

Decision of the European Ombudsman closing his inquiry into complaint 1190/2008/DK against the European Commission

Decision

Case 1190/2008/DK - Opened on 28/05/2008 - Decision on 09/12/2009

THE BACKGROUND TO THE COMPLAINT

1. On 8 December 2008, the complainant applied to the European Commission for public access to documents in accordance with Regulation (EC) No 1049/2001 [1] ('Regulation 1049/2001'). The complainant requested access to the Viewpoint of the Commission (C.07.5860. of 7 December 2007) [2] ('the Viewpoint'), adopted in accordance with Article 43 of the Euratom Treaty concerning the investment project for the construction of a new nuclear plant, called "Belene", in Bulgaria. He also requested all three working language versions of the same document from the Commission's on-line public register of documents.
2. On 16 January 2008, the Commission sent a holding reply and informed the complainant that it could not grant access to the document requested since it had not yet been able to obtain the consent of the relevant bodies to disclose it. It explained that its services would "*undertake to receive the needed consent from both the Bulgarian government and the concerned company Natsionalna Elektricheska Kompania of Bulgaria ... As soon as we will have received their consent I will transmit you the requested documents.*"
3. On 24 February 2008, in the absence of a reply from the Commission, the complainant submitted a confirmatory application.
4. In its holding letter of 17 March 2008, the Commission informed the complainant that it needed to extend the deadline for a reply by another 15 working days. It explained that it had not been able to obtain all the information necessary to carry out a proper analysis of the complainant's request to enable it to take a final decision.
5. On 10 April 2008, on the date of the extended deadline, the Commission sent a further holding letter, explaining that it still could not finalise the analysis of the complainant's request and that it was still not in a position to provide him with a final reply. It, however, assured the complainant that it was doing its best to provide him with a final reply as soon as possible.



6. On 24 April 2008, the complainant submitted a complaint to the Ombudsman.

7. On 27 May 2008, the complainant was granted partial access to the Viewpoint. However, the Commission deleted parts of the document relating to the note communicating the project in question, on the grounds that the Bulgarian authorities were opposed to their publication. The Commission explained to the complainant that, in accordance with Article 44 of the Euratom Treaty, it can publish investment projects communicated to it, only with the consent of the authorities of the Member State in question.

THE SUBJECT MATTER OF THE INQUIRY

8. On 28 May 2008, the Ombudsman opened an inquiry into the following allegation and claim:

The Commission failed to deal adequately, procedurally and substantively, with his application for public access to documents.

The complainant claimed that the Commission should grant him access to the documents concerned.

THE INQUIRY

9. On 28 May 2008, the Ombudsman asked the Commission to submit an opinion on the above allegation and claim. Furthermore, the Ombudsman also asked the Commission to provide information on the following points:

1) With regard to the delay that occurred in the present case, it appeared that the Commission consulted third parties, including a Member State. In its holding reply of 16 January 2008 to the complainant, the Commission referred to the " *needed consent* " of these third parties. The Ombudsman, therefore, asked the Commission to clarify on what legal basis the " *consent* " was " *needed* " in this case.

2) With regard to the above-mentioned consultation, Article 5(5) of the Commission Decision 2001/937/EC [3] on the application of Regulation 1049/2001 provides as follows: " *The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.* "

The Ombudsman, therefore, asked the Commission to provide detailed information concerning the letters which were sent by way of consultation, whether deadlines for a reply were specified,



and whether these deadlines were respected.

3) In its letter of 17 March 2008, the Commission stated that it had not "*been able to gather all the elements [it] need [ed] to carry out a proper analysis*". The Ombudsman, therefore, asked the Commission to explain which "*elements*" were involved, and why it had not been possible to gather those elements.

10. The Commission sent its opinion on 31 July 2008. The Commission's opinion was forwarded to the complainant with an invitation to submit observations. The complainant sent his observations on 3 November 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remark

11. By way of a preliminary remark, the Ombudsman notes that, on 27 May 2009, the complainant was granted partial access to the requested document, namely, the Viewpoint. Therefore, the Ombudsman considers the complainant's claim to be that the Commission should grant him full access to the Viewpoint.

A. Allegation of failure to deal adequately, procedurally and substantively, with the complainant's application for public access to documents

Arguments presented to the Ombudsman

12. The complainant alleged that the Commission failed to deal adequately, procedurally and substantively, with the application he submitted to it on 8 December 2007, for public access to a document in accordance with Regulation 1049/2001.

13. In its opinion, the Commission noted, in a preliminary remark, that the Viewpoint was adopted under Article 43 of the Euratom Treaty [4] . Given that Regulation 1049/2001 is based on Article 255(2) of the Treaty establishing the European Community (EC Treaty) [5] , the Viewpoint does not fall within the scope of Regulation 1049/2001. The Euratom Treaty does not contain any provisions similar to Article 255(2) of the EC Treaty. However, in accordance with Declaration 41, as annexed to the Final Act of the Treaty of Amsterdam, the institutions shall draw guidance from Regulation 1049/2001 for access to documents relating to matters in the Euratom Treaty. Article 305(2) of the EC Treaty provides that its provisions shall not derogate from the Euratom Treaty [6] . Therefore, Article 255 of the EC Treaty and Regulation 1049/2001 apply only if there are no provisions to the contrary in the Euratom Treaty. In dealing with the complainant's request for access to documents, the Commission acted in line with these provisions.



14. As regards the complainant's allegation, the Commission referred to its reply of 27 May 2008 to the complainant's confirmatory application, in which it granted partial access to the Viewpoint, and dealt with the complainant's arguments. In this reply, the Commission explained that, on 23 February 2007, in accordance with Article 41 of the Euratom Treaty, the Bulgarian authorities communicated to the Commission an investment project for the construction of a new power plant, called " *Belene* ", in Bulgaria. The Commission issued the Viewpoint in accordance with Article 43 of the Euratom Treaty. The parts of the Viewpoint which could not be disclosed [7] contain details of the investment project in question. According to Article 44 of the Euratom Treaty [8], the Commission can publish investment projects communicated to it only with the consent of the Member States, persons or undertakings concerned. Therefore, in view of this Article, the Commission considered that the consent of the Bulgarian authorities was necessary for the disclosure of the Viewpoint. The Bulgarian authorities and the investor company were consulted with regard to the disclosure of the note communicating the investment project, with the result that they opposed disclosure. Therefore, on the basis of Article 44 of the Euratom Treaty, disclosure of the parts of the Viewpoint which reflected the content of the note had to be refused.

15. As regards the Ombudsman's question concerning its reference to the " *needed consent* ", the Commission explained that, in view of Article 44 of the Euratom Treaty, and given the fact that the Viewpoint contained details of the investment project in question, the Commission considered that it could not be disclosed without the consent of the Bulgarian authorities.

16. As regards the Ombudsman's question concerning the consultation process, the Commission explained that Article 44 of the Euratom Treaty provides that the consent of the Member State is needed in order to publish the projects communicated to the Commission. This provision cannot be assimilated into Article 4(5) of Regulation 1049/2001, which provides that a Member State may request the Commission not to disclose a document originating from that Member State without its prior agreement. Consequently, Article 4(5) of Regulation 1049/2001, and Article 5(5) of Commission Decision 2001/937/EC [9] implementing it, are not applicable in this case. By letter dated 17 July 2007, the Commission consulted the Bulgarian authorities following an earlier request by the complainant for access to the note communicating the proposed investment in Belene. In their reply dated 30 August 2007, the Bulgarian authorities explicitly opposed the disclosure of the note. Having received a further request from the complainant for access to the Viewpoint on the same investment project, the Commission considered it necessary to re-consult the Bulgarian authorities with regard to this new request for access. The authorities were consulted by e-mail of 25 April 2008, and were requested to provide a reply within two weeks. The Bulgarian authorities responded on 20 May 2008. On the basis of their response, partial access was granted to the Viewpoint.

17. As regards the Ombudsman's question concerning the " *elements needed* ", the Commission explained that it was under an obligation to obtain the consent of the Bulgarian authorities in order to disclose the Viewpoint to the complainant. This consent had not been obtained when its letter dated 17 May 2008 was drafted. The Bulgarian authorities replied only on 20 May 2008, giving their consent to partial disclosure of the Viewpoint.



18. In his observations, the complainant pointed out that it took the Commission 24 weeks to provide him with a definitive answer to his application for public access to documents, and that the Commission's explanations do not justify this delay. In fact, it appears that the Commission did not consult the Bulgarian authorities until 25 April 2008, that is, four months after his initial application was submitted. Furthermore, the complainant considered the Commission's interpretation of the relevant rules to be incorrect. He considered the Viewpoint to be a Commission document, not a third-party document, and, therefore, the consent of the Bulgarian authorities was not necessary for its disclosure. Furthermore, in his opinion, the Commission's interpretation of Article 44 of the Euratom Treaty had " *no basis in law* ". The complainant concluded by saying that the Viewpoint should have been disclosed in the interests of " *transparency of nuclear safety matters* ".

Preliminary remark

19. The Ombudsman notes that Declaration 41 on the provisions relating to transparency, access to documents and the fight against fraud [10] provides that:

" The Conference considers that the European Parliament, the Council and the Commission, when they act in pursuance of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, should draw guidance from the provisions relating to transparency, access to documents and the fight against fraud in force within the framework of the Treaty establishing the European Community. "

20. The Ombudsman welcomes the Commission's proactive approach in applying the provisions of Regulation 1049/2001 when dealing with a request made under the provisions of the Euratom Treaty. In this context, and taking into account certain procedural shortcomings identified below, he would like to encourage the Commission to formalise its above approach. He makes a further remark below in this regard.

The Ombudsman's assessment regarding the procedural aspects

21. The complainant alleged that the Commission failed to deal adequately, at the procedural level, with his application for public access to documents. On 8 December 2007, he submitted his application. The Commission's first reaction was to send him a holding letter on 16 January 2008, thanking him for his interest and stating that it needed to obtain the consent of the relevant national authorities before it could disclose the requested document, namely, the Viewpoint. It appears, therefore, that the Commission failed to acknowledge receipt of the complainant's request.

22. As regards the registration of initial applications for access to documents, Article 7 of Regulation 1049/2001 provides that:

" 1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant ".



23. The Ombudsman points out that Regulation 1049/2001 does not establish any specific rules regarding the time required to register a request for access to documents. However, the Ombudsman considers that there should not be undue delays in the registration of such requests, since the purpose of the above obligation to handle applications *promptly* could not be attained, if the Commission had discretion as to when an application should be registered. (In turn, such discretion would affect the deadline for dealing with such an application). In the Ombudsman's view, the obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally take places, at the latest, on the first working day following receipt of an application. Since the Commission appears to have failed to register the complainant's initial application, the Ombudsman considers that the Commission failed to respect the above obligation.

24. As regards the handling of initial applications, Article 7 of Regulation 1049/2001 further provides that:

" ...Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal ...

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application. "

25. On 24 February 2008, the complainant submitted a confirmatory application. On 17 March 2008, the Commission wrote to the complainant:

" I refer to your letter of 24 February 2008, in which, in accordance with Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, you lodged a confirmatory application for access to the [Viewpoint]. Your application is currently being handled. However, since we still have not been able to gather all the elements we need to carry out a proper analysis of your request in order to take a final decision, we will not be able to reply to your confirmatory request within the prescribed time limit. Therefore, we have to extend this period by another 15 working days in accordance with Article 8(2) of Regulation 1049/2001. The new deadline expires on 10 April 2008. I apologize for any inconvenience this delay may cause. "

26. As regards confirmatory applications, Article 8 of Regulation 1049/2001 provides that:

" 1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access...

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that



detailed reasons are given. "

27. In the Ombudsman's view, it is clear that the tight deadlines foreseen in Regulation 1049/2001 are meant to ensure that the right of access is fully respected. Any failure to respect these deadlines thus constitutes an instance of maladministration. Since the complainant submitted the confirmatory application on 24 February 2008, the Commission was to decide on it, at the latest, by 14 March 2008. However, it did not inform the complainant about the extension of the initial deadline until 17 March 2008. The Ombudsman finds that, although this delay was limited, the fact remains that the Commission failed to inform the complainant *in advance* of the extension of the deadline for replying to its confirmatory application.

28. Following its decision to extend the deadline for replying to the confirmatory application, the Commission should have sent a decision to the complainant, at the latest, by 4 April 2008. However, it was only on 10 April 2008 that the Commission wrote to the complainant:

" I refer to my holding reply of 17 March 2008, in which the time limit for replying to your confirmatory request was extended by 15 working days, pursuant to Article 8(2) of the Regulation. This extended time limit expires today. Unfortunately, we still have not been able to finalise the analysis of your request and are, therefore, not yet in a position to provide you with a final reply. However, I can assure you that we are doing our outmost to provide you with a final reply as soon as possible. The absence of a reply within the prescribed time limit should, therefore, not be interpreted as an implicit refusal to grant access. I regret this additional delay and sincerely apologize for any inconvenience this may cause. "

29. Similarly to Articles 7 and 8 of Regulation 1049/2001, Article 2 of Commission Decision C(2001) 3714 [11] provides that *" the Commission shall answer initial and confirmatory access applications within fifteen working days from the date of registration of the application. In the case of complex or bulky applications, the deadline may be extended by fifteen working days. "*

30. The Ombudsman points out that neither Regulation 1049/2001 nor Commission Decision C(2001) 3714 provide for a further extension to an already extended deadline for a decision on an (initial or confirmatory) application for access to documents. Since the Commission extended the deadline for replying to the complainant's confirmatory application on two occasions, the Ombudsman finds that the Commission failed to respect both the Regulation and the Commission Decision referred to above.

31. Furthermore, Article 8(2) of Regulation 1049/2001 requires the Commission to provide the applicant with *" detailed reasons "* for extending the deadline. What constitutes sufficiently *" detailed "* reasoning within the meaning of the above provision may differ from case to case, depending on the relevant circumstances. Nevertheless, a simple reference, formulated in general terms, to the fact that the Commission has not *" gathered all the elements [it] need [ed] to carry out a proper analysis of [the complainant's] request in order to take a final decision "* cannot satisfy the foregoing requirement. Similarly, the statement that the Commission *" still [has] not been able to finalise the analysis of [the complainant's] request and [is] , therefore, not yet in a position to provide [it] with a final reply "* cannot satisfy the above obligation. Such



statements do not contain adequate elements to enable a review of whether the extension is justified in the specific case. Rather, explanations as to why the Commission could not obtain the necessary elements for the analysis of the application, or why the consultation of a third party, as referred to in the Commission's reply of 16 January 2008, would be appropriate. In the present case, the Ombudsman considers that these statements do not amount to " *detailed reasons* " within the meaning of Article 8(2) of Regulation 1049/2001.

32. Consequently, the Ombudsman finds that, while the Commission made constructive use of the provisions of Regulation 1049/2001 in its handling of the complainant's request, it failed to implement its provisions correctly. In particular, he finds that the Commission:

- breached Article 7 of Regulation 1049/2001, by failing to register the complainant's initial application;
- breached Article 8 of Regulation 1049/2001, by failing to inform the complainant in advance of the extension of the deadline for replying to its confirmatory application;
- contradicted the above two articles of Regulation 1049/2001, by extending the already extended deadline for a decision on the confirmatory application;
- breached Article 8(2) of Regulation 1049/2001, by failing to provide detailed reasons for the extension of the deadlines; and
- provided its final reply to the complainant's confirmatory application of 24 February 2008 only on 27 May 2008, that is, three months after it was made.

33. In this context, the Ombudsman refers to complaint 3697/2006/PB, which concerned similar circumstances. In his decision closing that complaint, he also found instances of maladministration regarding the Commission's failure to respect the above provisions.

Therefore, in his decision of 22 October 2007, he made pertinent critical and further remarks. By letter of 19 January 2009, the Commission replied to the Ombudsman regarding his critical and further remarks concerning complaint 3697/2006/PB. In its reply, it stated that applications for access to documents are normally registered upon receipt or on the first working day following receipt, and any delay in the registration could only be due to exceptional circumstances. The Commission agreed with the Ombudsman that an applicant for access to documents should be informed of an extension of the time limit to reply before it actually expires. Finally, it also agreed that it should give the applicant concerned more detailed explanations as to the reasons for extending a time limit.

34. In view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, which is available on the Ombudsman's website and which *postdates* the shortcomings identified above, the Ombudsman trusts that the Commission will handle future applications for access to documents in accordance with the practices to which it referred to in that response. In view of these circumstances, the Ombudsman does not consider it necessary to issue a critical remark, with respect to his findings in paragraph 32 above.

The Ombudsman's assessment as regards the substantive aspects

35. The Ombudsman notes that Article 43 of the Euratom Treaty provides that:



" The Commission shall discuss with the persons or undertakings all aspects of investment projects which relate to the objectives of this Treaty. It shall communicate its views to the Member State concerned. "

Further, Article 44 of the Euratom Treaty provides that:

" The Commission may, with the consent of the Member States, persons and undertakings concerned, publish any investment projects communicated to it. "

36. The Ombudsman further notes that, in its reply dated 27 May 2008 to the complainant's confirmatory application, the Commission pointed out that the Viewpoint was adopted under Article 43 of the Euratom Treaty. It further explained that the parts of the Viewpoint which could not be disclosed contained information and details of the investment project communicated to it by the Bulgarian authorities. Since, following a consultation with the Bulgarian authorities on 17 July 2007, the latter objected to the disclosure of the note communicating the investment project in question, parts of the Viewpoint reflecting the latter's contents had to be redacted.

37. The Ombudsman considers that the Commission acted in accordance with the above requirement when it consulted the Bulgarian authorities. In fact, disclosure of the Viewpoint without consulting the Bulgarian authorities would have infringed the rule set out in Article 44 of the Euratom Treaty.

38. The Ombudsman also notes that the Commission already consulted the Bulgarian authorities with regard to the possible disclosure of the Viewpoint on 17 July 2007, and that the Bulgarian authorities opposed its disclosure. The Ombudsman considers that the Commission acted in accordance with the rules of good administrative practice by consulting the Bulgarian authorities again, following the complainant's second request, with a view to a possible disclosure under slightly different circumstances.

39. In view of the above, the Ombudsman finds that the Commission acted in accordance with the relevant rules when it contacted the Bulgarian authorities and, following their explicit objections, granted only partial access to the Viewpoint.

40. As regards the complainant's argument that the Viewpoint was not a third-party document, but a Commission document and, therefore, not subject to the obligation to consult third parties, the Ombudsman notes that the Commission never claimed that this was the case. In fact, the Commission explained that, under Article 44 of the Euratom Treaty, it was required to obtain the consent of the party concerned to disclose information communicated to it under Article 43 of the Euratom Treaty. From the outset, when handling the complainant's application, the Commission clearly stated the aforementioned, without ever claiming that the Viewpoint was a third-party document.

41. In light of the above considerations, the Ombudsman finds no instance of maladministration in connection to the complainant's arguments relating to the Commission's alleged failure to substantively deal with his application for public access to documents. Consequently, the



complainant's claim cannot be substantiated.

B. Conclusions

On the basis of his inquiries into this complaint, and as set out more specifically under paragraph 32 above, the Ombudsman identified several shortcomings in the Commission's procedural handling of the complainant's request for access to documents. Under normal circumstances, the identification of such shortcomings would have led the Ombudsman to issue a critical remark.

However, in view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, which is referred to in paragraph 33 above and *postdates* the shortcomings identified above, the Ombudsman trusts that the Commission will handle future applications for access to documents in accordance with the practices to which it referred to in that response. In light of these circumstances, the Ombudsman does not consider it necessary, in the present case, to issue a critical remark with respect to his findings in paragraph 32 above.

The complainant and the Commission will be informed of this decision.

FURTHER REMARK

The Ombudsman welcomes the Commission's proactive approach in applying the provisions of Regulation 1049/2001 when dealing with a request made under the provisions of the Euratom Treaty. Implementing this approach might be made easier if greater clarity and precision were introduced into the rules or guidelines. This could perhaps be achieved through a revision of the Commission's existing internal rules on the application of Regulation 1049/2001.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg, on 9 December 2009

[1] Regulation (EC) No 1049/2001 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.

[2] Under the Euratom Treaty, the Commission shall submit its viewpoint to the Member State concerned about investment projects relating to the objectives of the Treaty.

[3] Commission Decision of 5 December 2001 amending its rules of procedure (notified under



document number C(2001) 3714) OJ 2001 L 345 p. 94, concerning the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[4] Article 43 of the Euratom Treaty provides: "*The Commission shall discuss with the persons or undertakings all aspects of investment projects which relate to the objectives of this Treaty. It shall communicate its views to the Member State concerned.*"

[5] Article 255 of the Treaty establishing the European Community (EC Treaty) provides:

" 1. *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.*

2. *General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.*

3. *Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.*"

[6] Article 305 of the Euratom Treaty provides:

" 1. *The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel.*

2. *The provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community.*"

[7] Points 7-10, 14-18 and 20 of the Commission's Viewpoint.

[8] Article 44 of the Euratom Treaty provides: "*The Commission may, with the consent of the Member States, persons and undertakings concerned, publish any investment projects communicated to it.*"

[9] Article 5(5) of the Commission Decision 2001/937/EC provides: "*The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of*



the information at its disposal. "

[10] Declarations annexed to the Final act of Amsterdam, the full text of which is available on <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf> [Link].

[11] 2001/937/EC, ECSC, Euratom: Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714) OJ 2001 L 345 p. 94., concerning the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.