

## **Draft recommendation to the European Commission in complaints 271/2000/(IJH)JMA and 277/2000/(IJH)JMA**

Recommendation

**Case 271/2000/JMA - Opened on 28/03/2000 - Recommendation on 12/03/2001 - Decision on 31/05/2001**

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

### **SUMMARY**

The original complaints concerned the European Commission's refusal to grant the complainant access to two different reports prepared by an independent consultant -En Act International- at the request of the institution regarding compliance of the UK and Gibraltar with two Community Directives on waste (Directive 75/442/EEC) and hazardous waste (Directive 91/689/EEC), as well as with the Habitats Directive (92/43/EEC). The Commission had only agreed to release selected parts of the requested documents on the grounds that some of the information contained in the reports was covered by the exception involving the protection of public interest (inspections and investigations) provided for under the Code of Conduct concerning Public Access to Commission documents (Decision 94/90/EC).

The Ombudsman's view is that the exception based on inspections and investigations of Decision 94/90/EC should only be applied when the requested documents have been drawn up in the course of an investigation connected to an infringement proceeding. The Ombudsman has concluded that the Commission wrongly refused access to Commission documents on the grounds that the documents in question were connected to inspections and investigations.

The Ombudsman therefore makes a draft recommendation that the Commission should reconsider the complainant's applications dated 16 February 1999 and 17 May 1999, and give access to the documents requested, unless the exceptions contained in Decision 94/90/EC apply.

### **THE COMPLAINTS**

The complainant had asked the Commission to obtain copies of two different reports prepared by an independent consultant -En Act International- at the request of the Commission regarding compliance of the UK and Gibraltar with two Community Directives on waste (Directive



75/442/EEC) and hazardous waste (Directive 91/689/EEC), as well as with the Habitats Directive (92/43/EEC).

As regards the report on UK and Gibraltar's compliance with the Directives on waste and hazardous waste, the complainant wrote to the Commission services requesting a copy of the document on 31 August 1998. In its reply of 11 January 1999, the Commission services only agreed to release selected parts of the document on the grounds that some of the information contained in the report was covered by the exception involving the protection of public interest (inspections and investigations) provided for under the Code of Conduct concerning Public Access to Commission documents (Decision 94/90/EC). In the document forwarded to the complainant, the information which presumably fell under that exception had been deleted from the original report. The complainant lodged a confirmatory application on 16 February 1999. On 19 March 1999, the Commission's Secretary-General ratified the decision taken by the responsible services (DG ENV) on the grounds that the excluded information was part of the Commission's preliminary investigations into a Member State's compliance with Community law, and that it might therefore lead to infringement proceedings.

On 27 January 1999, the complainant made a second request to the Commission services regarding access to the report on UK and Gibraltar's compliance with the Habitats Directive. The reply from DG ENV dated 4 March 1999, granted the request, although only in part. Some paragraphs of the released text had been deleted on the grounds that that information was covered by the exception involving the protection of public interest (inspections and investigations) of Decision 94/90/EC. On 17 May 1999, Mr Trojan ratified the decision taken by the responsible services (DG ENV).

In his complaints to the Ombudsman, the complainant alleged therefore that the Commission's decisions to partly reject his requests for access to the two documents were unlawful.

He put forward the following reasons:

- (i) The public interest exception should not apply to an independent and objective third party document. Independent reports cannot be considered as internal Commission documents, and therefore the exemptions provided for in Decision 94/90/EC should not apply to this type of documents. In order to hold the Commission accountable in its role as guardian of the Treaty, the public should have access to the independent advice which the Commission has received.
- (ii) The requested documents did not concern a specific "investigation", but were at most a prelude to a possible investigation. Thus, the reports were not drawn up solely for the purpose of a specific investigation, neither were they internal documents concerning the investigation of a case before the court. In support of his position, the complainant relied on the Court of First Instance's ruling in case T-92/98 (*Interporc Im- und Export GmbH v. Commission* [1999] ECR II-3521, par. 40), whereby the Court had restricted the notion of documents related to the exception of court proceedings, to those documents drawn up by the Commission solely for the purpose of specific court proceedings. By analogy, the complainant argued that a report to be covered by the investigation exemption should have been drawn up by the Commission solely for



the purpose of a specific investigation.

(iii) Taking into account the nature of the documents, the Commission could have sought to refuse access to parts of them only by reference to the exemption based on the need to protect the confidentiality of the institution's proceedings. In any such case, the Commission was under a duty to undertake a genuine balance of interest before taking a stand on the complainant's request.

(iv) The Commission failed to provide sufficient reasoning since it did not inform the complainant either of the reasons why the deleted material was related to the possible opening of an infringement procedure, or of the subject matter which the deleted material related to.

(v) The Commission acted in breach of the Aarhus Convention on Citizens' Environmental Rights, which had been signed by the institution in June 1998. Article 4(c) of the Convention contains a narrowly defined exemption relating to investigations by a public authority.

## THE INQUIRY

### **The Commission's opinions**

The Commission in its opinions first explained the background to both cases.

It justified its decisions to give only partial access to the two requested reports as follows:

(i) Applications of exceptions to an independent and objective third party document: The Commission considered that the requested documents had been commissioned and paid for by the Commission and as such, they should be considered documents drawn up by the Commission. If the institution had concluded that the documents were third party documents, access would have been denied in accordance with the provisions of Decision 94/90/EC.

(ii) The reports did not concern specific "investigations": The Commission insisted on the fact that the reports were related to specific investigations, namely the correct implementation by the UK and Gibraltar authorities of the Directives on waste and hazardous waste, as well as of the Habitats Directive. Following the conclusion of these documents, and largely as a result of them, the Commission's services launched three own initiative inquiries which could lead to the opening of infringement proceedings.

As regards the specific information deleted from the reports, the Commission stressed that it concerned a Member State's compliance with Community law. It pointed out that three own initiative cases (B-1998/2391, B-1998/2392 and B-1999/2119) had been opened to further assess the implementation of the Directives on waste and hazardous waste, and the Habitats Directive in the UK and Gibraltar. The reports were part of investigations which could lead to the opening of infringement proceedings under Article 226 of the EC Treaty.

The institution referred to the case law of Community courts in support of its position. It mentioned case T-105/95 ( *WWF UK v. Commission* ), in which the Court of First Instance



considered that the confidentiality which the Member States are entitled to expect of the Commission in similar cases warrants, under the heading of the protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure. The Commission also mentioned case T-309/97 (*Bavarian Lager Co. v. Commission*), in which the Court considered that disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the investigation. Hence in order to safeguard this objective, the Commission's view is that it has to refuse access to a preparatory document relating to the investigation stage of the procedure under Article 226 of the Treaty.

(iii) Need for a balancing of the interest: The decisions taken by the institution refusing full access to the requested documents were only based on the exception related to the protection of the public interest. The institution pointed out that the exception dealing with the protection of the confidentiality of the institution's proceedings was not invoked to refuse access to the requested documents.

(iv) Lack of sufficient reasoning: In the view of the Commission, to provide more detailed information on the deleted parts of each document would have required to reveal their contents, and by doing so the purpose of the institution's decisions would have been defeated.

(v) Breach of Article 4(c) of the Aarhus Convention: The Commission stressed that its refusal to grant full access to the reports had been taken on the basis of Decision 94/90/EC. It explained that the signature of the Aarhus Convention by the Commission in June 1998 was accompanied by a declaration in which the Community institutions agreed to apply the Convention within the framework of their existing and future rules on access to documents. Furthermore, the Commission indicated that the Convention does not grant an absolute right of access to environmental information, but foresees grounds of public and private interests on which requests for access to environmental information may be rejected. It finally pointed out that the Convention has not been ratified yet.

#### **The complainant's observations**

In his observations, the complainant maintained the allegations made in the original complaints.

In his view, the Commission could not consider the study as part of an investigation, but at best, it might inform it. The complainant pointed to the Commission's failure to state the dates of the investigation, or to assert that the study formed the basis for such investigation. He considered that an investigation can only be subsequent to the findings of the study. By characterizing everything done in the performance of that duty as an 'investigation', even when there was no Commission/Member State correspondence or negotiation involved, the institution sought to remove its performance from public scrutiny.

#### **Further inquiries**

In order to verify the content of the reports, two staff members from the Ombudsman's Secretariat inspected the relevant documents at the Commission's premises on 9 June 2000.

## **THE DECISION**



## **1 Nature of the reports prepared by a third party**

1.1 The complainant had asked the Commission to obtain copies of two different reports prepared by an independent consultant -En Act International- at the request of the Commission. The subject matter of these reports involved compliance of the UK and Gibraltar with two Community Directives on waste (Directive 75/442/EEC (2) , as amended by Directive 91/156/EEC (3) ) and hazardous waste (Directive 91/689/EEC (4) ), as well as with the Habitats Directive (92/43/EEC (5) ).

Since the requested documents had been drafted by a third party, the complainant contested the application of Decision 94/90/EC by the Commission. He considered that independent reports cannot be identified as internal Commission documents, and therefore that the exemptions provided for in Decision 94/90/EC should not apply to this type of document.

1.2 The Commission stressed that the requested documents were commissioned and paid for by the institution, and as such, they should be considered documents drawn up by the Commission. Moreover, the institution added that if it had concluded that the documents were third party documents, access would have been denied in accordance with the provisions of Decision 94/90/EC.

1.3 The Ombudsman notes that the Commission bears a primary responsibility for the drafting, use, and evaluation of the requested documents. The institution had chosen the consultant and commissioned the reports. Its services were the exclusive recipients of the final work. It also appears that the consultant firm which drafted the documents cannot release the documents without the prior consent of the Commission.

Given the nature of the documents, and the role of the Commission, it is reasonable to regard these reports as Commission documents, to which the rules of Decision 94/90/EC should apply (6) .

1.4 The Ombudsman considers therefore that there is no maladministration as regards this aspect of the case.

## **2 Refusal to give access on the basis of the protection of public interest**

2.1 The complainant has contested the Commission's application of the exception involving the protection of public interest (inspections and investigations) as a justification for not disclosing parts of the reports. In his view, the requested documents did not concern a specific "investigation", but were at the most a prelude to a possible investigation.

2.2 The Commission believes that the deleted parts of the reports concern a Member State's compliance with Community law, as illustrated by the fact that the Commission has started three own-initiative cases against the UK based on the findings of these reports. The institution has stressed that the reports were part of an investigation which might lead to the opening of infringement proceedings.

2.3 In order to assess the scope of the exception based on the protection of public interest, it appears first necessary to characterize the right of access to documents as enshrined in



Decision 94/90/EC, and the nature of the possible exceptions for its exercise.

The aim of Decision 94/90/EC on public access to Commission documents, is to give effect to the principle of the largest possible access for citizens to information, with a view to strengthening the democratic nature of the institutions and the trust of the public in the administration. Decision 94/90/EC is a measure conferring on citizens legal rights of access to documents held by the Commission, and is intended to apply generally to requests for access to documents.

2.4 Access to a Commission document can only be refused by the institution on the basis of the exceptions listed in the Code of Conduct annexed to the Decision. These exceptions refer to the protection of public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations), the individual and privacy, commercial and industrial secrecy, the Community's financial interests, and confidentiality.

As interpreted by the Community courts, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle of giving the public the "widest possible access to documents held by the Commission" (7) .

2.5 In interpreting the notion of inspections and investigations, Community courts have warranted the use of this specific exception when the requested document pertains to investigations which may lead to an infringement procedure (8) . In these cases the investigation stage has been identified with the period of negotiations between the Commission and the Member State concerned (9) . Such exchange takes place once the Commission has first concluded that a Member State is not properly implementing Community law.

2.6 An interpretation of the scope of "inspections and investigations", as suggested by the Commission, could preclude public disclosure of any document held by the institution which might be relevant for its role of guardian of the Treaty under Article 211 of the EC Treaty (10) . Accordingly, whole categories of documents whose content relates to Member States' compliance with Community law, and hence which may give factual or legal elements to the Commission in order to consider instituting infringement proceedings in the future, could be barred from public access.

It could also call into question public access to one of the most effective tools for monitoring the application of EC environmental law: the Commission and Member States' reports on the implementation of certain Directives relating to the environment (11) . The publication and large distribution of these documents among the public have been widely praised by the Commission (12) , even though their contents relate to the evaluation of Member States' compliance with Community law, and thus, can lead the Commission to institute infringement procedures.

2.7 The Ombudsman therefore considers that the exception based on inspections and investigations should only be applied when the requested documents have been drawn up in the course of an investigation connected to an infringement proceeding.



The two reports in this case were commissioned prior to any investigation, and with a view to solely considering the options available to the Commission. Moreover, at the time when the complainant lodged his requests for access to the reports, it appears as if the Commission had not instituted any infringement procedure under Article 226 of the Treaty, nor had it apparently started any of its preliminary stages.

2.8 The Ombudsman has concluded that the Commission has wrongly refused access to Commission documents on the grounds that the documents in question were connected to inspections and investigations. Such action constitutes an instance of maladministration.

2.9 In his letters to the Ombudsman, the complainant also put forward a number of additional reasons. Since the Ombudsman has concluded that the Commission wrongly refused access to the requested documents and that it should reconsider its decisions in this case, there is no need to further assess these reasons.

### **3 Conclusion**

The Ombudsman's inquiries into this case have revealed an instance of maladministration on the part of the European Commission. Since a friendly solution is not possible, the Ombudsman makes the following a draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the European Ombudsman:

#### **The draft recommendation**

The Commission should reconsider the complainant's applications dated 16 February 1999 and 17 May 1999, and give access to the documents requested, unless the exceptions contained in Decision 94/90/EC apply.

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 June 2001. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

Strasbourg, 12 March 2001

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) OJ L 194, 25.07.1975, p. 39.

(3) OJ L 78, 26.03.1991, p.32.

(4) OJ L 377, 31.12.1991, p. 20.

(5) OJ L 206, 22.07.1992, p. 7.

(6) The Ombudsman had expressed a similar position on the basis of the role played by the





Commission in the preparation of a document in its Decision on complaint 1045/21.11.96/BH/IRL/JMA against the European Commission; Annual Report of the European Ombudsman for 1998, p. 156.

(7) Joined cases C-174/98P and C-189/98P, *Netherlands and Van der Wal v. Commission*, [2000] ECR I-1, par 45; case T-20/99, *Denkavit Nederland v. Commission* [not yet reported] of 13.09.2000; par.45.

(8) Case T-105/95, *WWF UK v. Commission* [1997] ECR II-0313, par. 63.

(9) Case T-309/97, *Bavarian Lager Co. v. Commission* [1999] ECR II-3217, par. 46. Community courts have resorted to different standards in order to assess whether a document triggers the application of one of the exceptions under public interest. Thus, the judicial standard applied to documents to be used in court proceedings is that the Commission must have drawn up the document solely for the purposes of specific court proceedings (see case T-92/98, *Interporc Im- und Export GmbH v. Commission* [1999] ECR-II-3521, par. 40).

(10) The Ombudsman considers worth noting that the Commission has applied a different criterion in its Proposal for a Regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission Documents (Document COM (2000) 30 final/2). The proposed Regulation does not assimilate documents related to an infringement procedure to those produced in the course of inspections and investigations. Instead, it has defined two separate categories, within the exception concerning public interest, related respectively to inspections and investigations, and to infringement proceedings.

(11) See Council Directive 91/692/EEC of 23 December 1991 standardizing and rationalizing reports on the implementation of certain Directives relating to the environment; OJ L 377, 31.12.1991, p.48.

(12) 13th annual report on monitoring application of Community law-1995; OJ C 303, 14.01.1996, p. 48.