

## Decision of the European Ombudsman on complaint 3492/2006/(WP)BEH against the European Commission

Decision

**Case 3492/2006/(WP)BEH - Opened on 11/01/2007 - Decision on 31/07/2008**

Strasbourg, 31 July 2008

Dear Dr H.,

On 13 November 2006, you submitted a complaint to the European Ombudsman against the European Commission. The complaint concerned (a) your access to the questions of the pre-selection tests of selection procedure EPSO CAST 25 for the recruitment of contract agents for the EU institutions and bodies in which you had taken part, and (b) the Commission's alleged failure to reply to certain questions raised by you.

On 11 January 2007, I forwarded the complaint to the President of the Commission and informed you accordingly by letter of the same date. I asked the Commission to submit its opinion by 30 April 2007.

On 22 May 2007, I informed you that the Commission had requested an extension of the deadline for submission of its opinion to 30 June 2007 which I granted. The Commission requested a further extension of the deadline for submission of its opinion until 31 July 2007, which I granted and about which I informed you by letter of 25 June 2007.

In a letter dated 18 September 2007, you pointed out that you had not yet heard from the Commission and also stated that you had contacted the Commission's Secretariat-General in this regard.

By letter of 25 September 2007, I informed you that I had not yet received the Commission's opinion and that I had asked the Commission either to submit its opinion by 15 October 2007 or to provide me with a timetable for its reply.

By letter of 17 October 2007, the Chairman of the Committee on Petitions of the European Parliament informed me that you had submitted a petition to the Committee on Petitions. That petition related *inter alia* to the issue of language combinations, for which the European Personnel Selection Office ("EPSO") organised competitions, but which did not appear to be sought after. The Chairman took the view that, in light of my main responsibility in the subject-matter of your petition, I should examine the issues raised in your petition, and



transmitted certain documents related to your petition for my consideration.

In my response to the Chairman of the Committee on Petitions, on 26 October 2007, I pointed out that the issues raised by you with the Committee on Petitions were, in my view, covered by my ongoing inquiry and undertook to inform the Chairman of the Committee on Petitions of the outcome of my inquiry as soon as possible.

In a letter of 5 November 2007 which I received on 8 November 2007, you informed me that, apart from an acknowledgement of receipt, you had not yet heard from the Commission's Secretariat-General. You also asked me whether, having already submitted a complaint to the Ombudsman, you could still consider turning to the Court of First Instance of the European Communities (the "Court of First Instance") with regard to your case.

The Commission sent its opinion on 9 November 2007 and I forwarded it to you with an invitation to make observations on 16 November 2007. On this occasion, I also informed you that your case had been re-assigned to another Legal Officer.

In my letter of 16 November 2007, it was unfortunately not possible to consider your letter of 5 November 2007. In a further letter dated 14 December 2007, I explained to you that, in the meantime, the Commission had sent its opinion which I had forwarded to you with an invitation to make observations. Furthermore, I informed you that, in light of the overall significance of the question of access to test questions in computer-based tests, I had decided to start an own-initiative inquiry into this matter. For this reason no further inquiries were justified with regard to your first allegation and your first claim, both of which concerned access to test questions. I equally stated that I would inform you of the results of my own-initiative inquiry, in light of whose outcome EPSO could be willing to reconsider your case. Finally, I informed you that a complaint to the Ombudsman did not exclude the possibility of submitting an application to the Court of First Instance. However, I also drew your attention to the fact that submitting a complaint to the Ombudsman did not affect the applicable time-limits for submitting a case before this Court.

In a letter of 11 December 2007, which I only received on 20 December 2007, you thanked me for my intervention and asked me to close the case, even though you did not agree with certain arguments raised by the Commission.

In a letter of 7 January 2008, you confirmed that, in the meantime, you had received the Commission's opinion, which I had forwarded to you, and observed that you were not satisfied with it. Referring to my own-initiative inquiry concerning access to test questions in computer-based tests, you explained that, against this background, you appreciated all the more my willingness to deal with the matter on a general basis and thanked me for my promise to keep you informed of the outcome of my own-initiative inquiry.

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



## THE COMPLAINT

The complainant, a Czech citizen, took part in selection procedure EPSO CAST 25, organised by EPSO for the recruitment of contract agents for EU institutions and bodies. In the first phase of the selection procedure, candidates had to take a series of computer-based, multiple choice tests, which were designed to assess their verbal and numerical reasoning skills. Each question provided for four possible answers numbered with capital letters ranging from "A" to "D", from which candidates should choose the correct answer.

After EPSO had informed him that he had failed the first phase of the selection procedure, the complainant contacted EPSO on 12 April 2006 and asked that he be sent the test questions which he had answered incorrectly as well as the incorrect answers he himself had provided.

On 25 April 2006, EPSO provided the complainant with a table which indicated, with regard to each question, the capital letters corresponding to the correct answers as well as the capital letters corresponding to the answers given by the complainant. Questions which had not been answered were marked as "SKIPPED". The table equally indicated the percentage of correct answers given by the complainant, as well as the time spent by him on each question that he had answered. In its accompanying letter, EPSO explained that it was not possible to make available test questions to candidates and pointed out that the relevant database was protected by copyright.

On 28 April 2006, the complainant again turned to EPSO and explained that the table received was of little help to him, given that it contained no information on the contents of the questions asked, which he could no longer recall. He also stated that, in past selection procedures, which had not been computer-based, it had been possible to keep test questions after the tests, even though there seemed to be no differences in principle between the questions used at that time and those used in computer-based tests. He asked EPSO to explain its strict approach with regard to access to test questions used in computer-based tests, given that copyright did not seem to be at issue in the given context.

In an e-mail of 3 August 2006, EPSO apologised for its late reply and reiterated its view that it could not provide the complainant with the test questions which he had had to answer in selection procedure EPSO CAST 25. In this regard, EPSO pointed out that open competitions organised by it were subjected to specific rules laid down in the Staff Regulations of Officials of the European Communities (1) (the "Staff Regulations"), which did not allow the granting of access to "pre-selection test papers". These rules were to be considered as a *lex specialis* in relation to Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2) ("Regulation 1049/2001"). Even if Regulation 1049/2001 were to be considered applicable, EPSO could not grant access to test questions without seriously undermining the selection board's decision-making process. It went to argue that for this reason the exception to access contained in Article 4(3) first indent of Regulation 1049/2001 would apply. EPSO also took the view that any disclosure of the contents of its database would give an unfair advantage to candidates who had been granted access, and would thus have a negative impact on the



principle of equal treatment. EPSO further explained that, in a given selection procedure, every candidate was to sit an individual test generated on the basis of a random selection from a pool of questions in its database. It also stated that its website made available a sample range of questions designed to enable future candidates to familiarise themselves with what they were likely to encounter when sitting their own tests. Referring to Article 4(3) first indent of Regulation 1049/2001, EPSO concluded that there was no overriding public interest which would justify divulging test questions, given that test materials divulged would clearly be for private use. It also informed the complainant that, if he so wished, he could request the Commission's Secretary-General to review EPSO's position.

Making use of the appeals possibility indicated by EPSO, the complainant turned to the Commission's Secretary-General by letter of 22 August 2006. In his letter, the complainant confirmed his request for access to the questions contained in his test. In the given context, the complainant stated that he doubted EPSO's interpretation of Article 4(3) first indent of Regulation 1049/2001, in particular since each candidate was to sit an individual test, so that disclosure could not undermine the selection board's decision-making process. He also pointed out that none of the exceptions contained in Regulation 1049/2001 was applicable in his case. As concerns the Staff Regulations, the complainant argued that, even though he was not cognisant of this apparently internal regulation, he considered it unlikely that it would contradict Regulation 1049/2001.

In his letter of 22 August 2006, the complainant also raised the following issues:

(i) He stated that he did not understand why, in the recruitment of translators, great importance was given to numerical reasoning skills. Furthermore, he did not understand why language skills, which should be the primary focus of the test, were only assessed at the very end of the recruitment procedure. He raised the issue as to whether it would not be more logical to ask candidates to sit a translation test first and then, in case the same number of points had been obtained by candidates, take into account the results achieved in other tests, such as in the numerical reasoning test.

(ii) The complainant also asked why selection procedures were organised with respect to certain languages for which there did not appear to be sufficient demand in the EU institutions. In particular, he referred to a competition for assistant translators for German and Danish which he appears to have passed.

(iii) Furthermore, he asked why translators had to go through the whole selection procedure even when they had already passed the pre-selection tests of a previous procedure and only wished to extend their combination of languages (in his case adding English).

On 31 August 2006, the Commission's Secretariat-General acknowledged receipt of the complainant's request for access. On 21 September 2006, it informed him that it had to extend the deadline for a reply by another 15 working days. On 12 October 2006, it further informed him that it was still not in a position to reply to his request and would try to send him a final reply as soon as possible. In the same letter, the Commission's Secretariat-General also explained



that the complainant was entitled to complain to the Court of First Instance or to the European Ombudsman.

By letter of 13 November 2006, the complainant complained to the Ombudsman. In his complaint, he alleged that (1) he had not been provided with acceptable reasons for EPSO's refusal to grant him access to the test questions of his pre-selection test in the CAST 25 selection procedure, and (2) the Commission had failed to reply to certain questions he had posed in his letter of 22 August 2006.

He claimed that (i) he should be given access to the questions of his pre-selection test or, in case this should not be possible, be provided with a clear explanation of the reasons for the rejection of his application for access; (ii) he should receive a reply to his question as to why the English language is preferred to other languages within the EU institutions and why this fact is not openly admitted; and (iii) he should receive a reply to the questions raised in his letter of 22 August 2006.

On 11 January 2007, the Ombudsman informed the complainant that it did not appear that the latter had raised the question contained in his second claim with EPSO or the Commission. Since the complainant therefore did not appear to have made prior administrative approaches to the Commission, as required by Article 2(4) of the Statute of the European Ombudsman, the Ombudsman was not entitled to deal with his second claim.

## THE INQUIRY

By letter of 11 January 2007, the Ombudsman asked the Commission for an opinion on the complainant's allegations and his first and third claims. Whereas the complainant's correspondence had first been dealt with by EPSO, his confirmatory application for access to his test questions had been dealt with by the Commission's Secretariat-General. Following a telephone conversation on 14 December 2006, the Ombudsman's contact person in the Commission's Secretariat-General informed the Ombudsman's services that the Commission would be competent to deal with the matter.

### **The Commission's opinion**

In its opinion, the Commission observed that EPSO's refusal to grant access to the test questions was based on Regulation 1049/2001 and the Staff Regulations. It further noted that EPSO's position with regard to Regulation 1049/2001 was that disclosure of test questions asked would reveal the contents of the database containing test questions and thus affect the fairness and objectivity of future tests. In so arguing, EPSO had relied on the exception contained in Article 4(3) first subparagraph of Regulation 1049/2001 and had taken the position that disclosure of the contents of the test database would seriously undermine the decision-making process relating to the selection of staff. EPSO had also invoked the secrecy of selection board proceedings, as laid down in Article 6 of Annex III of the Staff Regulations, which should be considered as a *lex specialis* in relation to the general principle of access to documents.



The Commission took the view that Regulation 1049/2001 was not the appropriate instrument to handle requests from candidates aiming to obtain test questions that had been put to them in the course of a test or an examination. In support of this view, the Commission explained that candidates had a personal interest in a selection procedure, whereas Regulation 1049/2001 did not provide for privileged access.

With regard to its own handling of the complainant's confirmatory application for access, the Commission acknowledged that it had failed to reply to the complainant's confirmatory application within the time-limits provided for under Regulation 1049/2001 and pointed out that such absence of reply amounted to an implicit refusal. The Commission regretted that it had not been able to take an explicit decision. At the same time, the Commission pointed out that it could only confirm the refusal, which EPSO had based on Regulation 1049/2001, since putting questions asked of participants in the public domain would indeed affect the fairness and objectivity of future tests, given that it would give an unreasonable advantage to those candidates who had been granted access to test questions in advance. According to the Commission, the Staff Regulations provided the correct legal basis for this conclusion. The Commission found further support for its view in Regulation 45/2001 (3), which only provided for a right to be informed about the way in which personal data are processed.

As concerns the issue of languages selected for particular tests and the importance attached to numerical reasoning skills, the Commission explained that these were determined by the needs of the European institutions and described in the Call for expression of interest.

Regarding the need to repeat a numerical reasoning test even though such a test had already been passed by a candidate in another competition, the Commission took the view that a competition was to be taken as a whole. Therefore tests constituted integral parts of a concrete competition and formed an eliminatory step in the specific competition. As a consequence, candidates for a specific competition or selection procedure were required to sit all of the tests that were part of the competition.

The Commission drew attention to the fact that the requested profile of successful candidates was determined by the needs of the European institutions. Accordingly, the general contents of competitions and the order of tests were set in the Call for expression of interest prior to the selection procedure. The Commission finally observed that it was to be understood that successful candidates were selected in the translation test from among those candidates who had obtained the best results in the numerical reasoning test.

#### **The Ombudsman's letter of 14 December 2007**

In his letter of 14 December 2007, the Ombudsman informed the complainant *inter alia* that, given the overall significance of the question of access to test questions contained in computer-based tests, he had decided to start an own-initiative inquiry into this matter. For this reason no further inquiries were justified with regard to the complainant's first allegation and his first claim, both of which concerned the issue of access to test questions. The Ombudsman stated that he would inform the complainant of the results of his own-initiative inquiry, in light of whose outcome EPSO could be willing to reconsider the complainant's case.

#### **The complainant's letter of 11 December 2007**



In his letter of 11 December 2007, which he appeared to have sent before he had taken note of the Commission's opinion, the complainant thanked the Ombudsman for his intervention and asked him to close the case, even though he noted that he continued to disagree with certain arguments that had been raised by the Commission.

#### **The complainant's observations**

In his observations, the complainant pointed out that he was not satisfied with the Commission's opinion. Referring to the Ombudsman's own-initiative inquiry concerning access to test questions contained in computer-based tests, he explained that, against this background, he appreciated all the more the Ombudsman's willingness to deal with the matter on a general basis. He also thanked the Ombudsman in advance for his promise to keep him informed of the outcome of his own-initiative inquiry.

## **THE DECISION**

### **1 Preliminary remarks**

1.1 The complainant, a Czech citizen, took part in selection procedure EPSO CAST 25, organised by the European Personnel Selection Office ("EPSO") for the recruitment of contract agents in the EU institutions and bodies. In the first phase of the selection procedure, candidates had to take a series of computer-based, multiple choice tests, which were designed to assess their verbal and numerical reasoning skills. After EPSO informed him that he had failed the first phase of the selection procedure, the complainant contacted the Office and requested access to the test questions answered incorrectly by him as well as his own incorrect answers. Following his request, EPSO provided the complainant with a table, which contained information about the answers given by him as well as the correct answers with regard to each question asked. However, EPSO refused to grant him access to the actual test questions. Following the complainant's confirmatory application to the European Commission's Secretariat-General for access to the test questions put to him, the Secretariat-General confirmed EPSO's refusal to grant access.

1.2 In his complaint to the Ombudsman, the complainant made the following allegations:

(1) he had not been provided with acceptable reasons for EPSO's refusal to grant him access to the test questions of his pre-selection test in the CAST 25 selection procedure; and

(2) the Commission had failed to reply to certain questions which he had posed in his letter to the Commission's Secretariat-General of 22 August 2006.

He also made the following claims:

(1) he should be given access to the questions of his pre-selection test or, in case this should not be possible, be provided with a clear explanation of the reasons for the rejection of his application for access;

(2) he should receive a reply to his question as to why the English language is preferred to other languages within the EU institutions and why this fact is not openly admitted; and





(3) he should receive a reply to the questions raised in his letter to the Commission's Secretariat-General as to:

(i) why selection procedures are organised with respect to certain languages for which there does not appear to be sufficient demand in the EU institutions;

(ii) why, in selection procedures for translators, great importance is given to numerical reasoning skills and why these skills are assessed before assessing language skills; and

(iii) why, in such procedures, test parts which are not relevant to language skills and which the candidate already have passed in a previous procedure have to be passed again.

1.3 The Ombudsman noted that the complainant did not appear to have raised the question referred to in his second claim with EPSO or the Commission. He did not, therefore, appear to have made prior administrative approaches to the Commission concerning this issue, as required by Article 2(4) of the Statute of the European Ombudsman. In his letter informing the complainant about the opening of an inquiry in the present case, the Ombudsman therefore explained that the complainant's second claim was inadmissible and that the inquiry would thus only cover the complainant's allegations and his first and third claims. In view of the fact that the complainant's first allegation and his first claim both concern the issue of access to test questions, the Ombudsman deems it appropriate to consider them together. The complainant's second allegation and his third claim both relate to the Commission's alleged failure to reply to certain questions. For this reason they, too, will be considered together.

1.4 By way of a further preliminary remark, the Ombudsman considers it necessary to point out that, in his letter of 11 January 2007, he had asked the Commission to provide its opinion on the complaint by 30 April 2007. The Commission thus had more than three and a half months to prepare this opinion. Two extensions of the deadline were subsequently requested by the Commission and granted by the Ombudsman, first until 30 June 2007 and then until 31 July 2007. However, the Commission's opinion was in the end only submitted to the Ombudsman on 29 October 2007. The Ombudsman fully understands that, in particular cases, it may prove difficult for the Commission to comply with deadlines set by the Ombudsman and that, in such cases, an extension of time may become necessary. However, the Ombudsman considers that, in such cases, the Commission should submit a reasoned request for an extension of the relevant deadline. It should be noted that no request for an extension of the deadline beyond 31 July 2007 was submitted to him. The Commission's opinion was submitted almost six months after the date originally foreseen for this purpose and almost three months after the extensions of time requested by, and granted to, the Commission had expired. The Ombudsman trusts that the delays that occurred in the present case will not be repeated in future cases.

## **2 As regards the Commission's failure to give acceptable reasons for EPSO's refusal to grant access to test questions**

2.1 The complainant alleged that he had not been provided with acceptable reasons for EPSO's refusal to grant him access to the test questions of his pre-selection test in the CAST 25 selection procedure. He claimed that he should be given access to the questions of his





pre-selection test or, in case this should not be possible, be provided with a clear explanation of the reasons for the rejection of his application for access.

2.2 In its opinion, the Commission observed that EPSO's refusal to grant access to the test questions was based on Regulation 1049/2001 (EC) of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (4) ("Regulation 1049/2001") and the Staff Regulations of Officials of the European Communities (the "Staff Regulations") (5) . The Commission regretted that it had been unable to take an explicit decision on the complainant's confirmatory application within the time-limits provided for under Regulation 1049/2001. At the same time, the Commission pointed out that it could only confirm the refusal, which EPSO had based on Regulation 1049/2001, since, putting questions asked of participants in the public domain would indeed affect the fairness and objectivity of future tests, to the extent that it would give an unreasonable advantage to those candidates who had had access to test questions in advance. According to the Commission, the Staff Regulations provided the correct legal basis for this conclusion. The Commission found further support for its view in Regulation 45/2001 (6) , which only provided for a right to be informed about the way in which personal data are processed.

2.3 By letter of 14 December 2007, the Ombudsman informed the complainant that, in light of the overall significance of the question of access to test questions in computer-based tests, he had decided to start an own-initiative inquiry into this matter. For this reason no further inquiries were justified with regard to the complainant's first allegation and his first claim. The Ombudsman equally stated that he would inform the complainant of the results of his own-initiative inquiry, in light of whose outcome EPSO could be willing to reconsider his case.

2.4 In his observations on the Commission's opinion, the complainant explained that, given his dissatisfaction with the Commission's opinion, he appreciated all the more the Ombudsman's willingness to deal with the matter on a general basis. He also thanked the Ombudsman in advance for his promise to keep him informed of the outcome of his own-initiative inquiry.

2.5 Against this background, the Ombudsman takes the view that there are no grounds for further inquiries with regard to the complainant's first allegation and his first claim.

### **3 As regards the Commission's failure to reply to certain questions**

3.1 The complainant alleged that the Commission failed to reply to certain questions which he had posed in his letter to the Commission's Secretariat-General. One of these questions was why selection procedures are organised with respect to certain languages for which there did not appear to be sufficient demand in the EU institutions. The complainant claimed that he should receive a reply to these questions.

3.2 By letter of 17 October 2007, the Chairman of the Committee on Petitions of the European Parliament informed the Ombudsman that the complainant had submitted a petition to the Committee on Petitions which, *inter alia* , related to the issue of language combinations, for which EPSO organised competitions, but which did not appear to be sought after. The Chairman took the view that, in light of the Ombudsman's main responsibility in the subject-matter of the complainant's petition, the issues raised in the complainant's petition



should be examined by him. The Chairman also transmitted for the Ombudsman's consideration certain documents related to the petition. In reply to this letter, the Ombudsman pointed out that, in his view, the issues raised by the complainant with the Committee on Petitions were covered by his ongoing inquiry. He also stated that he would inform the Committee on Petitions of the outcome of his inquiry as soon as possible.

3.3 In reply to the questions raised by the complainant, the Commission made the following statements in its opinion. As concerns the issue of languages selected for particular tests and the importance attached to numerical reasoning skills, it explained that those were determined by the needs of the European institutions and described in the Call for expression of interest. Regarding the need to repeat a numerical reasoning test even though such test had already been passed by a candidate in another competition, the Commission took the view that each competition was to be regarded as constituting a whole. Therefore tests formed integral parts of a specific competition and served as an eliminatory step in it. As a consequence, candidates for a specific competition or selection procedure were required to sit tests that formed part of the competition. The Commission moreover drew attention to the fact that the requested profile of successful candidates was determined by the needs of the European institutions. Accordingly, the general contents of competitions and the order of tests were set in the Call for expression of interest prior to the selection procedure. The Commission finally observed that it was to be understood that successful candidates in translation competitions were selected from among those candidates who had obtained the best results in the numerical reasoning test.

3.4 In a letter of 11 December 2007, which he appears to have sent before he had taken note of the Commission's opinion, the complainant thanked the Ombudsman for his intervention and asked him to close the case, even though he noted that he continued to disagree with certain arguments that had been raised by the Commission. In his observations, the complainant did not comment on the Commission's replies to his questions but limited his comments to the issue of access to test questions.

3.5 The Ombudsman notes that, in his letter of 11 December 2007, the complainant asked the Ombudsman to close the case, even though he expressed disagreement with certain arguments raised by the Commission. The Ombudsman notes that the complainant's letter of 11 December 2007 appears to predate his taking note of the Commission's opinion. However, in his observations on the Commission's opinion, the complainant only commented on the aspect of the access to test questions with regard to which the Ombudsman had opened an own-initiative inquiry. Against this background, the Ombudsman understands the main issue of the complaint to be the issue of access to test questions. Thus, the Ombudsman considers that the complainant's request that the case be closed was not withdrawn after the complainant took note of the Commission's opinion. In view of the complainant's request to close the case, the Ombudsman does not consider it necessary to take a position with regard to the Commission's answers to the questions raised by the complainant.

3.6 In light of these considerations, the Ombudsman sees no need for further action on his part with regard to the second allegation and third claim raised by the complainant.

#### **4 Conclusion**



On the basis of the Ombudsman's inquiries into this complaint, it appears that he does not need to take further action in relation to the matter raised by the complainant. The Ombudsman therefore closes the case.

The President of the Commission and the Chairman of the Committee on Petitions of the European Parliament will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, OJ 1968 L 56, p. 1, as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, OJ 2004 L 124, p. 1.

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

(3) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p. 1.

(4) See footnote 2.

(5) See footnote 1.

(6) See footnote 3.