

## **Letter from the European Ombudsman opening own-initiative inquiry OI/2/2009/MHZ concerning the European Commission**

Correspondence - 06/05/2009

**Case** OI/2/2009/MHZ - **Opened on** 06/05/2009 - **Decision on** 12/11/2009

Mr José Manuel Barroso President of the European Commission 1049 Bruxelles BELGIQUE

Strasbourg, 6 May 2009

### **Own-initiative inquiry OI/2/2009/MHZ relating to the European Commission**

Mr President,

On 5 August 2008, I received a complaint from a Polish NGO against the Commission (complaint 2330/2008/MHZ). The complainant alleged that the Commission unjustly refused access to the reasoned opinion that, in accordance with the procedure outlined in Article 226 EC, it had addressed to Poland regarding the implementation of Directive 85/337/ECC. The Commission based its refusal on Article 4(2) of Regulation 1049/2001, which provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the "*purpose of inspections, investigations and audits*", unless there is an overriding public interest in disclosure. The Commission stated that the investigation is ongoing and, therefore, disclosure of the reasoned opinion could undermine the protection of its purpose. The Commission referred to the relevant case-law (T-191/99 *Petrie and others v Commission* [1999] II-3677, paragraph 68) in this regard.

In light of the above case-law, I did not find sufficient grounds to open an inquiry into the above complaint, but decided to suggest to the Commission that, when handling possible similar cases in the future, it could inform applicants that the refusal of access under Regulation 1049/2001 does not constitute an obstacle to possible disclosure of the document under national law.



Therefore, if such applicants have not already done so, they could consider addressing their national authorities in this regard.

In its replies dated 29 January and 16 February 2009, the Commission did not accept my suggestion. In its letter of 16 February 2009, it made the following statement: "*... when the Commission has refused access to a document it has sent to a Member State it would be inconsistent not to give a negative opinion on disclosure following a consultation by that Member State.*"

This statement raises a concern in so far as it appears to reflect a general policy of the Commission to give a negative opinion when, pursuant to Article 5 of Regulation 1049/2001, it is consulted by national authorities concerning requests submitted to them in accordance with national law for access to the Commission's reasoned opinions. Moreover, the *Petrie* case law on which the Commission rightly based its negative decision in case 2330/2008/MHZ relies on the idea that the Member State can reasonably expect the Commission to maintain confidentiality in relation to such documents. However, it does not appear reasonable for the Commission to invoke such an expectation as a reason for giving a negative opinion if the Member State itself consults the Commission.

I have thus decided to open an own-initiative inquiry into the Commission's policy when replying to the Member State consultations regarding access to reasoned opinions/letters of formal notice.

In this regard, I would be grateful if the Commission could reply to the following questions:

- Since the entrance into force of Regulation 1049/2001, how many times have Member States consulted the Commission regarding individual requests, submitted to them in accordance with national law, for access to its reasoned opinions/letters of formal notice? How did the Commission reply to such consultations? If any of the Commission's replies were negative, what justification did it give for replying in such a way?
- In the Commission's view, what is the legal basis for any such negative opinions?
- How many of these consultations were preceded by the Commission's refusal of access to the same document, in reply to a direct request submitted to it by an individual?
- Does the Commission consult the Member State concerned before deciding on whether to disclose its reasoned opinions/letters of formal notice?

I invite the Commission to submit its opinion by 31 July 2009. I would also like to inform the Commission that I will forward a copy of the present letter to the Member States' permanent representations, for their information and possible comments.

My Legal Officer, Ms Marta Hirsch-Ziembinska (tel.: +33 388 172746), will be responsible for the case.

Yours sincerely,



P. Nikiforos DIAMANDOUROS