

Draft recommendation to the European Commission in complaint 713/98/IJH

Recommendation

Case 713/98/(IJH)GG - Opened on 30/07/1998 - Decision on 11/12/2001

(Made in accordance with Article 3 (6) of the Statute of the Ombudsman. (1))

SUMMARY

The original complaint concerned the Commission's refusal to grant the complainant access to certain documents. During the course of the inquiry, it became clear that the complainant's real concern is to learn who made submissions to the Commission, and which representatives of a trade association attended a meeting organised by the Commission, in the context of its investigation into the complainant's allegation of an infringement of Community law. The Ombudsman proposed, as a possible friendly solution, that the Commission should supply this information to the complainant. The Commission considers that the Data Protection Directive (2) prevents it from supplying the names without the consent of the persons concerned. The Commission invited these persons to give their consent, but only a limited number of them have responded positively. The Data Protection Directive is the only legal basis to which the Commission has referred to justify not supplying all the names to the complainant. The Ombudsman's view is that the right to privacy with respect to the processing of personal data under the Directive does not require the Commission to treat as secret views or information which have been submitted to it concerning the exercise of its functions, nor the names of the persons who submitted the views or information. The Ombudsman therefore considers that the Commission has misunderstood its obligations under the Directive and has infringed the principle of openness. The Ombudsman therefore makes a draft recommendation that the Commission should inform the complainant of the names of the persons who made submissions and of the trade association representatives who attended the meeting in question.

THE COMPLAINT

On 8 July 1998, Mr R. complained to the European Ombudsman on behalf of the Bavarian Lager Company Limited, against the European Commission's refusal of his application for access to certain documents held by the Commission. The background to the complaint is that Mr R. complained to the Commission in April 1993 about a United Kingdom law, known as the Guest Beer Provision, which he considered to be an infringement of Article 30 (now Article 28) EC. The complaint was registered as P/93/4490/UK and the Commission began an investigation under Article 169 (now Article 226) EC. In August 1996, the complainant learnt from a press release issued by the UK Department of Trade and Industry that a tripartite meeting was to take



place in October 1996 between the Commission, the UK authorities and a trade association, the *Confédération des Brasseurs du Marché commun*, to discuss the Guest Beer Provision. He asked the Commission to allow him to attend the meeting but this request was refused. At the beginning of March 1997, the UK authorities proposed an amendment to the Guest Beer Provision. The Commission considered the proposed amendment to be satisfactory and terminated the Article 169 procedure. In May 1998, the complainant addressed a request to the Commission for access to any submissions made to under file reference P/93/4490/UK by 11 named companies and organisations and by three defined categories of person or company. The application was made under Decision 94/90 (3) by which the Commission adopted the Council and Commission joint Code of Conduct on public access to documents. (4) The Commission refused the initial application on the ground that the Code of Conduct applies only to documents of which the Commission is the author. The complainant's confirmatory application was rejected on the grounds that the fifth paragraph of the Code of Conduct states that: *"Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author."* In his complaint to the Ombudsman, the complainant alleged that: (i) the case law of the Court establishes that any document held by the Commission, irrespective of the author, is a Commission document. (ii) the Commission acted unfairly because it had previously supplied him with documents when it needed his assistance during the Article 169 investigation.

THE INQUIRY

The Commission's opinion As regards the complainant's first claim, the Commission's opinion stated that the Code of Conduct *"applies only to documents originating from the Commission."* The opinion also pointed out that the cases cited by the complainant in support of his first claim concerned situations where the Commission pleaded exceptions to the Code of Conduct on grounds of protection of the public interest or the Commission's interest in maintaining the secrecy of its deliberations. As regards the second claim, the opinion stated that the Commission's departments have no evidence to prove that the complainant was provided with documents when the Commission departments required his assistance. The opinion further stated that even if the Commission departments had indeed given him certain documents, this would not mean that these departments would be exempt from correctly applying the relevant provisions of the 1994 Code of Conduct upon further requests from him.

The complainant's observations In support of his first claim, the complainant's observations referred to the definition of "document" in the Code of Conduct. In support of his second claim, the complainant forwarded copies of the third party submissions which he claims the Commission made available to him.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's analysis of the issues in dispute After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's claims. *The complainant's first claim* The complainant claimed that the Code of Conduct also applies to documents which are held by the Commission, but of which it is not the author ("third-party documents"). The Code defines



"document" to mean *"any written text, whatever its medium, which contains existing data and is held by the Council or the Commission."* This definition appears to include third-party documents. The fifth paragraph of the Code could therefore be considered as an exception to the general principle, set out at the beginning of the Code, that *"(t)he public will have the widest possible access to documents held by the Commission and the Council"*. According to the established case-law of the Community Courts, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. The Ombudsman also noted in this context that the fifth paragraph is in the part of the Code which deals with *initial* applications. It is therefore arguable that in the case of a *confirmatory* application for a third-party document, the normal provisions of the Code should apply, including the obligation on the Commission to state its grounds for refusing access. If the applicant has made no efforts to obtain the document from its author then, on this interpretation, it could be appropriate for the Commission merely to refer to the fifth paragraph of the Code. However, if the applicant shows that he is unable to obtain the document from its author (e.g. because the author no longer possesses the document) then, on this interpretation, the Commission should grant access, unless one or more of the exceptions in the Code applies. The Ombudsman's provisional conclusion, therefore, was that the complainant's first claim raises an issue of legal interpretation of the Code of Conduct to which the Commission's opinion did not provide an adequate response and that an instance of maladministration could therefore exist. *The complainant's second claim* The complainant's second claim was that the Commission acted unfairly in refusing to grant him access to the documents in question. The claim of substantive unfairness could not be evaluated in the absence of an adequate statement of the Commission's reasons for refusing access. The Ombudsman's examination of the second claim was therefore concerned with the question of the adequacy of the Commission's reasoning. Insofar as the Code of Conduct may apply to third-party documents, it requires reasons to be given to justify the application of an exception. On the alternative assumption that the Code does not apply to third-party documents, the Commission would appear to have a discretionary power to decide whether to grant access or not, unless there is another legal provision which imposes an obligation on the Commission to maintain the secrecy of the documents in question. When a decision unfavourable to the citizen is made, the normal principle is that the reasons for the decision should be stated clearly and unequivocally, so as to enable those concerned to recognise the reasons for the decision and to facilitate review by a competent supervisory body. The Ombudsman's provisional conclusion, therefore, was that failure to provide adequate reasons to the complainant for rejection of his request for access to documents could be an instance of maladministration and that a mere reference to the fifth paragraph of the Code is not an adequate reason if the complainant shows that he is unable to obtain a document from its author. **The possibility of a friendly solution** On 2 February 1999, the complainant sent a further letter to the Ombudsman in which he made clear that he had applied for access to the documents concerned in order to obtain information which they may contain. He identified the information as being: 1 The names of the delegates of the *Confédération des brasseurs du marché commun* (CBMC) who attended the meeting at the Commission on 11 October 1996. The complainant stated that he has attempted to obtain this information directly from the CBMC which had advised him that he must seek the answer from the Commission since the relevant personnel had left the organisation and the files had been destroyed; 2 The names of any



persons who fall into one of the 14 categories identified in his original request and who made submissions under file reference P/93/4490/UK. In view of the Ombudsman's provisional conclusions referred to above, as well as the additional information provided by the complainant concerning his unsuccessful attempt to obtain certain of the documents in question, the Ombudsman considered that it was appropriate to propose a friendly solution to the complaint. He therefore wrote to the Commission on 3 March 1999 in accordance with Article 3 (5) of the Statute of the Ombudsman (4) , proposing that the Commission provide the information requested in the complainant's letter of 2 February 1999. *The Commission's reply* In its reply dated 7 June 1999, the Commission first stated that it could not share the complainant's view that the refusal to give access to the documents of third parties constitutes an exception to the general principle of granting public access. Consequently, it considered that there is no need to apply the rule recalled by the Community Courts that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly. As regards the proposed friendly solution, the Commission referred to Directive 95/46/EC which provides that personal data may not be used for purposes other than those for which it was collected, without the prior consent of the person concerned. However, the Commission indicated its willingness to seek an *ad hoc* solution to the complaint by asking the persons concerned to allow it to supply their names to the complainant. The Commission also stated that it would inform the Ombudsman of their replies and communicate their names where authorised to do so. *The Ombudsman's response* On 30 July 1999, the Ombudsman wrote to the Commission drawing its attention to the judgement which the Court of First Instance gave on 19 July 1999, in Case T-188/97 *Rothmans International v Commission* (5) . The Ombudsman also stated that he does not accept that Directive 95/46/EC could prevent the Commission from providing the information in question without seeking the consent of the persons concerned. However, in view of the *ad hoc* solution proposed by the Commission, it still appeared possible to achieve a friendly solution. The Ombudsman therefore asked the Commission to inform him by 30 September 1999 of the number of persons from whom the Commission had asked consent to communicate their names, and the number of positive and negative replies received. In October and November 1999, the Commission informed the Ombudsman that it had written to the persons concerned requesting approval to disclose their identities to the complainant, that 45 letters were sent in total and that 20 replies had been received, of which 14 were positive and 6 negative. The Commission also supplied the names and addresses of those persons who had replied positively. The Commission's response was forwarded to the complainant, whose observations made clear that the incomplete information supplied by the Commission does not satisfy him. The Ombudsman therefore informed the Commission in December 1999 that a friendly solution to the complaint is not possible. He also asked the Commission to provide an explanation of its legal stand that the Data Protection Directive prevents it from disclosing the identities of the persons concerned without their express permission, including precise reference to the provisions of the Directive which the Commission considers to impose a legal obligation of secrecy in this case. In January 2000, the Commission replied as follows: "*By virtue of Article 286 of the EC Treaty, Directive 95/46/EC applies to the Commission as well. As regards the interpretation of this Directive, it should be recalled that by virtue of article 2 thereof the data requested by Mr R. are personal data within the meaning of the Directive. Communicating these data to Mr R. constitutes processing of personal data within the meaning of the Directive. By virtue of Article 7 of the Directive, the processing of personal data is only*



allowed if it is covered by one of the six options listed under this provision. Therefore, disclosure to Mr R. of the names concerned is only allowed if one of the options under Article 7 applies. In the view of the Commission, the processing of personal data in this case is only permissible under Article 7(a). The other options of this provision do not apply in the case of Mr R.. Therefore, it is required that the data subject "unambiguously gives his or her consent". If he or she refuses to give his or her consent the personal data cannot be processed." (footnote reference omitted)

THE DECISION

1 The claim for access to documents 1.1 The complainant claimed that the Commission should grant him access to certain documents under its Decision 94/90 (6) . 1.2 During the course of the inquiry, the focus of the dispute became the complainant's claim that the Commission should provide him with information. It is therefore unnecessary for the Ombudsman to pursue the inquiry into the original claim for access to documents. **2 The provision of information** The complainant requested the Commission to inform him of the names of those persons who made submissions in relation to his complaint against the UK Guest Beer provision and of the representatives of a trade association (the *Confédération des brasseurs du marché commun*) who attended a meeting organised by the Commission in the context of its investigation of the complainant's allegation of a possible infringement of Community law by a Member State. 2.2 The principles of good administrative behaviour require that an official who has responsibility for the matter concerned shall supply members of the public with the information that they request (7) . The complainant should therefore be supplied with the names he has requested unless the Commission has a legal obligation to keep this information confidential. 2.3 The only legal basis for such an obligation to which the Commission has referred is the Data Protection Directive (8) . The Commission considers that the Directive prevents it from supplying to the complainant the names of the persons concerned without first obtaining their consent. This claim is evaluated in the next section. **3 The Data Protection Directive** 3.1 Article 286 EC provides that Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, the Treaty. Accordingly, the Data Protection Directive (9) applies to the Community institutions and bodies, including the Commission (10) . 3.2 The Directive establishes certain principles which are to be implemented by detailed legislation in the Member States. In considering the application of the Directive to the Commission, it should be recalled that no detailed implementing legislation binding on Community institutions and bodies yet exists. 3.3 At the level of principle, the Ombudsman notes that Article 1 of the Directive defines its object as being to ensure protection of "*the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data*" . 3.4 Information supplied to an administrative authority by a person who participates in an administrative procedure does not seem to be "personal data" relating to that person merely by reason of the fact that he or she has supplied it. The contrary view would imply that there exists a fundamental right to supply information to an administrative authority in secret, which is not the case. 3.5 Moreover, in interpreting and applying the Directive, it is important also to take account of the principle that *decisions should be taken as openly as possible* . This principle is affirmed by the Declaration on the right of access to information attached to the final act of the Maastricht Treaty (11) , by the case-law of



the Community Courts (12) and by Article 1 (13) of the Treaty on European Union. 3.6 Article 7 (14) of the Directive provides for six categories of processing (which includes transmission) of personal data to be permissible. Three of these categories appear to be applicable to public disclosure by the Commission of information submitted to it concerning the exercise of one of its functions. Such disclosure could be considered to be necessary for: - *compliance with a legal obligation*, since the Treaty on European Union establishes that openness is an obligation of the European institutions; - *the performance of a task carried out in the public interest or in the exercise of official authority*, since making information public is a normal part of the performance of a task carried out in the exercise of official authority; - *for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed*, since granting and receiving access to official information are legitimate interests pursued by the controller and by third parties respectively. 3.7 For the reasons given above, the Ombudsman is of the view that the right to privacy with respect to the processing of personal data under the Data Protection Directive does not require the Commission to treat as secret views or information which have been submitted to it concerning the exercise of its functions, nor the names of the persons who submitted the views or information. 3.8 The Ombudsman therefore considers that the Commission has misunderstood its obligations under the Data Protection Directive and has thereby infringed the principle of openness. This is an instance of maladministration. Since a friendly solution is not possible, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman: **The draft recommendation** The Commission should inform the complainant of the names of the delegates of the Confédération des brasseurs du marché commun who attended a meeting organised by the Commission on 11 October 1996 and of companies and persons in the 14 categories identified in the complainant's original request for access to documents who made submissions to the Commission under file reference P/93/4490/YK. 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 before 30 September 2000. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented. Strasbourg, 17 May 2000 Jacob SÖDERMAN

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15.

(2) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 OJ L 281/31.

(3) Commission Decision of 8 February 1994 on public access to Commission documents, OJ 1994 L 46/58.

(4) "As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint."

(5) The Ombudsman drew the Commission's attention in particular to paragraph 55 of the judgement in which it is stated that, "the rule on authorship, howsoever described, lays down an



exception to the general principle of transparency in Decision 94/90. It follows that this rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency."

(6) Commission Decision of 8 February 1994 on public access to Commission documents, OJ 1994 L 46/58

(7) See Article 22 of the European Ombudsman's *Code of Good Administrative Behaviour* of 19 July 1999.

(8) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 OJ L 281/31.

(9) *Note 8 above*

(10) The Directive also applies to the European Ombudsman. See the Ombudsman's decision of 30 November 1999 Concerning the designation of a data protection officer, which is available on the Ombudsman's website: <http://www.ombudsman.europa.eu/lbasis/en/dataprot.htm> [Link]

(11) Declaration 17: "The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."

(12) See for example, Case C-58/94, *Netherlands v Council* [1996] ECR I-2169.

(13) The second paragraph of which states: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, *in which decisions are taken as openly as possible* and as closely as possible to the citizen" (emphasis added).

(14) *"Member States shall provide that personal data may be processed only if:*

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in



the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1)."