

Decision of the European Ombudsman on complaint 3697/2006/PB against the European Commission

Decision

Case 3697/2006/PB - Opened on 05/02/2007 - Decision on 22/10/2007

The complainant had, under Regulation 1049/2001 [1], applied for public access to documents held by the European Regulators Group. His application was handled by the Commission.

The complainant inquired as to the apparently considerable delay in registering his application. According to Regulation 1049/2001, the deadline for replying to an application for access begins on the date of registration. The Ombudsman concluded that the complainant did not appear to wish to pursue this matter as a specific allegation. However, he did make a further remark in which he stated that, in his view, the legal obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally takes place, at the latest, on the first working day following receipt of an application.

The complainant had furthermore alleged maladministration with respect to the Commission's extension of the deadline for replying to his application. On this issue, the Ombudsman found maladministration and made a critical remark concerning delay and a second critical remark concerning the standard of the reasons given for its actions.

With respect to the second critical remark, the Ombudsman noted that, under Regulation 1049/2001, the institutions are required to provide applicants with "detailed reasons" for the extension of the deadline for replying to a confirmatory application. What constitutes such sufficiently "detailed" reasoning may differ from case to case. Nevertheless, a simple reference (as in this case), formulated in general terms, to the need to consult other Commission services cannot satisfy the foregoing requirement, since it does not contain adequate elements to enable review of whether the extension is reasonably justified. Such elements could consist of, in particular, explanations as to why the consultation of other specific Commission services is necessary, and why the internal consultation could not have been completed earlier. In the present case, the Commission merely justified its extension of the deadline as follows: "*for the handling of your application, we have to consult other Commission services*". This kind of statement did not amount to "detailed reasons" within the meaning of Regulation 1049/2001. The Commission, thus, failed to comply with the relevant statutory requirement. Accordingly, its failure to do so constituted an instance of maladministration.

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May



2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

Strasbourg, 22 October 2007

Dear Mr L.,

On 10 December 2006, you submitted a complaint to the European Ombudsman against the European Commission, concerning its handling of an application for access to documents that you had submitted to it. Your complaint was complemented by an e-mail sent on 9 January 2007.

On 5 February 2007, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 19 June 2007. I forwarded it to you with an invitation to make observations, which you sent on 19 July 2007.

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

THE COMPLAINT AND ITS BACKGROUND

On 6 October 2006, the complainant applied to the European Commission, under Regulation 1049/2001 (1), for access to two documents: "Report on Mobile access market competition, MVNO/access and bottlenecks, ERG(06)45" and "Internal report on Mkt 18 analysis, ERG(06)47".

On 7 November 2006, the Secretary of the European Regulators Group ("ERG") replied to the complainant and explained to him that the Commission had decided to refuse to grant it access to the two documents. With regard to the first document, the Secretary considered that the "commercial interest" exception stated in Regulation 1049/2001, (Article 4(2), first indent), applied. With regard to the second document, the Secretary stated that access could not be given because the document was "*still considered a working (unfinished) document. Shall it become adopted, we will duly publish information about its nature*". The Secretary also informed the complainant of the possibility to appeal the above refusal to the Commission's Secretary-General.

By letter of 7 November 2006, the complainant made a confirmatory application to the Commission's Secretariat-General. On 15 November 2006, the complainant received an acknowledgement of receipt from the Commission. In this communication, the Commission stated that his confirmatory application had been registered on 15 November 2006, and that the deadline of 15 working days would thus expire on 6 December 2006 (2).

On 6 December 2007, the complainant had not received any reply to his confirmatory application. He therefore wrote to the Commission, asking when a reply would be forthcoming.

On 7 December 2007, the Commission sent an e-mail to the complainant, attaching a scanned



letter, dated 6 December 2007, which informed the complainant that (i) in order to reply to his request for access to documents, the Secretariat-General had to consult other Commission services, and that it therefore had to extend the deadline for a reply in accordance with Article 8 of Regulation 1049/2001. The new deadline set as a result of the extension was stated to be 5 January 2007.

On 10 December, the complainant submitted a relevant complaint to the European Ombudsman.

On 7 January 2007, the complainant had not yet received any decision from the Commission on his confirmatory application. He therefore wrote to the Commission asking for a reply, and pointed out that three months had passed since he submitted his initial application for access.

On 8 January 2007, the Commission wrote to the complainant that it needed more time to complete the German translation of its decision on his confirmatory application, and that it could therefore regrettably not send the decision to the complainant at the time previously stated. It informed him about his right to complain to the Court of First Instance and the Ombudsman (3) .

The complainant informed the Ombudsman of the Commission's reply by e-mail dated 9 January 2007. The complainant also pointed out that this reply clearly suggested that the Commission intended to reject his confirmatory application since (i) the documents that he had requested were in English (thus, they did not need to be translated), and (ii) he had already informed the Commission that he was prepared to receive replies in English, French and Italian.

On 31 January 2007, the Ombudsman's services telephoned the complainant in order to ask him whether he had received the Commission's decision on his confirmatory application. The complainant stated that he had not yet received any reply.

In his present complaint to the Ombudsman, the complainant made the following allegations and claim:

(1) The Commission failed to give precise valid and adequate grounds for its initial rejection of his application for access to the above-mentioned documents.

(2) The Commission wrongly granted itself additional time to reply to applications under Regulation 1049/2001 by registering his applications several days after the actual receipt of the applications (4) .

(3) The Commission's extension of the deadline for replying to his confirmatory application was in breach of Regulation 1049/2001 (i) because it did not notify him of this extension in advance and (ii) because it did not provide him with detailed reasons for this extension (5) .

(4) There was unjustified delay on the part of the Commission in informing him about its decision on his confirmatory application of 7 November 2006.



The complainant claims that the Commission should grant him access to the documents that he requested in his initial and confirmatory applications.

On 5 February 2007, the Ombudsman opened the present inquiry with respect to the second, third and fourth allegations. The Ombudsman decided not to open an inquiry into the first allegation (and the corresponding claim), since the rejection of the complainant's access request had been reviewed by the Commission following the submission of the confirmatory application, and the Ombudsman was not in possession of the Commission's relevant decision. The complainant was informed that he could file a new complaint if he wished to challenge the Commission's decision on the confirmatory application, once it had been communicated to him (6) .

THE INQUIRY

The Commission's opinion

The Commission submitted the following opinion:

1. Background

The complainant made an initial request for access to two reports by the ERG. The request was sent by e-mail on (Friday) 6 October 2006 and registered on (Monday) 16 October 2006. On the same day, that is, on 16 October 2006, it was forwarded to the Directorate-General for Information Society and Media and an acknowledgement of receipt was sent to the complainant.

The ERG is an external advisory group, whose role is to reflect on, discuss and give advice with respect to the electronic communications regulatory field. It was established by Commission Decision 2002/627/EC (7) , as amended by Commission Decision 2004/641/EC (8) . It is composed of the heads of the national regulatory authorities ("NRA") in the Member States. Experts from EEA States and from candidate countries may participate as observers. The Commission "[...] shall provide the secretariat to the Group. " (Article 4 of Decision 2002/627/EC.)

On 7 November 2006, the Secretariat of the ERG replied to the complainant, refusing to grant him access to the two reports and informing him of his right to submit a confirmatory application to the Commission's Secretary-General. The reasons for denying access were "protection of the commercial interests of the operators" and "protection of the decision-making process", since the draft report had not yet been adopted.

On 7 November 2006, the complainant submitted a confirmatory application by post, which was registered on 15 November 2006.

On 6 December 2006, the Commission extended the time-limit for its response by 15 working days, that is, until 5 January 2007. On 8 January 2007, the Commission informed the complainant that it needed more time in order to translate the reply to his confirmatory application into German. In this letter, the Commission informed him of his right to submit a complaint to the Ombudsman or to bring proceedings before the Court of First Instance.



On 9 January 2007, the reports requested by the complainant were published on the ERG's website. However, at the request of some NRAs, a limited amount of data was omitted from the published reports, since the data concerned had been obtained by operators on condition of non-disclosure.

On 12 January 2007, the complainant sent an e-mail requesting full access to the reports, which had been made partially accessible on the ERG's website.

On 7 February 2007, the Secretary-General sent the complainant the Commission's final reply to his request for full access to the reports. In this reply, the Commission stated its reasons for not publishing the reports in full.

2. Response to the complainant's allegations

The Commission noted that the Ombudsman was only investigating the procedural aspects of the handling of the complainant's application and not the decision on the confirmatory application itself.

2.1 Registration of applications:

Most applications for access to Commission documents are received by e-mail at a single access point, in a functional mailbox managed by the Secretariat-General. Applications are registered in the order in which they are received and they are forwarded, on the day of registration, to the Directorate-General responsible for handling them. Furthermore, an acknowledgement of receipt is sent to the applicant on the day of registration. Delays in registering applications may occur when the number of applications received exceeds the capacity of the staff to handle them.

The complainant's initial application was sent by e-mail on (Friday) 6 October 2006 at 20.43. The earliest date for its registration would have been (Monday) 9 October 2006. Due to the large number of applications received and to a serious shortage of administrative staff in the relevant service during that period, the registration was delayed until Monday, 16 October 2006. The Commission regrets this delay, which was entirely due to the staff shortage in the said period. There is no deliberate policy of delaying the registration of applications.

The complainant's confirmatory application was sent by post. It was registered the day after it reached the relevant service in the Secretariat-General.

2.2 Extension of the time-limit

The confirmatory application was registered on 15 November 2006. The 15 working-day time-limit expired on 6 December 2006. The letter by which the Commission extended the time-limit was sent on the same day, that is, within the time-limit. The extension of the time-limit was due to the fact that the reports by the ERG are published following a formal decision by the ERG itself. The ERG's Secretariat needed to organise such a written procedure before the Commission could decide, on the basis of the results of this consultation, to release the reports. It should be noted that the ERG allowed for the publication of the reports almost in their entirety.

2.3 Unjustified delay in informing the complainant

At the time of the application, the reports were still confidential. However, it was expected that the ERG would, at a later stage, publish non-confidential versions of the reports. This happened



on 9 January 2007.

At the time the Commission intended to inform the complainant about the publication of the reports, it received his e-mail of 12 January 2007, in which he requested access to the full confidential versions of the reports. The Commission decided to handle this e-mail as a new confirmatory application, which was in the complainant's interest, but it did not inform him accordingly.

In practice, the complainant's application for access was handled in three rather than two stages, namely:

- the initial application of 6 October 2006 was not granted, due to the still confidential nature of the reports;
- the confirmatory application of 7 November 2006 resulted in the publication of non-confidential versions of the reports;
- the complainant's e-mail of 12 January 2007 was handled as a confirmatory application for full access to the reports; full access was denied and the reasons for refusal of access were given in the Commission's final reply of 7 February 2007.

3. Conclusion

The Commission regrets the delays that occurred in the handling of the complainant's requests.

The Commission made the following comments with regard to the delay which occurred between the time of the complainant's confirmatory application, sent on 7 November 2006 and registered on 15 November 2006, and the Commission's final reply of 7 February 2007: It should be noted that due to the specific nature of the ERG, which is essentially an external advisory body, it would not have been possible to shorten the time needed to take a decision regarding the publication of the reports requested by the complainant. If the Commission had replied strictly within the time-limits, access would have been denied pending the ERG's decision on publication of non-confidential versions of the report. The Commission chose, instead, not to take a final decision on the application as long as the ERG had not established the non-confidential versions.

The complainant's observations

In his observations on the Commission's opinion, the complainant made, in summary, the following comments:

(1) Regarding the registration of applications under Regulation 1049/2001, the complainant stated that he did " *not blame the Commission for any wrongdoing; however, it is noticeable that the registration of applications submitted by ordinary mail takes place at reception, whereas the registration of applications submitted electronically takes longer* ".

(2) With regard to the Commission's remarks on the extension of the time-limit, the factual information provided by the Commission is wrong. The Commission's e-mail that informed the complainant of the extension was sent to him in the afternoon of 7 December 2006, not on 6 December. The fact that the Commission's e-mail contained an attached letter dated 6 December 2006, the original of which the complainant did not receive by post, does not change the fact that the complainant was only informed of the extension on 7 December 2006. Article



7(3) of Regulation 1049/2001 was accordingly not respected. Regarding the *reason* stated by the Commission for the extension, this is neither adequate nor relevant. The reason was that "*[f]or the handling of your application, we have to consult other Commission services*". In its opinion, the Commission does not even claim to have consulted another Commission service, but rather indicates that a formal decision of the ERG was a prerequisite for a Commission decision on access. However, this explanation is not supported by any of the legal bases of the ERG, which was set up as a consultative organ for the Commission, and which is subject to the latter's confidentiality requirements (Article 7 of Decision 2002/627/EC). Thus, ultimately, the Commission must decide on the confidentiality of documents dealt with in the ERG-framework, not the ERG itself.

(3) The partial publication of the documents on the ERG's website was not communicated to the complainant. However, the complainant discovered that the publication had taken place, and informed the Commission by e-mail of 12 January 2007 that, in case the Commission would send him these partially published documents, access to this version of the said documents would not satisfy his access application.

The Commission's decision to consider the above-mentioned e-mail of 12 January 2007 as a new application does not change the fact that there was a failure on its part to respect the deadlines for the initial application. And, at any rate, even if the e-mail of 12 January 2007 were correctly considered a new application, the subsequent reply of 7 February 2007 was, again, delayed.

THE DECISION

1 Allegation that the Commission had wrongly granted itself additional time to reply to the complainant's applications under Regulation 1049/2001, by registering them several days after their actual receipt (9)

1.1 In response to this allegation, the European Commission made the following comments in its opinion:

Most applications for access to Commission documents are received by e-mail at a single access point, in a functional mailbox managed by the Secretariat-General. Applications are registered in the order in which they are received; on the day of registration, they are forwarded to the Directorate-General responsible for handling them, and an acknowledgement of receipt is sent to the applicant on the same day. Delays in registering applications may occur when the number of applications received exceeds the capacity of the staff to handle them.

The complainant's initial application was sent by e-mail, on Friday, 6 October 2006 at 20.43 pm. The earliest date for its registration would have been Monday, 9 October 2006. Due to the large number of applications received and a serious shortage of administrative staff in the relevant service during that period, the registration was delayed until Monday, 16 October 2006. The Commission regretted this delay, which was entirely due to the staff shortage in the said period. There is no deliberate policy of delaying the registration of applications.



The complainant's confirmatory application was sent by post. It was registered the day after it reached the relevant service in the Secretariat-General.

1.2 In his relevant observations, the complainant stated that he did " *not blame the Commission for any wrongdoing; however, it is noticeable that the registration of applications submitted by ordinary mail takes place at reception, whereas the registration of applications submitted electronically takes longer* ".

1.3 In light of the complainant's above-quoted statement, the European Ombudsman considers that no further inquiry into the allegation here concerned appears necessary. However, the Ombudsman will make a pertinent further remark below.

2 Allegation that the extension of the deadline for replying to the complainant's confirmatory application was in breach of Regulation 1049/2001

2.1 Article 8(2) of Regulation 1049/2001 provides that:

" In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "

2.2 The complainant alleged the following:

The Commission's extension of the deadline for replying to his confirmatory application was in breach of Regulation 1049/2001 (i) because it did not notify him of this extension in advance and (ii) because it did not provide him with detailed reasons for this extension (10) .

With regard to part (i) of this allegation, the Ombudsman notes the following:

- it is not disputed that the Commission's deadline for replying to the complainant's confirmatory application was 6 December 2006 (11) ; and
- it is not disputed that the Commission informed the complainant of the extension by e-mail sent to him on 7 December 2007.

Thus, in breach of Article 8(2) of Regulation 1049/2001, the Commission did not inform the complainant in advance of the extension. This constitutes an instance of maladministration, and the Ombudsman makes a relevant critical remark below.

2.3 With regard to part (ii) of the allegation, the Ombudsman notes that the Commission is required, under Article 8(2) of Regulation 1049/2001, to provide the applicant with "detailed reasons" for the extension of the deadline for its reply to the confirmatory application. What constitutes sufficiently "detailed" reasoning, within the meaning of the above provision, may differ from case to case, depending on the relevant circumstances. Nevertheless, a simple reference, formulated in general terms, to the need for consultation with other Commission services cannot satisfy the foregoing requirement, since it does not contain adequate elements to enable review of whether the extension is reasonably justified in the specific case. Such elements could be, in particular, explanations as to why the consultation of other specific



Commission services is necessary, and why the internal consultation could not have been completed earlier.

In the present case, the only explanation given by the Commission to the complainant for its extension of the deadline was that "*for the handling of your application, we have to consult other Commission services*". As pointed out above, this kind of statement does not amount to "detailed reasons" within the meaning of Article 8(2) of Regulation 1049/2001. The Ombudsman therefore finds that the Commission failed to comply with the relevant statutory requirement and this constitutes an instance of maladministration. A pertinent critical remark is made below.

3 Allegation about unjustified delay on the part of the Commission in informing the complainant of its decision on his confirmatory application

3.1 Article 8(2) of Regulation 1049/2001, quoted in point 2.1 of the present decision, provides that the deadline for the Commission's reply to a confirmatory application may, in exceptional cases, be extended (once) by 15 working days. In the case at hand, it is clear that the Commission failed to reply within the extended deadline and, hence, to discharge its relevant obligations under Article 8(1) and (2) of the Regulation. In this regard, it must be noted that the provision of Article 8(3) (12) of the same Regulation did not relieve the Commission of its obligation to reply within the extended deadline. Neither did its initially purported inability to provide a German translation of the relevant decision. The Commission's argument, put forward for the first time in its opinion on the present complaint, that it could not make a decision on the confirmatory application before the European Regulators Group itself had decided on the publication of its reports in question is equally unacceptable. Indeed, this argument has been formulated without reference to the legal provisions on which it is based and, as such, cannot result in the fashioning of an exception additional to the exceptional provision of Article 8(2) of the Regulation, which should be construed strictly.

3.2 In light of the above, the Ombudsman finds that the Commission's failure to reply to the complainant's confirmatory application within the extended deadline provided for in Article 8(2) of the Regulation amounted to an instance of maladministration. A pertinent critical remark is made below.

4 Conclusion

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

The Commission failed to inform the complainant in advance of the extension of the deadline for replying to his confirmatory application. This failure was in breach of Article 8(2) of Regulation 1049/2001 and constitutes an instance of maladministration.

The Commission is required, under Article 8(2) of Regulation 1049/2001, to provide the applicant with "detailed reasons" for the extension of the deadline for its reply to his confirmatory application. What constitutes sufficiently "detailed" reasoning, within the meaning of the above provision, may differ from case to case, depending on the relevant circumstances.

Nevertheless, a simple reference, formulated in general terms, to the need for consultation with other Commission services cannot satisfy the foregoing requirement, since it does not contain adequate elements to enable a review of whether the extension is reasonably justified in the



specific case. Such elements could, in particular, consist of explanations as to why the consultation of other specific Commission services is necessary, and why the internal consultation could not have been completed earlier. In the present case, the only explanation given by the Commission to the complainant for its extension of the deadline was that "*for the handling of your application, we have to consult other Commission services*". As pointed out above, this kind of statement does not amount to "detailed reasons" within the meaning of Article 8(2) of Regulation 1049/2001. The Commission, thus, failed to comply with the relevant statutory requirement and this constitutes an instance of maladministration.

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

FURTHER REMARK

The Ombudsman recalls that, according to Articles 7(1) and 8(1) of Regulation 1049/2001, applications for access to documents and confirmatory applications shall be handled promptly and a reply to an access application or a confirmatory application shall be given within 15 working days as from the date of registration of such an application. The Ombudsman takes the view that the obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally take places, at the latest, on the first working day following receipt of an application.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

(2) Article 8 ("Processing of confirmatory applications") of Regulation 1049/2001 contains the following provisions:

" 1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an 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. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1



may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "

(3) Article 8(3) of Regulation 1049/2001 provides that "*[f]ailure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty. "*

(4) Regulation 1049/2001 provides that a reply shall be made within 15 working days from the registration of the application (Articles 7 and 8). It does not define when that registration has to take place.

(5) Article 8(2) of Regulation 1049/2001 provides that "*[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "*

(6) The complainant subsequently filed such a complaint (complaint 488/2007/PB, inquiry opened on 24 May 2007).

(7) 2002/627/EC: Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ 2002 L 200, p. 38.

(8) 2004/641/EC: Commission Decision of 14 September 2004 amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services, OJ 2004 L 293, p. 30.

(9) Regulation 1049/2001 provides that a reply shall be made within 15 working days from the registration of the application (Articles 7 and 8). It does not define when that registration has to take place.

(10) Article 8(2) of Regulation 1049/2001 provides that "*[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. "*

(11) This is taken as given in the present case, and specifically without prejudice to any more detailed examination as to whether the relevant registration was carried out in a timely manner (cf. point 1.3 above), and without prejudice to the Ombudsman's further remark in the present decision.

(12) See note 3 above.