

Draft recommendation of the European Ombudsman in his inquiry into complaint 676/2008/RT against the European Commission

Recommendation

Case 676/2008/RT - Opened on 28/03/2008 - Recommendation on 27/10/2008 - Special report on 28/03/2008 - Decision on 07/07/2010

(Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1])

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a non-governmental organisation acting in the field of environmental protection. On 1 March 2007, it asked the Commission for access to information and documents held by the Directorate-General (DG) for Enterprise and Industry and by Vice-President Verheugen. The information and documents requested related to meetings between the Commission and representatives of car manufacturers, at which the question of the Commission's approach to carbon dioxide emissions from cars was discussed as from 1st January 2006.

2. On 25 June 2007, the complainant submitted a confirmatory application to the Secretary-General of the Commission, who on 9 August 2007.

3. With reference to eighteen letters, received by Vice-President Verheugen from various car manufacturers, the Commission informed the complainant that it needed to consult their authors. This was in order to assess whether an exception to the right of access, as provided for in Article 4(1) or 4(2) of Regulation 1049/2001 [2] , applied to the content of said letters [3] . After this consultation, the Commission would give the complainant access to all of the letters which were not subject to the afore-mentioned exception.

4. On 14 November 2007, the Commission informed the complainant that no exceptions to the right of access were found in relation to fifteen letters. Accordingly, the complainant was granted access to these letters. However, the Commission refused to grant access to three letters, sent by company X to Vice-President Verheugen. In so doing, it based its decision on the exception set out in Article 4(2), first indent of the Regulation 1049/2001, namely, that their disclosure would undermine the protection of the company's commercial interests.



THE SUBJECT MATTER OF THE INQUIRY

5. The complainant alleged that the Commission:

- wrongly refused access to the company X letters, on the basis of the first indent of Article 4(2) of Regulation 1049/2001 [4] ; and
- wrongly refused partial access to the company X letters, on the basis of the Article 4(6) of Regulation 1049/2001 [5] .

The complainant claimed that:

- the Commission should grant it access to the requested letters in their entirety.

THE INQUIRY

7. The complaint was forwarded to the Commission, with a request for an opinion on its content by 31 May 2008. The Commission requested an extension of time, which was granted until 30 June 2008. Once received, the Commission's opinion was forwarded to the complainant, with an invitation to submit observations. The complainant sent its observations on 4 September 2008.

8. On 25 September 2008, in accordance with Article 3(2) of the Ombudsman's Statute, the Ombudsman's services carried out an inspection of the documents to which the complainant referred, at the Commission's premises.

9. A copy of the report on this inspection was sent both to the complainant and to the Commission.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure to grant access to the relevant documents and the related claim

Arguments presented to the Ombudsman

10. The complainant alleged that the Commission wrongly refused (i) access to the company X letters on the basis of the first indent of Article 4(2) of Regulation 1049/2001, and (ii) partial access to the company X letters, on the basis of the Article 4(6) of Regulation 1049/2001. It also claimed that the Commission should grant it access to the requested letters in their entirety.

11. The complainant argued that the Commission failed to give a detailed explanation as regards the commercial interests of company X and did not take into account the overriding



public interest in disclosure.

12. In its opinion, the Commission argued that the three letters in question detailed company X's "*specific position on the automobile market*". The Commission went on to say that it could not provide further details as regards the content of the letters, without revealing their content. It concluded that disclosure of the letters would undermine the protection of company X's commercial interests.

13. Additionally, the Commission pointed out that it did in fact carry out "*the public interest test*" and concluded that company X's commercial interests outweighed the public interest in disclosing the letters. Partial access could not be granted, because the letters did not contain parts that could be disclosed without harming company X's commercial interests.

The Ombudsman's inspection of documents

14. The Ombudsman's services inspected the following documents at the Commission's premises, which the Commission considered to be confidential:

(i) The letter from Mr. K, President of company X, to Vice-President Verheugen of 28 November 2005, plus annexes.

(ii) The letter from Mr. K to Vice-President Verheugen of 15 December 2006.

(iii) The letter from company X of 2 February 2007, forwarding copies of letters sent by Mr K to Chancellor Merkel, President Barroso and Vice-President Wallström.

(iv) An exchange of e-mails between the Commission and company X. The Commission informed company X that it intended not to disclose the above letters.

The Ombudsman's assessment

15. Article 1(a) of Regulation 1049/2001 provides that the aim of this Regulation is to ensure the widest possible access to documents held by the Council, the European Parliament and the Commission. According to the established case-law of the Community courts, any exceptions to this principle have to be interpreted strictly.

16. In order to process a request for access to documents, the Commission has to follow the assessment sequence [6] found below and to examine:

(i) First, whether the requested document falls within the scope of one of the exceptions provided for in Article 4 of Regulation No 1049/2001;

(ii) Second, whether disclosure of that document would specifically and actually undermine the protected interest;



(iii) Third, whether there is no overriding public interest in disclosure; and

(iv) Fourth, whether the need for protection applies to the whole document in question.

17. The Commission refused to grant the complainant access to company X's relevant letters on the basis of the Article 4(2), first indent, of Regulation 1049/2001. According to this provision, "*The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property (...)*"

18. The letters in question were sent by company X in the context of a consultation held by the Commission with key stakeholders concerning the review of the Community Strategy to reduce carbon dioxide emissions from passenger cars. It was therefore likely that the three letters contained information on company X's business relations. Consequently, the Commission could have regarded them as falling within the scope of the exception laid down by Article 4(2), first indent, of Regulation No 1049/2001.

19. In this respect, the Ombudsman must examine whether the information contained in the relevant documents is indeed so sensitive that disclosure of the latter would seriously affect company X's commercial interests.

20. The only concrete reference to the content of the letters that the Commission put forward was that "*in these letters company X explained its specific position on the automobile market*".

21. This could be reasonably understood as pertaining to company X's commercial interests in a broad sense including its market shares; its commercial strategy; industrial, financial, banking or commercial data, including information relating to the company's business relations or contracts; its methods of assessing costs; and its company know-how.

22. On the basis of the Ombudsman's inspection of the documents, it appears that the content of these letters or of their annexes does not, in its entirety, relate to the protected commercial interests described above. Moreover, it cannot be ruled out that some of the information contained in the letters has already been made available to the public, either by the company itself or by other entities, such as the competent national authorities for the sector, or even by specialized publications dealing with the automobile industry.

23. In this regard, Article 4(1) of the Ombudsman's Statute stipulates that the Ombudsman and his staff "*shall be required not to divulge information or documents which they obtain in the course of their inquiries*". The Ombudsman is therefore prevented from quoting documents that the institution considers to be confidential or from referring to them in a way that would disclose their contents.

24. Even if the letters contained exactly the kind of information described in point 21 above, this fact would not, in and of itself, be sufficient to allow the conclusion to be drawn that their disclosure would specifically and actually undermine the commercial interests of company X.



As the Court of First Instance held in a recent judgment [7] , if all information relating to a company and its business relations were regarded as being covered by the protection given to commercial interests in accordance with Article 4(2), first indent, of Regulation No 1049/2001, effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions.

25. The Commission's only reference to company X's " *specific position on the automobile market* ", which was not backed up by any other reference to the individual facts of the case, is not sufficient to conclude that the exception laid down in Article 4(2), first indent, of Regulation 1049/2001 applies.

26. The Ombudsman therefore considers that the Commission has not established that disclosure of the relevant documents would specifically and actually undermine company X's commercial interests. Moreover, the Ombudsman is not convinced that partial access, if granted, would necessarily harm company X 's commercial interests, as argued by the Commission.

27. If it was the Commission's intent to support its refusal to grant access by indicating (and showing the Ombudsman the relevant documents mentioned under (iv) above during the inspection) that company X itself had asked it not to disclose the letters, the Ombudsman points out that, according to the Community case-law, the views expressed by the third party author of a document, in the framework of the consultation provided for in Article 4(4) of the Regulation No 1049/2001, is not binding on the Commission [8] . Despite company X's request, the Commission was still obliged to carry out its own assessment as regards the applicability of the exceptions provided for under Article 4(1) or (2) of Regulation No 1049/2001.

28. On the basis of the evidence available, is not possible to establish whether the Commission did indeed carry out the public interest test. Nevertheless, in view of the findings in point 26, in conjunction with point 16 above, it is not necessary to examine whether there was an overriding public interest in disclosure.

29. In light of the above considerations, the Ombudsman concludes that the Commission wrongly refused access to the company X letters on the basis of Article 4(2), first indent and Article 4(6) of Regulation 1049/2001. This is an instance of maladministration. The Ombudsman will make the corresponding draft recommendation below.

B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should grant access to the three letters sent by company X to Vice-President Verheugen in their entirety or consider partially disclosing them.



The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 30 January 2009. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 27 October 2008

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Regulation 1049/2001, regarding public access to European Parliament, Council and Commission documents, OJ L 267 of 20.10.2000.

[3] Article 4(4) of Regulation 1049/2001 reads as follows: "*As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.*"

[4] First indent of Article 4(2) of Regulation 1049/2001 reads as follows: "*The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property (...) unless there is an overriding public interest in disclosure.*"

[5] Article 4(6) of Regulation 1049/2001 reads as follows: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.*"

[6] In accordance with Case T-380/04, *Terezakis v. Commission*, judgment of 30 January 2008, paragraph 88, not yet published in the ECR.

[7] See Case T-380/04, *Terezakis v. Commission*, paragraph 93, not yet published in the ECR.

[8] *Idem*, paragraph 60.