Draft recommendation of the European Ombudsman in his inquiry into complaint 793/2007/(WP)BEH against the European Parliament

Recommendation
Case 793/2007/(WP)BEH - **Opened on** 27/03/2007 - **Recommendation on** 21/07/2009 - **Decision on** 13/09/2010

(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 journalist. On 27 November 2006, he applied to the European Parliament for access to certain documents relating to the financing of its D4-D5 building in Brussels. He requested access to the following documents:

(i) the pre-information notice of the Call for financing the said building published in the Official Journal of the European Communities ('the Official Journal');

(ii) the Call for tender and the list of banks contacted;

(iii) a report by an accounting and consulting firm, containing an evaluation of tenders submitted;

(iv) Parliament's decision on the award of the public contract to a Belgian bank; and

(v) a copy of the contract awarded.

2. By letter of 18 December 2006, Parliament informed the complainant that its D4-D5 building was built by a private developer. As a consequence, the Community directives on public procurement did not apply to the financing of the building, since, pursuant to a contract between Parliament and the developer, the latter was in charge of ensuring the external financing of the building project. Parliament, therefore, did not have to organise a tender for the financing of the building project. Against this background, Parliament stated that the documents mentioned under (i), (ii) and (v) were held by the developer. Given that no tender had been published in the Official Journal, the document mentioned under (iv) did not exist. As regards the report prepared

by the accounting and consulting firm, Parliament explained that it was to be considered as a third-party document within the meaning of Article 4(4) of Regulation 1049/2001 [2] . Consequently, Parliament was under an obligation to consult KMPG regarding the possibility of disclosure and had already done so. Parliament promised to keep the complainant informed of further developments following its contacts with the accounting and consulting firm.

3. On 8 January 2007, the complainant submitted a confirmatory application for access to the documents covered by his initial application. As regards the document mentioned under (iv), the complainant took note of Parliament's position that it did not exist. Consequently, instead of asking for access to this document, he requested access to the letters exchanged between Parliament and the developer in the framework of Parliament's consultation with it.

4. On 18 January 2007, Parliament informed the complainant that, following a thorough examination of the report prepared by the accounting and consulting firm, it considered that the report contained information concerning the commercial interests of the banks involved. Therefore, on the basis of Article 4(2) first indent of Regulation 1049/2001, it could not grant access.

5. On 16 March 2007, the complainant submitted a complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

6. The complainant made the following allegations.

(1) Parliament failed to deal properly with, and reply to, his confirmatory application for access to documents.

(2) Contrary to Article 7(1) of Regulation (EC) 1049/2001, Parliament's two letters in reply to his first application for access did not indicate the possibility of submitting a confirmatory application.

(3) Parliament wrongly changed its reasoning as regards its rejection of access to one of the documents concerned by his request. According to the complainant, the later reasoning was furthermore insufficient, given that it failed to indicate how the commercial interests of the banks concerned would be *undermined* .

(4) Parliament infringed Article 6(4) of Regulation (EC) 1049/2001 by not indicating clearly if it held copies of three of the documents to which he had requested access.

(5) Parliament possibly made incorrect and misleading statements concerning the applicability of the directive for the award of public contracts.

7. As regards the complainant's fifth allegation, the Ombudsman considered that the complainant had not raised this issue in his contacts with Parliament. Given that he had,

therefore, not made the appropriate prior administrative approaches required by Article 2(4) of the Statute of the European Ombudsman, his fifth allegation was inadmissible.

8. On 7 April 2007, the complainant informed the Ombudsman that he had received Parliament's decision on his confirmatory application for access to the documents in question. While he pointed out that he wished to maintain his complaint, he also stated that his fourth allegation had been dealt with satisfactorily by Parliament and had thus become obsolete. In view of Parliament's decision on his confirmatory application, the complainant submitted the following new allegations.

(6) Parliament's rejection of access to the call for tender and the list of banks contacted by the developer [3] was not properly reasoned.

(7) Parliament wrongly changed its reasoning as regards its rejection for a second time of access to one of the documents. Furthermore, the new reasoning was still not plausible.

(8) Parliament ignored the complainant's request, made in his confirmatory application, that he should be given access to a certain correspondence conducted by Parliament, if a certain other document did not exist.

(9) Parliament's argument that there was no overriding public interest in the disclosure of the documents concerned was incorrect.

9. On 17 June 2007, the complainant informed the Ombudsman that he had contacted Parliament regarding his fifth allegation. However, he had still not received a reply after two months. He, therefore, asked the Ombudsman to include the fifth allegation in his inquiry. Given that the complainant's fifth allegation was now admissible, the Ombudsman decided to include it in his ongoing inquiry.

THE INQUIRY

10. The complaint was forwarded to Parliament for an opinion, which it sent on 12 July 2007. As regards the complainant's fifth allegation, the Ombudsman asked Parliament for an opinion by 2 July 2007. In a further letter of 12 July 2007, Parliament referred to a letter sent to the complainant on 5 July 2007, in which it explained its position on his fifth allegation. Both Parliament's opinion and its additional letter were forwarded to the complainant with an invitation to make observations, which he sent on 2 August 2007.

11. By letter of 24 September 2008, the Ombudsman informed the complainant that complaint 1450/2007/(WP)BEH against OLAF, which he submitted on 21 May 2007, related to legal issues similar to those raised by his fifth allegation in the present complaint. A uniform approach was therefore desirable. Given that the Ombudsman was pursuing further inquiries in complaint 1450/2007/(WP)BEH, he asked for the complainant's understanding for the fact that he had not taken further steps as regards the present complaint since the time the complainant submitted

his observations. However, he pointed out that, once OLAF's reply to his request for further information arrived, he would proceed with his inquiry into the present complaint as rapidly as possible.

12. In a letter of 19 October 2008, the complainant brought to the Ombudsman's attention two further documents relating to his case. During a telephone conversation on 28 May 2009, the Ombudsman's services discussed the possibility of a friendly solution with the complainant. The Ombudsman can only submit a friendly solution proposal to the institution concerned, if he has the complainant's prior agreement. In an e-mail of 31 May 2009, and in a further telephone conversation on 2 June 2009, the complainant refused the friendly solution proposal.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

13. On 7 April 2007, the complainant informed the Ombudsman that, in light of Parliament's decision on his confirmatory application for access, his fourth allegation had become obsolete. The Ombudsman understood this to mean that the complainant wished to drop his fourth allegation. Thus, the present draft recommendation only deals with the complainant's allegations (1)-(3) and (5)-(9).

14. The complainant's fifth allegation relates to Parliament's statements on the applicability of the directives for the award of public contracts. His other allegations concern various aspects of Parliament's handling of his applications for access to certain documents. Therefore it seems useful to start by considering the complainant's fifth allegation before turning to his other allegations.

15. As regards the complainant's allegations concerning Parliament's handling of his applications for access, the Ombudsman deems it useful to address them in chronological order, following the sequence of procedural stages for requests for access to documents provided for in Regulation 1049/2001. Thus, he will first consider the allegation relating to Parliament's decision on the complainant's initial application (second allegation). He will then turn to the allegations relating to Parliament's decision on the confirmatory application (in chronological order, the complainant's first, eighth, third and seventh, and sixth allegations). Given that the third and seventh allegations both raise the question concerning the extent to which Parliament, (wrongly in the complainant's view), changed the reasoning underpinning its decision to refuse access, they will be addressed together. Finally, the Ombudsman will analyse the question regarding the existence of an overriding public interest in disclosure (the ninth allegation).

16. In his observations on Parliament's opinion, the complainant submitted that Parliament may have breached Article 9(3) of the Rules governing public access to European Parliament documents which, as regards consultation of third parties concerning third-party documents,

requires third parties to make their position known within five working days. It appears that the complainant has not raised this issue in his contacts with Parliament. Given that he has, therefore, not made the appropriate prior administrative approaches required by Article 2(4) of the Statute of the European Ombudsman, the Ombudsman considers that he is not entitled to deal with this aspect in the present inquiry.

A. Allegation of possibly incorrect and misleading statements (the complainant's fifth allegation)

Arguments presented to the Ombudsman

17. The complainant stated that, according to Parliament, the directives for the award of public contracts did not apply to the financing of Parliament's D4-D5 building, given that, pursuant to a contract between Parliament and the developer, the latter was in charge of ensuring the external financing of the building project. He submitted that this statement appeared to contradict the jurisprudence of the Court of Justice. It followed from the Court's case-law that " *a contract ... cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority* " [4] . Furthermore, he pointed to Article 8 of Directive 2004/18/EC [5] ('the Directive'), which provides that the Directive applies to contracts subsidised directly by contracting authorities by more than 50 %. In the complainant's view, contracting authorities thus had to ensure that the provisions of the Directive were complied with, if third parties selected by them entered into contracts with other parties.

18. Against this background, the complainant alleged that Parliament possibly made incorrect and misleading statements as regards the applicability of the Directive.

19. Instead of submitting a separate opinion on the present allegation, Parliament referred to its letter, sent to the complainant on 5 July 2007 (see paragraph 10 above). In this letter, Parliament replied to three specific questions raised by the complainant, namely:
- whether Parliament subscribed to the view that the Directive, which it had itself adopted as a co-legislator, did not apply to its own building projects;
- whether, in the event of an affirmative reply to the first question, Parliament did not consider this to be a circumvention of the personal scope of application of the Directive, which was incompatible with its aim and purpose; and
- in the event of a negative reply to the first question, which steps Parliament had taken or intended to take to ensure that the developer complied with the provisions of the Directive in carrying out the project?

20. In respect of the complainant's first question, Parliament took the view that its public contracts were not subjected to the directives on the award of public contracts. Instead, they were governed by the Financial Regulation [6] which, according to its Article 14(2), did not allow Community institutions and bodies to raise loans. This was why Parliament did not organise a tendering procedure. The same reasons rendered equally immaterial the complainant's views

on the provisions of the Directive, as well as on the judgment referred to by him.

21. In reply to the complainant's second question, Parliament essentially stated that, in view of the prohibition for Community institutions and bodies to raise loans, only a financing arrangement via a contract between the developer and a bank could be envisaged for the financing of Parliament's D4-D5 building. The directives on the award of public contracts did not apply to private law contracts. As a consequence, a tendering procedure in line with these directives was not possible. Nevertheless, in its negotiations with the developer, Parliament successfully ensured that a transparent consultation of the banking sector on as large a scale as possible took place. As a consequence, the basic principles of a tendering procedure were fully complied with.

22. As regards the complainant's third question, Parliament stated that Article 119 of the Financial Regulation did not oblige it to publish building contracts in the Official Journal. At the same time, it regretted that the contract in question had not been published on Parliament's website.

23. In his observations, the complainant submitted that the directives on the award of public contracts did not contradict the Financial Regulation. Instead, the Financial Regulation rendered them fully applicable. In support of his reasoning, the complainant relied, in particular, on recital 24 of the Financial Regulation, which reads as follows: " *As regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply* ..." He equally pointed out that a number of provisions of the Financial Regulation made express reference to these directives.

24. In addition, the complainant submitted that the fact that Community institutions and bodies were not allowed to raise loans did not render inapplicable the rules on the award of public contracts. If the Financial Regulation were to be interpreted as prohibiting all forms of external financing, Parliament could not authorise a private company to ensure such financing, since it could not delegate powers which it did not have. If, on the other hand, a delegation of powers was possible, the delegating authority had to ensure that the contracted private company complied with the rules governing the award of public contracts.

25. The complainant also took the view that Parliament appeared to consider the contract relating to the D4-D5 building as a building contract within the meaning of Article 119(2) of the rules for the implementation of the Financial Regulation [7] ('the Implementing Rules'). However, Article 16(a) of the Directive in fact only excluded from its scope of application building contracts relating to *existing* buildings. Given that, in 2004, at the time when the relevant contract was concluded, the D4-D5 building did not yet exist, Parliament wrongly relied on this exception to the application of the Directive.

26. According to the complainant, the rules on the award of public contracts did not only apply to the financing of the D4-D5 building, but also to the building and supply contracts concluded in

the framework of the project. As a consequence, contrary to what Parliament had stated, his reference to the judgment of the Court of Justice in Case C-44/96 was not irrelevant.

27. The complainant referred to Parliament's statement, according to which the basic principles of a tendering procedure had been fully complied with. To his knowledge, basic Community law principles regarding tendering procedures provided that the list of those invited to submit a tender bid could not be pre-determined at the outset. However, Parliament's remarks showed that a list of 15 banks to be contacted was in fact established at the outset. In this regard, he questioned why only three of the fifteen banks had reacted, given that Parliament was clearly a creditworthy client.

The Ombudsman's assessment

28. Before assessing Parliament's statements regarding the applicability of the directives on the award of public contracts, it seems useful to summarise these statements. In the Ombudsman's view, Parliament's respective statements can be summarised as follows.

(i) Public contracts awarded by Parliament are not governed by the directives on the award of public contracts, but instead by the Financial Regulation (Parliament's first statement).

(ii) The directives on the award of public contracts do not apply to private law contracts. This notwithstanding, the basic principles of a tendering procedure were fully complied with as regards the contract between the developer and the bank (Parliament's second statement).

29. In its letter of 5 July 2007 to the complainant, to which it referred instead of writing a separate opinion on the complainant's fifth allegation, Parliament also stated that building contracts do not have to be published in the Official Journal. The Ombudsman considers that this statement does not relate to the applicability of the public procurement directives. Instead, it relates to a consequence of the said directives being applicable or not. As such, it is not covered by the present allegation and the Ombudsman therefore sees no need to deal with it in his draft recommendation.

As regards Parliament's first statement

30. In order to ascertain whether or not Parliament's first statement is correct, the Ombudsman needs to analyse the legal relationship between the directives on the award of public contracts and the Financial Regulation. Given that the complainant referred to the Directive in the first place as the applicable piece of legislation, the Ombudsman will therefore focus on the relationship between the Financial Regulation and the Directive.

As regards the relationship between Directive 2004/18 and the Financial Regulation

31. Like all directives, the Directive is addressed to the Member States (see Article 84 of the Directive and Article 249 of the EC Treaty). Pursuant to its Article 7, the Directive shall, subject to certain exceptions, apply to public contracts which have a value estimated to be equal to or

greater than the thresholds set by it. A public contract is a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities with a given object set by the Directive (Article 1(2)(a)). The term " *contracting authority* " is defined in Article 1(9) of the Directive as the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

32. Turning to the Financial Regulation, Title V of its Part I, entitled 'Public Procurement', consists of two chapters, the first of which is entitled 'General provisions'. This chapter is further subdivided into the following sections: 'Scope and award principles', 'Publication', 'Procurement procedures', and 'Guarantees and control'. The second chapter is entitled 'Provisions applicable to contracts awarded by the Community institutions on their own account'.

33. It follows from the foregoing that the Directive provides for rules on the award of public contracts which, at first sight, only apply to contracts awarded by Member State authorities or bodies. At the same time, the Financial Regulation provides for rules on the award of public contracts by Community institutions. Against this background, it thus appears that the rules on public procurement contained in the Financial Regulation constitute provisions specifically governing the award of contracts by Community institutions. It is true that, as pointed out by the complainant, recital 24 of the Financial Regulation states that "[a] *s regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply* ..." At the same time, this is not to say that the directives on the award of public contracts as such apply to contracts awarded by the institutions. Instead, the said recital suggests that the Financial Regulation should, in principle, follow the approach of the respective directives. It follows that the rules of the directives for the award of public contracts can only be relevant for contracts awarded by the institutions to the extent that they have been incorporated by the Financial Regulation. Thus, as pointed out by the complainant, the Implementing Rules make occasional reference to provisions of the procurement directives, for example in Article 118(5). However, it seems clear that such references to individual provisions of the procurement directives cannot amount to a general reference to the said directives. For the sake of clarity, it appears useful to add that this legal situation is different from the one prevailing under the old Financial Regulation [8] , under which Article 56 outlined that " *each institution shall comply with the same obligations as are imposed upon bodies in the Member States by those directives* ".

34. This view on the relationship between the Financial Regulation and the Directive appears to be confirmed by the case-law of the Court of Justice. Without explicitly addressing the relationship between these two bodies of rules, the Court, in a number of judgments, considers the Financial Regulation as the body of rules applicable to the award of contracts by the Community institutions [9] .

35. This view is further corroborated by the position taken by the European Commission. In reply to a parliamentary question, given on behalf of the Commission, Commissioner Grybauskaite explained that "[t] *he provisions on procurement of the Financial Regulation have*

been inspired by the provisions of Directive 2004/18/EC of Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. " [10] In the same answer, she also referred to certain differences between the Financial Regulation and the Directive.

As regards the correctness of Parliament's first statement

36. Against this background, the Ombudsman concludes that he sees no reason to doubt the correctness of Parliament's first statement, according to which public contracts awarded by it are not governed by the directives concerning the award of public contracts, but instead by the Financial Regulation. In view of the above, he sees no reason to assume that Parliament's first statement was misleading.

As regards Parliament's second statement

37. Turning to Parliament's second statement, it needs to be borne in mind that the complainant's allegation covers two different contractual relationships. These included Parliament's contract with the developer and the contract between the developer and the financing bank. Although, in its letter of 5 July 2007 to the complainant, Parliament appears to focus only on the latter contractual relationship, the complainant, in his letter of 10 April 2007 to Parliament, underlined Parliament's role in the financing of the D4-D5 building. Therefore, when assessing whether or not Parliament's second statement was incorrect or misleading, both contractual relationships will have to be considered.

As regards Parliament's obligation to organise a tendering procedure

38. As regards Parliament's award of the contract to the developer, the Ombudsman considers that, in line with the above findings on the relationship between the Financial Regulation and the Directive, the rules contained in the Financial Regulation must be considered applicable. In contrast, for the reasons stated above, the Directive cannot apply. It follows that the complainant's argument that Article 16(a) of the Directive only excludes building contracts regarding *existing* buildings from its scope of application, and thus not Parliament's D4-D5 building, is irrelevant. The same is true for the complainant's reference to Article 8 of the Directive, which provides that the Directive applies to contracts which are subsidised directly by contracting authorities by more than 50 %.

39. As regards the contractual relationship between the developer contracted by Parliament and the bank, the Ombudsman takes the view that, in light of its scope of application, (as argued by Parliament), the Directive cannot be considered to apply to contracts between two private companies. At the same time, the Ombudsman notes that Article 89(2) of the Financial Regulation stipulates that all procurement contracts shall be put out to tender on the broadest basis possible. Against this background, it needs to be considered how far the involvement of the developer, a private party, in the financing of the D4-D5 building, could have an impact on Parliament's obligation under the Financial Regulation to organise a tender.

40. The complainant repeatedly underlined the relevance of a judgment of the Court of Justice in the given context. In the relevant judgment, the Court held that " *a contract ... cannot cease to be a public works contract when the rights and obligations of the contracting authority are transferred to an undertaking which is not a contracting authority* " [11] . Parliament took the view that this judgment was irrelevant, given that the directives on the award of public contracts did not apply to contracts awarded by Parliament.

41. The said judgment relates to Directive 93/37, which was repealed by the Directive (see Article 82 of the Directive). More precisely, it interprets Article 1(a) of Directive 93/37, which defines the notion of a " *public works contract* " in the following terms: " *'public works contracts' are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority ... which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority* ". This definition appears largely to match the definition of a " *public contract* " pursuant to Article 88 of the Financial Regulation. According to this provision, "[p] *ublic contracts are contracts for pecuniary interest concluded in writing by a contracting authority within the meaning of Articles 104 and 167, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services.* " Against the background of essentially analogous provisions, it appears unclear why the thrust of the Court's judgment should not apply to the interpretation of the Financial Regulation.

42. Parliament also pointed out that, in its negotiations with the developer, it successfully ensured that a transparent consultation of the banking sector took place on as large a scale as possible. It added that, as a consequence, the basic principles of a tendering procedure were fully complied with. In reply, the complainant stated that, to his knowledge, basic Community law principles on tendering procedures require, among others, that the list of those invited to submit a tender bid is not pre-determined from the outset. In this regard, he argued that the financing of the D4-D5 building was indeed pre-determined from the outset. The Ombudsman recalls that, under the heading 'Principles of awarding contracts', Article 2 of Directive 2004/18 stipulates that contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way. Thus, he considers that, as a matter of principle, tendering procedures should be open to all interested economic operators, without a pre-selection being carried out by the contracting authority. Against this background, he shares the complainant's concerns.

As regards the correctness of Parliament's second statement

43. In light of the above, the Ombudsman concludes that there is no reason to doubt the correctness of Parliament's statement, according to which the directives on the award of public contracts do not apply to private law contracts. However, he considers that (i) by failing to address the implications of the said judgment of the Court of Justice and (ii) by taking the view that the basic principles of a tendering procedure were fully complied with, whereas only a pre-determined list of banks was apparently contacted, Parliament made statements, which

were not entirely correct. Given this finding, the Ombudsman sees no need to address, in the present draft recommendation, the question concerning how far Parliament's statement may have been misleading.

44. Given these circumstances, the Ombudsman finds that Parliament's second statement was not entirely correct. This constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. Allegation of failure to indicate the possibility of a confirmatory application (the complainant's second allegation)

Arguments presented to the Ombudsman

45. The complainant alleged that, contrary to Article 7(1) of Regulation (EC) 1049/2001, Parliament's two letters of reply to his initial application for access did not indicate the possibility for him to submit a confirmatory application.

46. In its opinion, Parliament acknowledged that it did not inform the complainant in its reply about the possibility to submit a confirmatory application. It expressed its regret in this regard, but pointed out that this omission did not have any negative consequences for the applicant, who was fully conversant with Regulation 1049/2001.

47. In his observations, the complainant acknowledged Parliament's regret.

The Ombudsman's assessment

48. The Ombudsman recalls that Article 7(1) of Regulation 1049/2001 requires that, in the event of a refusal to grant access, the institution inform the applicant of his or her right to make a confirmatory application. It seems useful to point out that this obligation applies regardless of whether or not an applicant is familiar with this right. The Ombudsman notes that Parliament regretted its omission to do so in the present case and that the complainant has acknowledged its regret. He therefore takes the view that there is no need to examine this issue further.

C. Allegation of a failure to deal properly with his confirmatory application (the complainant's first allegation)

Arguments presented to the Ombudsman

49. The complainant stated that, on 8 January 2007, he submitted to the President of Parliament by registered mail a confirmatory application for access. However, at the time of submitting his complaint to the Ombudsman, he had neither received a reply nor an

acknowledgement of receipt. Against this background, he alleged that Parliament failed to deal properly with, and to reply to, his confirmatory application for access to documents.

50. On 7 April 2007, the complainant informed the Ombudsman that he had received Parliament's reply dated 14 March 2007. Given that, contrary to Article 8 of Regulation 1049/2001, Parliament had taken more than two months to reply to his confirmatory application, he stated that he wished to maintain his allegation. He further pointed out that he had not received an acknowledgment of receipt to his confirmatory application, as required by Regulation 1049/2001.

51. In its opinion, Parliament stated that it received the complainant's confirmatory application on 30 January 2007. It pointed out that it registers mail on the date of receipt. An acknowledgment of receipt was sent on 2 February 2007. The time limit for Parliament's reply was determined as 22 February 2007. On 19 February 2007, Parliament sent an e-mail to the complainant in which it informed him, in accordance with Article 8(2) of Regulation 1049/2001, of an extension of the time limit until 14 March 2007. Parliament sent its reply to the complainant on 14 March 2007. Parliament therefore considered that it had dealt correctly with the complainant's confirmatory application.

52. In his observations, the complainant pointed out that Parliament's assertion that it received his confirmatory application on 30 January 2007 was not credible, given that he sent the respective letter by registered mail from Luxembourg on 9 January 2007. He submitted a corresponding receipt to the Ombudsman. He further pointed out that none of the two e-mails allegedly sent by Parliament had reached him. He took the view that this could be due to the fact that the address field of the e-mails submitted by Parliament showed his e-mail address in inverted commas.

The Ombudsman's assessment

53. The complainant provided evidence to prove that he sent his confirmatory application for access from Luxembourg on 9 January 2007. In its opinion, Parliament explained that it only received the complainant's confirmatory application on 30 January 2007. Although a period of more than 20 days for a letter to travel from Luxembourg to Brussels appears to be excessively long, there is no evidence to suggest that the complainant's confirmatory letter arrived before the date indicated by Parliament. He therefore sees no reason to doubt Parliament's relevant statement.

54. Parliament submitted with its opinion copies of the e-mails it claims to have addressed to the complainant on 2 February and 19 February 2007. However, the complainant explained that he did not receive these e-mails at the time. At first sight, it cannot be excluded that, by putting the complainant's e-mail address in inverted commas, Parliament used an incorrect address when sending these e-mails.

55. The Ombudsman notes that he would have to carry out further inquiries in order to try and clarify this point. However, considering that (i) the Ombudsman will make a draft

recommendation below and (ii) the points at issue here seem of limited importance, the Ombudsman finds that there would be no need to examine this issue further if Parliament were to accept his draft recommendation.

D. Allegation of ignoring certain aspects of his confirmatory application (the complainant's eighth allegation)

Arguments presented to the Ombudsman

56. In its decision on the complainant's initial application for access, Parliament informed the complainant that one of the documents, namely, Parliament's decision on the award of the public contract to a Belgian bank, did not exist. In his confirmatory application, the complainant took note of the fact that the said document did not exist. In view of the explanations given by Parliament, according to which there had been a consultation between itself and the developer, he requested access to the letters exchanged in the framework of this consultation. Against this background, the complainant alleged that Parliament ignored his request, made in his confirmatory application, to be given access to a certain correspondence exchanged between Parliament and the developer if a certain other document did not exist.

57. In its opinion, Parliament stated that, as explained in its reply to the complainant's confirmatory application, it had a right of access to the developer's financing conditions. By signing a long-term lease agreement including a purchase option with the developer, Parliament accepted, without an exchange of letters, that the developer's financing conditions should become applicable.

58. In his observations, the complainant accepted that Parliament may have consented to the developer's financing conditions by signing the contract on the long-term lease. At the same time, he submitted that this was not a valid reason to refuse access to the consultation documents pre-dating the signature of the contract.

The Ombudsman's assessment

59. As regards access to the letters exchanged in the framework of the consultation between Parliament and the developer, the complainant has apparently not yet submitted a confirmatory application for access to Parliament. It follows from Article 8 of Regulation 1049/2001 that the Ombudsman can normally deal with a complaint only after a confirmatory application for access has been submitted to the institution concerned. However, given that Parliament did not raise this aspect and also that the documents here at issue are closely related to certain documents to which the complainant requested access in his initial application, the Ombudsman sees no reason to refrain from dealing with the present allegation regarding its substance.

60. The Ombudsman understands Parliament's position to be that it accepted the developer's financing conditions by signing the respective contract, but did not exchange any letters with the developer in this regard. This appears from Parliament's decision on the complainant's

confirmatory application, to which it referred in its opinion. In that letter, Parliament explained that it consented to the promoter's financing conditions by signing the respective contract, but not by sending a letter.

61. In his confirmatory application, the complainant requested access to certain documents in lieu of other documents which, according to Parliament, did not exist. Referring to the developer's consultation with Parliament on the financing conditions, he requested access to the letter which was used to consult Parliament (" *Schreiben, mit dem das Parlament konsultiert wurde* "), as well as the letter containing Parliament's opinion in the framework of the consultation (" *Schreiben, mit dem das Parlament im Rahmen dieser Konsultation Stellung genommen hat* "). Given that the parties do not dispute that Parliament was consulted before signing the respective contract, it is clear that the complainant's subsidiary application for access relates to documents which, if extant, pre-date the contract signed by Parliament. In its opinion, Parliament stated that it accepted the developer's financing conditions by simply signing the contract. No separate exchange of letters occurred in this regard. The Ombudsman understands Parliament's position to be that its consent to the developer's financing conditions did not involve an exchange of letters. In his observations, the complainant accepted Parliament's view. He pointed out, however, that the mere reference to having granted its consent by means of signing the respective contract could not serve as an argument for refusing to grant him access to consultation documents which preceded the signing of the contract. The Ombudsman notes that it cannot be inferred with certainty from Parliament's opinion whether or not such consultation documents exist. In view of these circumstances, the Ombudsman concludes that, by referring to the signing of the contract alone, Parliament did not sufficiently address the complainant's subsidiary application for access to the two letters. At the very least, Parliament left unanswered the question whether or not the said correspondence actually exists.

62. In light of the above, the Ombudsman finds that Parliament failed sufficiently to address the complainant's confirmatory application for access. This constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

E. Allegation of inconsistent/insufficient reasoning (the complainant's third and seventh allegations)

Arguments presented to the Ombudsman

63. As regards the complainant's request for access to the report of the accounting and consulting firm evaluating the tenders submitted ('the report'), Parliament, in its decision on the complainant's initial application, took the view that this was a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. Thus, before a decision on the possibility of granting access could be taken, its author had to be consulted. Parliament, therefore, contacted the consulting firm regarding this matter. In a letter of 18 January 2007, Parliament informed the complainant that, following an in-depth analysis of the report, it had concluded that it concerned

the commercial interests of the banks involved. As a consequence, and pursuant to Article 4(2) first indent of Regulation 1049/2001, access could not be granted.

64. Against this background, the complainant alleged that Parliament wrongly changed its reasoning regarding its refusal of access to one of the documents concerned by his request. According to the complainant, the subsequent reasoning was furthermore insufficient, given that it failed to indicate how the commercial interests of the banks concerned would be *undermined* .

65. In its decision on the complainant's confirmatory application, and on the basis of Article 4(2) first indent of Regulation 1049/2001, Parliament stated that access could not be granted. This was because banks would have been able to obtain knowledge of their competitors' business strategies on the financial market. This would in turn weaken the competitive positions of the banks involved in future tendering procedures. Against this background, the complainant alleged that Parliament wrongly changed, for a second time, its reasoning as regards its rejection of access to one of the documents. In support of his allegation, he took the view that it was inherent in the logic of Regulation 1049/2001 that the decision on an initial application for access had to exhaustively address the reasons justifying a refusal to grant access. According to him, processing of the confirmatory application only served the purpose of examining whether the reasons for a refusal of access given in the decision on the initial application were plausible. In addition, he alleged that the new reasoning was still not plausible.

66. In its opinion, Parliament reiterated its view that the report was to be considered a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. Thus, Parliament consulted the accounting and consulting firm in order to ascertain its views on granting access. The accounting and consulting firm confirmed that the report contained a financial analysis of the offers submitted by the banks which the developer had contacted. As a result, the information concerned the financial interests of certain banks. According to Parliament, the accounting and consulting firm also felt that its intellectual property rights should be protected, pursuant to Article 4(2) first indent of Regulation 1049/2001. Parliament explained that it saw no reason to deviate from the accounting and consulting firm 's assessment and refused access on the basis of Article 4(2) first indent of Regulation 1049/2001. In its decision on the complainant's confirmatory application, Parliament confirmed its position and explained how the commercial interests of the banks concerned " *might be compromised* ".

67. In response to the complainant's seventh allegation, Parliament again confirmed its view that access could not be granted, given that the information contained in the document (to which it referred as document PE 229.331/BUR) was covered by the exception foreseen by Article 4(2) first indent of Regulation 1049/2001. The fact that the complainant held a copy of the document did not mean that he had obtained it with Parliament's consent.

68. In his observations, the complainant pointed out that Parliament had acquired the report and thus obtained the right to freely dispose of it. This included the right to grant access to third parties. Although confidentiality of the report could have been stipulated, the complainant took the view that Parliament had not submitted credible evidence that the report was covered by a confidentiality agreement.

69. The complainant further pointed out that, at the time when he obtained access to document PE 229.331/BUR, Regulation 1049/2001 was not yet in force. As a consequence, he could not submit an application for access to this document. Moreover, the document was not marked confidential and Parliament did not submit any evidence to show that it had been classified as confidential.

The Ombudsman's assessment

70. The Ombudsman infers from the statements made by both parties in the course of his inquiry that a copy of the document covered by the present allegation is apparently in the complainant's possession. Nevertheless, Parliament took the view that access to the document could not be granted. The Ombudsman recalls that access to documents within the meaning of Regulation 1049/2001 is public access. Thus, granting access to a document means that this document is subject to public disclosure. It follows that the fact that the complainant may have in his possession a copy of the respective document, which has not been publicly disclosed in line with Regulation 1049/2001, could not prevent the Ombudsman from considering whether or not Parliament has given sufficient reasons as to why access cannot be granted. It furthermore seems important to recall that the subject-matter of the complainant's third and seventh allegations is not how the complainant obtained access to document PE 229.331/BUR. Consequently, there is no need to comment on this aspect, addressed in Parliament's opinion and in the complainant's observations. Instead, the issue to be addressed by the Ombudsman is whether Parliament wrongly changed its reasoning as regards its refusal to grant access to the report and whether Parliament's reasoning was sufficient. The Ombudsman will first analyse whether Parliament wrongly changed its reasoning. He will then examine whether Parliament's reasoning was sufficient.

As regards the alleged change in Parliament's reasoning

71. Parliament qualified the report as a third-party document within the meaning of Article 4(4) of Regulation 1049/2001. However, the complainant asserted that Parliament had acquired the report. According to him, this would normally mean that Parliament could freely dispose of it and grant access to it. He moreover stated that Parliament did not submit credible evidence to establish that the report was covered by a confidentiality agreement.

72. 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.* "

In relation to third-party documents, Article 4(4) places the institutions under an obligation to consult the third party concerned, with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document should or should not be disclosed [12] . Given that Regulation 1049/2001 only applies to documents held by an institution (Article 2(3) of

Regulation 1049/2001), there can be no doubt that only documents in an institution's possession may be considered to be third-party documents. Pursuant to Article 3(b) of Regulation 1049/2001, " *third party* " shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries. At first sight, the fact that a document is owned by an institution does not rule out the qualification of the same document as a third-party document, given that Regulation 1049/2001 appears to be indifferent to the aspect of ownership. Instead, the Regulation focuses on the origin of third-party documents (see Article 4(5) of Regulation 1049/2001). At the same time, the fact that a document is owned by an institution strongly suggests that an institution can, in principle, dispose of it freely. In its decision on the complainant's confirmatory application for access, Parliament expressly stated that it owns the report. However, in its opinion, Parliament did not comment on the aspect of ownership but instead exclusively relied on Article 4(4) of Regulation 1049/2001.

73. Considering that ownership, understood as a right, vests the sole power of disposal in the owner, the Ombudsman considers that the application of Article 4(4) of Regulation 1049/2001 would limit the owner's sole power of disposal by means of a procedural obligation to consult the author of the document. It follows that the fact that Parliament is the owner of the report could imply that Article 4(4) of Regulation 1049/2001 is not applicable. In the given context, the Ombudsman also notes the complainant's view that Parliament did not establish that the report was covered by a confidentiality agreement. The Ombudsman sees no need to take a definitive stance on the implications of Parliament's ownership of the report. However, he considers that, despite the fact that it was the owner of the document in question, Parliament did not sufficiently explain why it considered Article 4(4) of Regulation 1049/2001 to be applicable.

74. However, bearing in mind that the complainant alleges that Parliament wrongly changed its reasoning concerning its refusal to grant access to one of the documents concerned by his request, the Ombudsman needs to examine whether, by first relying on Article 4(4) of Regulation 1049/2001 and later invoking the commercial interests-exception, Parliament actually changed its reasoning. For the purpose of this analysis, the question whether Parliament's reliance on Article 4(4) of Regulation 1049/2001 was justified is of no direct relevance, given that Parliament does not appear to have changed its designation of the report as a third-party document.

75. It follows from the case-law of the Community courts that, as a general rule, consultation of the third party is a precondition for determining whether the exceptions to the right of access provided for in Regulation 1049/2001 are applicable. Only in cases where it is clear that the document should or should not be disclosed are the institutions under no obligation to consult with the third party [13] . It appears useful to add that the consultation of a third party is not binding on the institution but is designed to enable it to assess whether an exception is applicable [14] .

76. By letter of 18 December 2006, Parliament informed the complainant that it contacted the accounting and consulting firm with a view to consulting it on the report. By letter of 18 January 2007, Parliament informed the complainant that the exception provided for in Article 4(2) first

indent of Regulation 1049/2001 applied to the report. Given that the report contained information which concerned the commercial interests of the banks involved, access could not be granted.

77. In light of these facts, and against the background of the Community courts' case-law, which considers the consultation of the third party as a precondition for determining whether an exception applies, the Ombudsman is unable to endorse the complainant's view that, by first consulting the third party and afterwards relying on an exception contained in Regulation 1049/2001, Parliament wrongly changed its reasoning. It appears useful to add that consultation of the third party is a procedural requirement. However, it does not, as such, concern the question as to which of the exceptions actually applies. The complainant also took the view that Parliament did not inform him about the outcome of the consultation. In this regard, the Ombudsman notes that the complainant remains free to request access to the respective consultation documents. However, given that he has apparently not yet done so, the Ombudsman is not entitled to deal with this aspect of the complaint.

78. Turning to Parliament's decision on the complainant's confirmatory application, the complainant pointed out that Parliament had again changed its reasoning. In his view, this was not in line with Regulation 1049/2001. Parliament considered that its decision on the complainant's confirmatory application confirmed the reasoning of its decision on the initial application.

79. The Ombudsman notes that both Parliament's letter of 18 January 2007 and its decision on the confirmatory application are grounded on the same legal basis, namely, Article 4(2) first indent of Regulation 1049/2001. In its letter of 18 January 2007, Parliament explained that it considered the report to concern the commercial interests of banks. In its decision on the complainant's confirmatory application, Parliament reiterated this reasoning. It added that disclosure would create the risk that the competitors of the banks involved would obtain knowledge of the latters' business strategies. It is true that, in its decision on the complainant's confirmatory application, Parliament specified why it considered Article 4(2) first indent of Regulation 1049/2001 applied. At the same time, it is clear that this additional information merely spells out why Parliament considers that the commercial interests of the banks involved would be concerned.

80. In any event, Regulation 1049/2001 does not prevent an institution, when deciding on a confirmatory application, from relying on another exception not contained in its decision on an initial application, if it considers that the exception initially relied on cannot sufficiently justify its decision. Equally, the Ombudsman is not aware of a rule which would prohibit Parliament from giving further details on the reasons for refusing access in its decision on a confirmatory application. It follows from the case-law of the Court of Justice that, when replying to a confirmatory application, an institution is *obliged* to state why elements capable of casting doubts on the well-founded character of its initial decision are not such as might warrant a change in its position [15] . However, this is not to say that an institution is not entitled to give further information with regard to the reasoning of its decision, which may later be reviewed by the Community courts or the Ombudsman.

81. In view of the above findings, there is no need to consider whether Parliament *wrongly* changed its reasoning.

82. It follows that the complainant's allegation that Parliament wrongly changed the reasoning of its decision refusing access to the report is unfounded.

As regards the alleged insufficiency of Parliament's reasoning

83. According to Article 1(a) of Regulation 1049/2001, one of the purposes of Regulation 1049/2001 is to ensure the widest possible access to documents. It emerges from the settled case-law of the Community courts regarding Regulation 1049/2001 that the exceptions to the general right of access to documents must be interpreted and applied strictly [16] . The mere fact that a document concerns an interest protected by an exception cannot itself justify the application of that exception. Therefore, before lawfully relying on an exception, the institution concerned is required to assess (i) whether access to the document would specifically and actually undermine the protected interest and (ii) whether there is no overriding public interest in disclosure. That assessment must be apparent from the reasons underpinning the decision [17] .

84. According to the complainant, Parliament's letter of 18 January 2007 did not explain how the protection of commercial interests of the banks involved would be affected. As regards Parliament's decision on his confirmatory application, he pointed out that, to his knowledge, the banks submitted their offers in Spring 2004. It thus appeared highly unlikely that these offers would allow inferences to be made on business strategies in the year 2007. Moreover, he pointed out that Parliament had granted access to a similar report relating to its D3 building. Clearly, disclosure of this report had not resulted in a situation whereby Parliament no longer received any offers. Against the background of these arguments, the Ombudsman will examine whether Parliament has established that granting access would undermine commercial interests.

85. In its letter of 18 January 2007, Parliament referred to Article 4(2) first indent of Regulation 1049/2001 and stated that the report contains information concerning the commercial interests of the banks involved. In its decision on the complainant's confirmatory application, Parliament stated that access could not be granted because competitors of the banks involved would be able to obtain knowledge of the latters' business strategies. This would in turn weaken the positions of the banks involved in future tendering procedures.

86. The Ombudsman considers that the commercial interests of the banks involved may indeed be at stake. However, bearing in mind that exceptions to the right of access to documents are to be interpreted narrowly, and taking the explanations given by Parliament into account, he fails to see how granting access would *specifically and actually undermine* commercial interests, thereby meeting the condition set by the case-law of the Community courts. Moreover, the complainant's argument that a report on offers apparently submitted in 2004 would not allow any inferences to be made on business strategies deployed in 2007 has not been contradicted

by Parliament. It appears useful to add that, in order to be relied upon, the risk of an interest being undermined must be reasonably foreseeable and not purely hypothetical [18] .

87. In its opinion, Parliament explained that the accounting and consulting firm felt that its intellectual property rights should be protected, pursuant to Article 4(2) first indent of Regulation 1049/2001. Parliament further stated that it saw no reason to deviate from the accounting and consulting firm's assessment. Against this background, the Ombudsman understands that Parliament also appears to consider applicable the intellectual property-exception provided for in Article 4(2) first indent. However, given that, in the context of the allegations here under review, the Ombudsman needs to ascertain whether, in its decision on the complainant's confirmatory application, Parliament has given sufficient reasons for refusing access, the Ombudsman need not take a definitive view on exceptions which have been invoked by Parliament in the course of this inquiry only. In any event, and in light of the explanations provided by Parliament, the Ombudsman fails to see at first sight how granting access would *specifically and actually undermine* the intellectual property rights of the consultancy firm. This is even more so, bearing in mind that Parliament owns the report.

88. In light of the above, the Ombudsman finds that Parliament has given insufficient reasons for its decision to refuse access to the report. This constitutes an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

F. Allegation of insufficient reasoning as regards access to the call for tender (the complainant's sixth allegation)

Arguments presented to the Ombudsman

89. The complainant alleged that Parliament's refusal to grant access to the call for tender and the list of banks contacted by the developer [19] was not properly reasoned.

90. In its opinion, Parliament submitted that, in line with its respective statements contained in its decision on the confirmatory application, it had a right of access to these documents subject to confidentiality. Given that the documents contained information considered as business secrets, Parliament was bound by its legal obligation of professional secrecy [20] .

91. In his observations, the complainant noted that, in support of its view that it was bound by professional secrecy, Parliament referred to a judgment of the Court of Justice. He stated, however, that only one of the three criteria given by the Court was fulfilled in the present case. He furthermore reiterated his argument mentioned in paragraph 86 above.

The Ombudsman's assessment

92. The Ombudsman notes that, in its decision on the complainant's confirmatory application, Parliament relied on Article 4(2) first indent of Regulation 1049/2001 in order to justify its refusal

to grant access to the said documents. According to Parliament, disclosure would undermine the commercial interests of the developer and the banks involved. It also pointed out that the said documents had been forwarded subject to confidentiality. After consulting the developer, in accordance with Article 4(4) of Regulation 1049/2001, Parliament pointed out that the developer also felt that disclosure would undermine its commercial interests and that it therefore expected Parliament to comply with its duty of confidentiality.

93. As regards the applicability of Article 4(2) first indent of Regulation 1049/2001, it follows from the case-law of the Community courts that, if an institution decides to refuse access, it must explain how access to that document could specifically and actually undermine the interest protected by the exception relied upon [21] . In the present case, the Ombudsman considers that Parliament's reasoning essentially concludes that the exception contained in Article 4(2) first indent of Regulation 1049/2001 is applicable. However, it does not give reasons why granting access would specifically and actually undermine the commercial interests of the developer and the banks involved. It seems useful to recall that the mere fact that a document concerns an interest protected by an exception cannot in itself justify the application of that exception. Finally, the reply given by a third party when consulted by a Community institution in connection with a request for access to documents is not binding on the institution but allows it to assess whether an exception is applicable [22] . A reference to the consultation of a third party can therefore not be considered sufficient to pass the threshold set by the case-law of the Community courts.

94. Turning to the aspect of professional secrecy, the Ombudsman notes that, in support of its view that the documents in question were covered by the obligation of professional secrecy, Parliament referred to a judgment of the Court of First Instance. After an analysis of this judgment, the Ombudsman considers that it establishes a relationship between the obligation of professional secrecy and, among other things, Regulation 1049/2001. Thus, the Court held that "*... to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the obligation of professional secrecy* " [23] . Given the Ombudsman's view that Parliament has not sufficiently explained why Article 4(2) first indent of Regulation 1049/2001 is applicable, it follows from the case-law of the Community courts that Parliament has not given sufficient reasons why the documents at issue are covered by the obligation of professional secrecy.

95. In light of the above, the Ombudsman finds that Parliament has given insufficient reasons for its decision to refuse access to the documents in question. This failure to provide sufficient reasons constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

G. Allegation of incorrect reasoning as to existence of an overriding public interest (the complainant's ninth allegation)

Arguments presented to the Ombudsman

96. The complainant alleged that Parliament's argument that there was no overriding public interest in the disclosure of the documents concerned was incorrect. In support of his allegation, he submitted that there was indeed an overriding public interest in disclosure, given that, in the absence of a tendering procedure, the risk of manipulation at the taxpayers' expense was significant.

97. In its opinion, Parliament submitted that, in his request for access, the complainant did not invoke an overriding public interest in disclosure. It referred to the case-law of the Court of First Instance and pointed out that an overriding public interest was to be considered distinct from the general public interest in access [24] . Its nature had to be objective rather than subjective. Although public scrutiny of the use of public funds constitutes a public interest, this in itself was not sufficient to justify disclosure. In this regard, Parliament stated that its Committee on Budgetary Control and the European Court of Auditors enforce applicable rules on behalf of the public.

98. In his observations, the complainant essentially took the view that it was not for him to demonstrate the existence of an overriding public interest, given that applications for access do not have to be reasoned. He further considered that Parliament did not address his argument, according to which the risk of manipulation was high. Manipulations could only be uncovered if access to the documents was granted. The fact that Parliament's Committee on Budgetary Control and the European Court of Auditors monitor the application of the rules in place did not diminish the overriding public interest, since Parliament did not establish that these bodies had actually exercised their control with regard to the facts at hand. Even if such control had taken place, there was still an overriding public interest to verify whether the results achieved were correct.

99. In reply to Parliament's argument that disclosure could jeopardise its credibility and its ability to negotiate with future contractors, the complainant stated that, in light of the case-law of the Court of Justice, this argument was entirely unconvincing. Companies entering into contracts with institutions normally accepted that there are different transparency requirements than in contracts between private entities. A developer benefiting from Parliament's contraventions of the rules on the award of public contracts could not rely on legitimate interests.

The Ombudsman's assessment

100. The Ombudsman recalls at the outset that, pursuant to Article 6(1) of Regulation 1049/2001, an applicant requesting access to documents is not obliged to state reasons for the application. Furthermore, it follows from the Court's case-law that an institution which invokes one of the exceptions provided for in Article 4 of Regulation 1049/2001 is required to ascertain whether there is an overriding public interest justifying disclosure [25] .

101. Against this background, Parliament's argument that the complainant did not invoke the existence of an overriding public interest in his applications for access cannot be considered convincing.

102. In its opinion, Parliament relied on a judgment of the Court of First Instance in support of its view that an overriding public interest was to be considered to be distinct from the general public interest in access. Indeed, in its judgment in Case T-84/03 *Turco* , the Court of First Instance stated the following:

" *83. The overriding public interest, under Article 4(2) of Regulation No 1049/2001, capable of justifying the disclosure of a document which undermines the protection of legal advice must therefore, as a rule, be distinct from the above principles which underlie that regulation. If that is not the case, it is, at the very least, incumbent on the applicant to show that, having regard to the specific facts of the case, the invocation of those same principles is so pressing that it overrides the need to protect the document in question. That is not, however, the case here.* "

103. The judgment of the Court of First Instance in *Turco* was subject to an appeal to the Court of Justice. In its judgment of 1 July 2008 [26] , the Court partly set aside the judgment under appeal and held as follows:

" *45. In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.*

[...]

74. As has been held in paragraphs 44 to 47 and paragraph 67 of this judgment, the Court of First Instance misinterpreted Article 4(2) of Regulation No 1049/2001 in deciding that the overriding public interest capable of justifying the disclosure of a document, must, as a rule, be distinct from the principles which underlie that regulation.

75. It is clear that the provisions of a legislative act must be applied in the light of the principles underlying it. "

104. According to Parliament, an overriding public interest is to be considered distinct from the general public interest in access. Although this statement must be considered to be in line with the case-law as it stood at the time when it was made, in light of the judgment of the Court of Justice in *Turco* , it can no longer be considered correct. Bearing in mind that (i) a judgment rendered by the Court authoritatively interprets Community law with retroactive effect and (ii) the complainant submitted plausible and concrete arguments suggesting the existence of an overriding public interest, the Ombudsman finds that Parliament's argument that there was no overriding public interest in the disclosure of the documents concerned was based on an incorrect premise. This constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the

H. The draft recommendation

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

Parliament should correct or clarify the second statement made in its letter of 5 July 2007, in line with the considerations set out in paragraphs 37 - 43.

Parliament should (i) clarify whether there are any documents relating to its consultation with the developer pre-dating the signature of the contract with it, and (ii) in case of an affirmative response, process the complainant's request for access to these documents.

Parliament should grant access to the report, the Call for tender and the list of banks contacted by the developer or, bearing in mind the complainant's arguments regarding an overriding public interest, provide a convincing explanation as to why the exceptions relied on by it are applicable.

Parliament and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 October 2009. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 21 July 2009

[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 (EC) No 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, OJ 2001 L 145, p. 43.

[3] In the letter extending his inquiry to the complainant's new allegations, the Ombudsman referred to a " *list of banks contacted by Parliament* ". However, from the submissions made in the course of the inquiry, it became clear that the allegation in fact relates to a list of banks contacted by the developer.

[4] Case C-44/96 *Mannesmann Anlagenbau* [1998] ECR I-73, paragraph 43.

[5] Directive (EC) No 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.

[6] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1.

[7] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357, p. 1.

[8] Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, as last amended on 9 April 2001 and as appealed by Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

[9] See, for instance, Case T-271/04 *Citymo SA v Commission* [2007] ECR II-1375, paragraphs 68 et seq.

[10] Commission's answer to parliamentary question E-2295/2008 of 9 June 2008, available online at:
http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-2295&language=EN [Link]

[11] Case C-44/96 *Mannesmann Anlagenbau* [1998] ECR I-73, paragraph 43.

[12] Case T-168/02 *IFAW v Commission* [2004] ECR II-4135, paragraph 55.

[13] Case T-168/02 *IFAW v Commission* [2004] ECR II-4135, paragraph 55; Case T-380/04 *Terezakis v Commission* , judgment of 30 January 2008, not yet published in the ECR, paragraph 54.

[14] Case T-380/04 *Terezakis v Commission* , judgment of 30 January 2008, not yet published in the ECR, paragraph 60.

[15] Case T-188/98 *Kuijer v Council* [2000] ECR II-1959, paragraph 46.

[16] See, for instance, Case T-403/05 *MyTravel Group v Commission* , judgment of 9 September 2008, not yet published in the ECR, paragraph 32.

[17] See Case T-403/05 *MyTravel Group v Commission* , judgment of 9 September 2008, not yet published in the ECR, paragraph 33.

[18] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* , judgment of 1 July 2008, not yet published in the ECR, paragraph 43.

[19] These are the documents listed under (ii) in paragraph 1 above.

[20] Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraphs 29 and 71-75.

[21] See Case T-403/05 *MyTravel Group v Commission* , judgment of 9 September 2008, not yet published in the ECR, paragraph 33.

[22] Case T-380/04 *Terezakis v Commission* , judgment of 30 January 2008, not yet published in the ECR, paragraph 60.

[23] Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraph 74.

[24] Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 82.

[25] Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 44. This part of the judgment has not been set aside by the Court of Justice in Joined cases C-39/05 P and C-52/05 P *Turco v Council* , judgment of 1 July 2008, not yet published in the ECR (see below).

[26] Joined cases C-39/05 P and C-52/05 P *Turco v Council* , judgment of 1 July 2008, not yet published in the ECR.