

Decision of the European Ombudsman on complaint 3130/2006/ID against Europol

Decision

Case 3130/2006/ID - Opened on 05/12/2006 - Decision on 04/08/2008

Strasbourg, 4 August 2008

Dear Mr K.,

On 5 October 2006, you submitted a complaint to the European Ombudsman against Europol concerning its failure to reply to e-mails you had sent to it and to give reasons for its decisions rejecting your applications for certain posts.

On 5 December 2006, I opened an inquiry into your complaint. On 2 March 2007, I received Europol's opinion on the complaint. By e-mail of 4 June 2007, you made observations on this opinion.

On 28 January 2008, I made a friendly solution proposal with regard to your complaint. Europol replied by letter dated 5 March 2008. You made observations on this reply by e-mail dated 9 April 2008.

I am now writing to inform you of the results of my inquiries into your complaint.

THE COMPLAINT

In 2005 and 2006, the complainant applied to Europol for three different positions, namely, (i) administrative assistant; (ii) second officer in the crimes against persons unit, which is part of the illegal immigration group; and (iii) second officer, secretariat of the Europol Management Board. His applications were not accepted. As regards two of them, Europol informed him that, in the event that it did not contact him, this would imply his non-inclusion in the list of persons who would participate in the further stages of the selection procedure. As regards the other application, he received a letter saying that he had not been included in the relevant list.

In an e-mail dated 17 July 2006, addressed to the Human Resources Unit of Europol, the complainant stated:

" I would like to be informed [of] the reasons why my application for post No 2330-289 was



rejected by your services. It's the third time that I don't know the reasons for this rejection (it happened for post[s] No 2330-229 and 2330-237). (...) I want the elements and the qualifications of the persons who evaluated me, the elements and the skills of the person who is being hir[ed] from [sic] you for posts 2330-229, 289 and 237. Its [sic] obvious [sic] that his/hers qualifications must be more than mine. "

By e-mail dated 3 August 2006, the complainant corrected the above-mentioned numbers, referring to the positions he had applied for.

In the absence of a reply, the complainant lodged the present complaint with the European Ombudsman. He alleged, in essence, that Europol had failed to reply to his e-mail of 17 July 2006 (as corrected by his e-mail of 3 August 2006) and had failed to give reasons for its decisions not to accept his applications for three positions. The Ombudsman opened an inquiry into these allegations made by the complainant.

THE INQUIRY

In its opinion on the complaint, Europol noted, in particular, the following. The complainant received, in the course of a telephone call, an answer to his e-mail of 17 July 2006 (as corrected by his e-mail of 3 August 2006). In addition, the Human Resources Unit of Europol prepared a letter for the complainant's attention, informing him of the reasons that had led to the rejection of his applications at the pre-selection stage.

In this letter, dated 28 February 2007, the Head of Europol's Human Resources Unit, first, expressed his regret for not having replied earlier and in writing to the complainant's e-mail. In order to remedy this shortcoming, the Head of Unit informed the complainant that, in view of the information he had provided, the Selection Boards had found that he did not meet the requirements mentioned in the vacancy notices or that the tasks and responsibilities of the positions in question did not correspond to his professional profile. Regarding the complainant's request for information relating to the identity of the members of the Boards and of the selected candidates, he stated that Europol's legal framework did not allow it to provide such confidential personal data.

In his observations on Europol's opinion, the complainant referred to the principles of transparency, access to documents, as well as good administration. He also made a number of points expressing his dissatisfaction with the 28 February 2007 reply, which he had received from the Head of Europol's Human Resources Unit. He indicated, in particular, that Europol had not explained why he had been considered inadequate for the positions in question. Moreover, he did not accept Europol's justification for its failure to provide the information he had requested about the qualifications of the members of the Selection Boards and of the persons who had actually been selected and recruited.

THE OMBUDSMAN'S FRIENDLY SOLUTION PROPOSAL



After taking the above into account, and on the basis of a reasoned analysis of the relevant issues, the Ombudsman made the preliminary findings that Europol had still failed to provide the complainant with adequate reasons for its decisions rejecting his applications, and that Europol had also failed to reply adequately to the complainant's information request. He, thus, made a friendly solution proposal, in accordance with Article 3(5) of his Statute (1) . More specifically, he suggested that Europol could reconsider its reply of 28 February 2007 to the complainant and (a) provide him with a sufficiently detailed and specific explanation for its decisions not to retain his applications for the positions in question; and (b) give him the information he had requested about the members of the Selection Boards and the selected candidates, unless it invoked valid and adequate grounds for not doing so.

In its reply of 5 March 2008, Europol provided additional explanations for its decisions not to retain the complainant's applications. Moreover, it gave information on the qualifications of the members of the Selection Boards and explained why it could not provide similar information in relation to the successful candidates. In his observations, the complainant stated he was not satisfied with the additional explanations and information provided by Europol. Hence, it appears that a friendly settlement of the dispute has not been achieved.

THE DECISION

1 Allegation that Europol failed to reply to the complainant's e-mail of 17 July 2006 and to give reasons for its decisions not to accept his applications for three positions

1.1 In the context of the present inquiry, Europol replied to the complainant's e-mail of 17 July 2006 (as corrected by his e-mail of 3 August 2006). Since Europol took pertinent action in response to the part of the complaint concerning its failure to reply, no further inquiry into this aspect of the case is justified.

1.2 In his observations of 4 June 2007, the complainant contested the propriety and adequacy of Europol's reply of 28 February 2007. This matter is discussed below.

1.3 According to settled case-law, the statement of reasons required by Article 190 of the EC Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question. This should be done in such a way as to enable the persons concerned to ascertain the reasons for the measure and to facilitate its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular (i) the content of the measure in question; (ii) the nature of the reasons given; and (iii) the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (2) .

As regards the duty to state grounds, Article 18 of the European Code of Good Administrative Behaviour provides:

" 1. Every decision of the Institution which may adversely affect the rights or interests of a private



person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.

2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.

3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning. "

The Ombudsman remarks that a decision to exclude a candidate from a recruitment procedure on the ground that he or she does not meet one or more of the eligibility conditions set out in the competition notice (or similar document) should state, in a clear and unequivocal fashion, the reason(s) for the exclusion as well as the condition(s) the candidate did not fulfil. When the selection procedure involves a large number of candidates, the institution may initially confine itself to stating the reasons for the refusal in a summary manner and informing the candidates only of the criteria and the result of the selection. Nevertheless, the institution must subsequently give a specific and adequate explanation to each of those candidates who ask for it (3) .

1.4 In the present case, the complainant, in his e-mail of 17 July 2006, in essence asked to be provided with a sufficiently detailed and specific reasoning for Europol's decision not to retain his applications for the positions in question. In its reply of 28 February 2007, Europol merely stated that the Selection Boards had found that he did not meet the requirements mentioned in the vacancy notices or that the tasks and responsibilities of the positions in question did not correspond to his professional profile. This statement cannot, manifestly, be considered to amount to a sufficiently detailed and specific explanation for Europol 's decisions not to retain the complainant's applications. The complainant was, thus, justified in arguing, in his observations of 4 June 2007, that Europol had still failed to provide him with adequate reasons for these decisions. This failure appeared to be an instance of maladministration.

1.5 In light of the above considerations, the Ombudsman made a relevant proposal for a friendly solution. More specifically, he suggested that Europol could reconsider its reply of 28 February 2007 to the complainant and provide him with a sufficiently detailed and specific explanation for its decisions not to retain his applications for the positions in question.

1.6 In its reply, Europol noted, in particular, that t he complainant's application forms gave no indication of the duties he was carrying out in the position he held at the time. His CV provided only post titles in all cases, without specifying the duties/responsibilities of these posts. The Selection Boards were , thus, unable to determine what direct experience he had that was relevant to the positions he had applied for and to the duties these positions involved. In his observations, the complainant contested this explanation, arguing, in essence, that the information he had provided was enough in this respect (4) .



1.7 The Ombudsman notes that, under the relevant recruitment notices, applicants were required to fill out (in English) the Europol application form and submit it together with their CV. This application form contained a chapter entitled "Present or most recent job." In this part of the application, there was a section entitled "Exact designation of post / rank," followed by another one, bearing the heading "Nature of work/description of duties." In the former section ("Exact designation of post / rank"), the complainant wrote "L. COMMANDER (H.C.G.)". In the latter section ("Nature of work/description of duties"), the complainant wrote, in all his three applications, "See details [sic] c.v. attached to the application form." The complainant did not write anything in the parts of the application forms referring to "previous job[s]".

In the part of his CV concerning his "Work Experience", the complainant referred to the different services (around ten) he had worked for. For example, "A Port Police Department/ Central Port Authority of Piraeus" and "Directorate of Technical Support for Operational Resources and Special Forces / Resources Department"). Further, in two cases, he referred to his relevant capacity, namely, "Olympic Games stuff [sic] trainer" and "deputy Harbour Master at the port police of Naxos". However, in relation to the listed work experience, he failed to provide any specific and sufficiently clear information about the nature of the work and the duties carried out in these posts. Similarly, the complainant did not provide such information in the part of his CV entitled "Main activities and responsibilities / occupation or position held".

1.8 In light of the above, the Ombudsman concludes that, in reply to his friendly solution proposal, Europol provided a reasonable and adequate explanation for its decisions not to retain the complainant's applications, thereby remedying the shortcoming indicated in point 1.4 above. The Ombudsman, thus, considers that no further inquiry into this part of the complaint is justified. Nevertheless, the Ombudsman will make, at the end of the present decision, a further remark regarding Europol's additional argument that, on the basis of the information provided in his applications and attached CV, the complainant appeared to be "overqualified" for the posts in question.

1.9 Furthermore, the Ombudsman recalls that principles of good administration, embodied in Articles 22 and 12(1) of the European Code of Good Administrative Behaviour (5), require that EU institutions or bodies, such as Europol, reply adequately to information requests made by citizens and provide them with the information they have requested, unless they invoke valid and adequate grounds for not doing so.

1.10 In the present case, the complainant asked to know "*the elements and the qualifications of the persons who evaluated [him]*", and "*the elements and the skills of the person[s]*" selected to fill the positions in question. In its reply of 28 February 2007, Europol stated that, as regards the complainant's request for information about the identity of the members of the Selection Boards and of the selected candidates, its legal framework did not allow it to provide him with such confidential personal data. However, Europol did not provide adequate explanations in support of this argument, including the legal provision(s) it applied. Moreover, its above statement was limited to the disclosure of the identity of the members of the boards and the successful candidates. The part of the complainant's query referring to the "elements" of these persons could reasonably be interpreted as concerning (if not exclusively, at least in particular)



their identity. Nevertheless, the query also referred explicitly to the "qualifications" or "skills" of the same persons. Europol did not specifically address this part of the complainant's information request. Europol, thus, appeared to have failed to comply with the requirement mentioned in point 1.9 above. This seemed to be an instance of maladministration.

1.11 In light of the above considerations, the Ombudsman made a relevant proposal for a friendly solution. More specifically, he suggested that Europol could reconsider its reply of 28 February 2007 to the complainant and give him the information he had requested about the members of the Selection Boards and the selected candidates, unless it invoked valid and adequate grounds for not doing so. In the context of the implementation of this proposal, Europol was invited properly to take into account, in particular, (i) the Ombudsman's special report in relation to complaint 341/2001/(BB)IJH; (ii) points 4.3.3 and 5.2 of the Background Paper of the European Data Protection Supervisor concerning "Public Access to Documents and Data Protection" (pages 40, 46, 47 and 53); and (iii) the fact that, as a matter of general practice, Community institutions and bodies disclose the names of the members of boards in recruitment procedures (for example, EPSO publishes in the Official Journal the names of the members of the boards in the competitions it organises).

1.12 In its reply, Europol provided information about the capacity and the educational and/or professional background of the members of the Selection Boards. It did not disclose their names, in view of "the type and sensitive nature of Europol's activities." In his observations, the complainant did not contest the adequacy of this information; he rather made comments indicating that he was expecting that the persons evaluating the applications would have more qualifications. Relatedly, the Ombudsman notes that the composition of a board in a recruitment procedure must be such as to guarantee a fair and objective evaluation of the candidacies (6). The complainant has not made any specific, duly substantiated arguments to this effect. Moreover, the information provided by Europol does not suggest a procedural deficiency in this respect.

1.13 In light of the above, the Ombudsman concludes that, in reply to his friendly solution proposal, Europol appears to have provided the information sought by the complainant as regards the members of the Selection Boards, thereby remedying the relevant shortcoming indicated in point 1.10 above. The Ombudsman, thus, considers that no further inquiry into this part of the complaint is justified.

1.14 In relation to the complainant's query concerning the selected candidates, Europol replied by saying that it was not in a position to disclose the names or other data contained in the personal files of the successful candidates, as they were not informed beforehand of such a possibility in the vacancy notices. In his observations, the complainant pointed out that Europol had not disclosed the qualifications of the successful candidates and appeared to express dissatisfaction about that.

1.15 The Ombudsman notes that, in support of its refusal to disclose the qualifications of the selected applicants, Europol invoked the fact that these persons had not been informed beforehand of such a possibility in the vacancy notices. However, this fact, standing alone, does



not amount to a valid and adequate explanation for non-disclosure, in particular taking into account that information on the qualifications of the selected candidates is severable from information on their identity. In this regard, it must be recalled that the principle of equal treatment of candidates in recruitment procedures implies, inter alia, the existence of an obligation of sufficient transparency, designed to enable verification that the requirement of equal and fair treatment of candidates has been complied with. This obligation is triggered, in particular, in relation to the decisions selecting the candidate(s) to be recruited. In this context, the obligation to provide reasons is aimed, inter alia, at providing the applicants with adequate assurances that the selection decision was fair (7) . It goes without saying that, in recruitment procedures like the ones here concerned, based on the files of the applicants, the qualifications of the successful candidate(s) constitute a core element of the reasoning of the selection decision. Hence, in the absence of special circumstances justifying secrecy, a refusal such as the one at issue in the present case amounts to maladministration.

1.16 Hence, both in its opinion on the complaint and in its reply to the Ombudsman's friendly solution proposal, Europol was unable to give valid and adequate grounds for its refusal to provide the requested information concerning the qualifications of the selected candidates. On the other hand, it did provide an adequate explanation for the rejection of the complainant's applications. Taking the above into account, the Ombudsman does not consider it justified further to pursue the matter, and will close this aspect of the case with a critical remark.

2 Conclusion

On the basis of the above, the Ombudsman (a) concludes that, in the course of the present inquiry, Europol appears to have remedied its failure to provide the complainant with an adequate explanation for its decisions to reject his applications and with the information he sought about the qualifications of the members of the relevant Selection Boards; (b) makes the following critical remark:

Europol was required to reply adequately to the complainant's request for information on the qualifications of the selected candidates and to provide him with this information, unless it invoked valid and adequate grounds for not doing so. Europol has failed to comply with the above requirement. This was an instance of maladministration.

The Ombudsman, thus, closes the case. The Director of Europol will also be informed of this decision.

Further remark

In its reply to the Ombudsman's friendly solution proposal in the present case, Europol stated, inter alia, that the complainant's applications were rejected also because he seemed to be "overqualified" for the relevant posts. It added that it should ensure that its staff members are suitably motivated to carry out their duties and that it could not guarantee such motivation in the complainant's case. In this regard, the Ombudsman recalls that (a) the relevant recruitment notices contained no provision corresponding to the above criterion applied by Europol; (b) according to the case-law of the Community Courts, the essential function of a recruitment notice of Competition is to give those interested in applying for a competition the most accurate information possible about the requirements for the post, in order to enable them to judge whether they should apply for it; this implies, inter alia, that a candidate cannot be excluded



from a competition on the basis of a condition/requirement additional to the ones laid down in the recruitment notice (8) ; and (c) pursuant to Article 27 of the Staff Regulations, "*[r]ecruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity.*" Moreover, he notes that a candidate who appears to possess qualifications clearly superior to the ones required by a recruitment notice should not, in general, be presumed to be "not suitably motivated" to carry out the duties of the relevant post he has applied for. For the above reasons, the Ombudsman would like to invite Europol to reconsider the approach reflected in its above-mentioned statements and to inform him of the result of this reconsideration.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) 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, OJ 1994 L 113, p. 15. Under Article 3(5) of this Decision, "[a]s far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complainant."

(2) See, e.g., Case C-266/05 *P Sison v Council* [2007] ECR I-1233, paragraph 80.

(3) Cf. Case T-55/91 *Fascilla v Parliament* [1992] ECR II-1757, paragraphs 32, 33, 35; Case 225/87 *Belardinelli v Court of Justice* [1989] ECR 2353, paragraph 7. Cf. also the Ombudsman's decisions on complaint 2539/2005/ID (point 3.3) and on complaint 2560/2005/ID (point 1.2).

(4) The Ombudsman requested and received from Europol a full copy of the complainant's applications for the three posts in question.

(5) Article 22 of the Code provides, *inter alia* : " 1. *The official shall (...) provide members of the public with the information that they request. (...) The official shall take care that the information communicated is clear and understandable. (...) 3. If, because of its confidentiality, an official may not disclose the information requested, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he cannot communicate the information.* "

Article 12(1) of the Code provides: " *The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, (...) the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.* "

(6) See, e.g., Case T-160/99 *Svantesson and others v Council* [2001] ECR-SC I-A-175 and II-799, paragraph 32.



(7) Cf., in particular, Case T-110/96 *Bareth v Committee of the Regions* [1997] ECR-SC I-A-435 and II-1163, paragraph 46.

(8) See, in particular, Case T-158/89 *Van Hecken v Economic and Social Committee* [1991] ECR II-1341, paragraphs 25 et seq.