the documents concerned were clearly covered by data protection rules;
- (b) "in comparison", the "*procedure according to the Staff Regulations*" offered the complainant "*more extensive access*" to documents and information; the access rights under Regulation 1049/2001 are, "*in comparison*", to be considered "*subsidiary*".

The complainant again wrote to the Commission, arguing that Regulation 1049/2001 was applicable. He described his e-mail making this argument as a confirmatory application under Regulation 1049/2001.

On 4 January 2006, the complainant received an e-mail from the Commission confirming receipt of his confirmatory application. It informed him that his application would be processed within the deadline foreseen in Regulation 1049/2001.



On 17 January 2006, the Commission's Secretary-General rejected the complainant's confirmatory application. The reply contained the following points:

- (a) under Regulation 1049/2001, the personal interest of the person seeking access has no relevance;
- (b) given the personal and confidential nature of the documents applied for, those documents cannot be released under Regulation 1049/2001;
- (c) in accordance with the relevant case-law of the Court of First Instance, the documents here concerned are all, and in their entirety, so obviously covered by one of the exceptions in Regulation 1049/2001 that an individual assessment of each document is not necessary;
- (d) therefore, the access request had to be rejected on the basis of Article 4(1) of Regulation 1049/2001 (protection of individual integrity and personal data);
- (e) however, this rejection did not influence other special legal bases granting the complainant special rights of access;
- (f) articles 26 and 26a of the Staff Regulations grant officials a special right of access to their personal and medical files;
- (g) it follows from the above that the general public right of access in Regulation 1049/2001 is "*subsidiary*" to the above-mentioned rights in the Staff Regulations. The Court of First Instance has, in its decision of 5 April 2005, Case T-376/03 *Hendrickx*, "*recognised that*" the general rules on public access "*can be inapplicable*" on the basis of "*the principle 'lex specialis derogat legi generali'*".

The Secretary-General's reply confirmed the decision to forward the access request to the Commission's DG Personnel.

In his complaint to the Ombudsman, the complainant argued that the Secretary-General failed to recognise that his rights under Article 255 of the EC Treaty and under Regulation 1049/2001 were not restricted by additional rights under the Staff Regulations or by data protection rules, but that they existed separately. Furthermore, the rejection of his application did not comply with the reasoning criteria laid down in the Regulation.

The complainant added that, in the meantime, he had been granted access to his medical and personal file and to parts of the file on the recognition of an occupational disease. However, this access had been granted (1) belatedly, (2) only in Luxembourg and Brussels and (3) without the possibility of taking copies, with the exception of his personal file, where he had been allowed to take copies. Therefore, his interest in complete access to the documents on the basis of Regulation 1049/2001 persisted.



The Ombudsman opened the present inquiry in respect to the following allegation and claim:

The Commission wrongfully rejected the complainant's request, formulated on the basis of Regulation 1049/2001, for access to his medical and personal files and to all files in connection with his application for recognition of an occupational disease.

The complainant claimed that, on the basis of Regulation 1049/2001, he should be granted complete access to the documents concerned.

In his complaint, the complainant mentioned that the Commission also dealt with his request for access to documents on other legal bases. However, since his complaint appeared only to relate to the refusal of access under Regulation 1049/2001, the Ombudsman specifically limited his inquiry to the Commission's dealing with the complainant's request for access under that Regulation.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission explained that the Commission's Secretary-General had rejected the complainant's confirmatory application, but that the complainant had obtained access to his personal and medical files by making use of the relevant provisions of the Staff Regulations.

The Commission submitted that the Court of First Instance had clarified that the purpose of Regulation 1049/2001 was " *to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him* " (3) . Therefore, the applicant's interest in obtaining access was not relevant with regard to the decision whether or not to disclose a document. If the documents were to be disclosed to the complainant under Regulation 1049/2001, the same documents would become public and would have to be disclosed to any other person requesting access. This conclusion followed from Article 9(e) of the detailed rules on the application of Regulation 1049/2001 (4) .

According to the Commission, all documents requested by the complainant contained personal data in the meaning of Article 2(a) of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data. The medical files contained data revealing a person's health, which, pursuant to Article 10 of this Regulation, were a special category of data.

It was obvious that public disclosure of the documents requested by the complainant would undermine the protection of his privacy and integrity and would violate the provisions of Regulation 45/2001. Since the documents requested were manifestly covered by the exception set out in Article 4(1)b of Regulation 1049/2001, there was, according to case law of the Court of First Instance (5) , no need to carry out an individual examination of each document.

The Commission went on to explain that Article 26 of the Staff Regulations stipulated that an official's personal file was confidential. This file was only to be consulted in the offices of the administration or on a secure electronic medium. However, pursuant to the same provision, an



official had the right, even after leaving the service - as in the complainant's case - to acquaint himself with all documents in his file and to take copies of them. Pursuant to Article 26a of the Staff Regulations, an official furthermore had the right to acquaint himself with the content of his medical file. In accordance with the principle "*lex specialis derogat legi generali*", these specific rules governing an official's right of access to his personal and medical files took precedence over the general provisions regarding the public right of access laid down in Regulation 1049/2001. This reasoning had been confirmed by the Court of First Instance (6) .

The Commission concluded that, since Regulation 1049/2001 governed the public's right of access to documents of the institutions, it was not the appropriate legal framework for granting a member of the Commission's staff access to his personal and medical files held by the institution's administration. The Staff Regulations contained specific adequate provisions for granting the Commission's officials access to these files. In the case at hand, the complainant had obtained such access.

The complainant's observations

In his observations, the complainant maintained his complaint.

As to the Commission's submission that he had been granted access to the files in question on the basis of the relevant provisions of the Staff Regulations, the complainant stated that this was not true. He had been granted access to some documents, which had been selected by the Commission. However, this did not constitute full access as guaranteed under Regulation 1049/2001, particularly given that he had not been allowed to make notes or to take photographs or copies and that "the most interesting documents had been removed from the files".

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman's request for further information and a supplementary opinion

In his letter of further inquiry, the Ombudsman asked for information on the following:

(1) which documents the Commission had granted the complainant access to? and

(2) which documents was the complainant was allowed to make copies of?

The Ombudsman furthermore asked the Commission to submit an additional opinion on the complainant's further allegation that "the most interesting documents" had been removed from the files before he was granted access.

The Commission's reply

In its reply, the Commission provided the following information and comments:

The complainant was granted access to his personal file in Luxembourg on 12 January 2004 and 15 July 2004. In accordance with Article 26 of the staff Regulations, he was allowed to take copies of any documents he asked for.

The complainant's medical file consists of two parts:



a) an administrative file held by the Office for the administration and settlement of individual entitlements (PMO) (7) ;

b) a medical file held by the Medical Service.

On 2 March 2006, the complainant visited the offices of the PMO and was shown, at his specific request, the file concerning his request for recognition of an occupational disease. At that time, the file was still under examination and no final decision had been taken. The complainant was therefore not allowed, at that moment, to take copies.

The complainant consulted his medical file at the Medical Service on 20 January 2005 and on 10 February 2006. On both occasions, the complainant spoke with Dr K. and was granted access to the complete file. At his second visit, he made photographs of the documents.

With regard to access to medical files, the Commission applies conclusion 221/04 of the College of Heads of Administration, of the Institutions and Bodies of the European Community.

No documents were removed from the files before they were shown to the complainant. The Commission presumed that the complainant had expected to find in the file medical reports concerning his request for the recognition of an occupational disease. However, the doctors, who examined the complainant, had not yet submitted their final report. The final, report would be transmitted to a doctor of the complainant's choice.

The Commission drew the Ombudsman's attention to the fact that the complainant had lodged a similar complaint with the European Data Protection Supervisor.

The complainant's second set of observations

In his observations on the Commission's reply, the complainant made, in summary, the following remarks:

As regards access to his personal file, the complainant stated that the Commission's account was correct. However, he submitted that his personal file did not comply with the requirements laid down in Article 26 of the Staff Regulations because certain information and decisions on evaluation were only to be found in "Sysper II" (an internal staff management software system) and not on the personal file. Therefore, the complainant asked the Ombudsman to see to it that his personal file should be completed in this respect, particularly since, following his retirement, he no longer had access to "Sysper II".

As regards his medical file, the complainant submitted that the Commission's description of that file was incomplete, since his application had referred to all medical and personal files and explicitly also to sickness insurance, which did not only consist of the file on the recognition of an occupational disease. The complainant considered that, apart from the latter file, the PMO held additional files concerning him, which had not been made accessible to him.

As to his visit to the PMO premises on 2 March 2006, the complainant submitted that the



Commission had not only refused to allow him to take photocopies of parts of the file. He had also not been allowed to take photographs or to make notes. When he had tried to do so, the file had been taken away from him. The complainant emphasised that he had pointed this out to the Commission in an e-mail of 8 March 2006 and that it had never contested this account of events.

As regards the medical report which, according to the Commission, had not been finalised when the access took place, the complainant agreed with this account. However, he added that he had already pointed out to the Commission in his e-mail of 8 March 2006 that the report "in its present form" was missing from the file. The complainant insisted that this first report would have had to be on the file. In this context, it was irrelevant if the Commission had never put the report on the file or if it had removed it from the file before showing it to him.

As regards the content of his medical file, the complainant considered that the list the Commission enclosed with its reply was incomplete. This was clear if one compared this list with the list the European Data Protection Officer had compiled in the framework of his parallel complaints procedure. According to the latter, there was a document called "*9bis Letter of PMO to AXA of 12 October 2005 - Communication of the report from IDOC of 16 September 2005*". A footnote in the EDPS's list stated: "*This document was not listed/numbered by PMO. There are two Communications from IDOC to PMO: one of 16 September 2005, with the conclusions annexed and signed, and a second one, of 6 February 2006 (numbered by PMO as document 11), which makes reference to the previous communication and has an annex also called conclusions; those "conclusions" are not signed and are shorter, although with the same three conclusive paragraphs. The first communication and annex are the annexed documents to the letter of 12 October 2005 from PMO to AXA Belgium.*" According to the complainant, the file he had consulted did not contain a letter to AXA dated 12 October 2005, or two IDOC communications. It was certain that there was no "full IDOC report" on the file. It appears that, in this context, the complainant referred to the attachment to document 9bis.

The complainant alleged that the Commission had intentionally not mentioned the existence of this document 9bis, which raised the question as to how far the Commission's other submissions were trustworthy.

As regards the preliminary report, which, according to the complainant, should have been on the file, the complainant submitted that its existence had been confirmed to him by telephone and constituted, next to the IDOC dossier, his main reason for consulting the file in Brussels. In this context, the complainant pointed to a letter, sent by a head of unit in the PMO to the EDPS in the framework of the latter's inquiry, which, in turn, appears to have been sent to him by the EDPS. The relevant passage reads: "*Dr H., one of the Commission's medical officers, has examined [the complainant]. Confidentially, I can add that Dr H. has drawn up a preliminary report but now wishes to seek the opinion of a medical expert (psychiatrist). This report was not shown to [the complainant] as it has not yet been finalised.*" According to the complainant, this confirmed his account of events and showed also that the Commission at least evaded addressing the issue of the preliminary report when communicating with the Ombudsman.



According to the complainant, it was therefore clear that the full IDOC report as well as the preliminary report drawn up by Dr H. had been in the possession of the PMO on 2 March 2006 and that they had not been on the file he had consulted.

As regards the medical file held by the medical service, the complainant agreed with the Commission's account. He confirmed that he had taken photographs of certain documents. However, the complainant stated that the quality of these photographs had proven to be insufficient in order to decipher handwritten notes in a foreign language, so that he wished to maintain his claim that he should be sent photocopies.

As regards the so-called conclusion 221/04, which the Commission had applied, the complainant considered that this conclusion raised more questions than it provided answers to. This was particularly the case with respect to the question of (a) the legal basis on this conclusion had been reached, (b) the body that had adopted it, and (c) the soundness of the procedure leading up to its adoption, for example, whether trade unions had been involved. Furthermore, it was doubtful whether this conclusion was in line with higher ranking law, including, among others, Article 255 of the EC Treaty, information-related self-determination, good administration and Regulations 45/2001 and 1049/2001. The complainant considered that this was not the case, so that the conclusion was void or at least not applicable. The complainant made detailed comments to support his view that the individual provisions of the conclusion were unlawful. He also referred to arguments he had brought forward in prior submissions as well as in his complaint to the EDPS and added that certain rules of European primary law and of legal principles in the EU Member States as well as the ECHR supported his view.

The Decision of the European Data Protection Supervisor

With his second set of observations, the complainant enclosed the decision of the EDPS on a complaint submitted to him by the complainant (case 2006-0120). This complaint concerned the PMO's refusal to grant him full access to his personal data and the transfer of his medical data to a Belgian insurance company, as well as certain documents relating to the procedure before the EDPS. As regards access to the complainant's personal data, the EDPS lists "documents exchanged with AXA Belgium", which correspond to the list enclosed with the Commission's reply, apart from the document "9bis" mentioned by the complainant. The EDPS noted that, according to PMO, the complainant had had access to all these documents, except document 9bis. This document itself was a formal one, that is, a "cover letter", but its annex, that is, the full IDOC report, contained health related data. In this respect, the EDPS recommended that the PMO should reconsider the granting of full access to document 9bis, containing the IDOC conclusions.

By letter of 10 December 2006, also enclosed with his second set of observations, the complainant asked the EDPS for a reconsideration of his complaint. As regards access to documents, he pointed out, among other things, that the possibilities of access given to him on 2 March 2006 in Brussels, without having the right of making notes, taking photographs or requesting photocopies, were too limited to satisfy his rights. It also appears that he considers that he has still not been granted access to the full version of the IDOC report concerned.



THE DECISION

1 Allegation that the Commission wrongfully rejected the complainant's application for access, insofar as it was based on Regulation 1049/2001, and relevant claim

1.1 On 25 November 2005, the complainant, a former Commission official, asked for access (1) to all personal and medical files held by the Commission, its medical service and sickness insurance service concerning him and (2) to all documents relating to his application for the recognition of an occupational disease, in particular to the files concerning the examination carried out by Commission services in this respect. He based his application on the relevant provisions of the Staff Regulations and on Regulation 1049/2001 (8) . The Commission decided to deal with this access request on the basis of the Staff Regulations, rather than on the basis of Regulation 1049/2001. Eventually, it granted access under the Staff Regulations. In his complaint to the Ombudsman, the complainant alleged that the Commission wrongfully rejected his above access request, to the extent it was based on Regulation 1049/2001.

1.2 In its opinion, the Commission noted, in particular, that the rules of Articles 26 and 26(a) of the Staff Regulations concerning the officials' right of access to their personal and medical files take precedence over the general provisions, regarding access to documents, laid down in Regulation 1049/2001. This is in accordance with the principle *lex specialis derogat legi generali* . In support of this approach, the Commission referred to the decisions of the Court of First Instance in Cases T-376/03 and T-371/03 (9) . The Commission, thus, concluded that Regulation 1049/2001 was not the appropriate legal basis for granting a member of its staff access to his or her personal and medical files held by the institution's administration. In his observations, the complainant maintained his allegation

1.3 The Ombudsman notes that, in light of the case-law referred to by the Commission, its above approach is reasonable. Hence the Commission's contested decision does not amount to an instance of maladministration, to the extent that the complainant's access request concerned documents contained in his personal and medical files referred to in Articles 26 and 26(a) of the Staff Regulations. The complainant's relevant claim is not, thus, sustained.

1.4 In this regard, the Ombudsman notes that the complainant appears to have argued, in his observations, that the Commission might have held documents which could reasonably be considered as falling within the scope of his access request but which were not included in his personal and medical files to which he was given access, under Articles 26 and 26(a) of the Staff Regulations. The Ombudsman's remarks in point 2.3 below are also relevant to this issue.

2 Allegation that the Commission removed "the most interesting documents" from the files to which the complainant was granted access

2.1 Following the complainant's access request referred to in point 1.1 of the present decision, the Commission granted him access, under the Staff Regulations. The complainant subsequently made the additional allegation, taken up for inquiry, that "the most interesting documents" had been "removed", that is, taken out from the files to which he was actually granted access.

2.2 With regard to this allegation, the Commission explained that no documents had been



removed from the files shown to the complainant. It presumed that the complainant had expected to find in the said file medical reports concerning his request for the recognition of an occupational disease. However, the doctors who had examined the complainant had not yet submitted their final report. The final report would be transmitted to a doctor of the complainant's choice.

2.3 In his relevant observations of 10 December 2006, the complainant made a number of arguments to the effect that various documents should have been on the files to which he was granted access, and/or that documents which were covered by his access request of 25 November 2005 were not communicated to him.

The Ombudsman notes that such issues do not fall within the scope of the present inquiry. Hence, they are not examined in the present decision (10) .

2.4 With regard to the complainant's allegation, mentioned in point 2.1 above, the Ombudsman notes that the Commission's factual statement that no documents had been removed from the files shown to the complainant carries with it a (refutable) presumption of truthfulness (11) .

The complainant has not made any cogent arguments, supported by appropriate evidence, refuting this presumption (12) . Hence, the Ombudsman finds no instance of maladministration corresponding to the complainant's above allegation.

In light of the above, the Ombudsman finds no instance of maladministration corresponding to the complainant's above allegation.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, the Ombudsman has found no instance of maladministration corresponding to the complainant's allegations examined in points 1 and 2 of the present decision.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission document, OJ L 145, p. 43.

(2) OJ L 8, p. 1.

(3) Case T-110/03, *Sison v Council* , [2005] ECR, p. II-1429.



(4) OJ 2001 L 345, p. 94.

(5) Case T-2/03, *VIK v Commission* , [2005] ECR p. II-1121.

(6) Case T-376/03, *Hendrickx v Council* , [2005] ECR, p. I-A-209 and p. II-957; and Case T-371/03, *Le Voci v Council* , [2005] ECR, p. I-A-209 and p. II-957.

(7) The Commission provided a list of the contents of that file.

(8) Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission document, OJ L 145, p. 43.

(9) Case T-376/03, *Hendrickx v Council* , [2005] ECR, p. I-A-209 and p. II-957, paragraphs 55-57, and Case T-371/03, *Le Voci v Council* , [2005] ECR, p. I-A-209 and p. II-957, paragraph 122-124.

(10) The complainant is free to consider submitting a new complaint to the Ombudsman about these issues. Relatedly, the Ombudsman recalls the conditions for opening an inquiry provided for in Articles 1-3 of the Statute of the European Ombudsman.

(11) Cf. Case T-311/00 *British American Tobacco v Commission* [2002] ECR II-2781, paragraph 35.

(12) The complainant's point that the medical file shown to him (on 20 January 2005 and on 10 February 2006) did not contain a document which the Commission/PMO sent to the EDPS for the purposes of the latter's examination of complaint 2006-120 (lodged by the complainant on 9 March 2006), but did not list/number it in the relevant account of documents sent to the EDPS, cannot be considered as such an argument.