

## **Decision of the European Ombudsman closing his inquiry into complaint 819/2007/PB against the European Commission**

Decision

**Case 819/2007/PB - Opened on 29/05/2007 - Decision on 16/12/2009**

The Commission refused to grant public access to Ireland's application in a case before the Court of Justice. The court case concerned a request to annul Directive 2006/24/EC on the retention of data in electronic communications services.

The Commission found that it would be damaging to the court proceedings to grant public access to Ireland's application. It relied on an exception in the EU's legislation on public access to documents, namely, Regulation 1049/2001.

The complainant disagreed. He argued that even if the exception referred to by the Commission applied, there was an "overriding public interest" in access to Ireland's application. He referred to a provision of Regulation 1049/2001, which foresees that, even when an exception to access applies, there might be an "overriding public interest".

During the Ombudsman's inquiry, the Court of First Instance issued a judgment suggesting that the submissions of parties to a court case shall normally remain confidential until a hearing - if any - has been conducted. In the case before the Ombudsman, the Commission refused public access at a time when the hearing had not yet been conducted. The substance of the Commission's decision was, therefore, correct at the time when it was taken.

The Court of Justice subsequently conducted a hearing in the case initiated by Ireland. The Ombudsman held that, following the hearing, the Commission was obliged to give valid reasons for its refusal to grant public access to Ireland's application. He based his view on the above-mentioned judgment of the Court of First Instance. However, the Commission maintained its refusal to grant access, and did so without providing valid reasons. The Ombudsman, therefore, issued a critical remark.

The Ombudsman furthermore queried whether the Commission had effectively ignored the relevant interpretation in the above-mentioned judgment of the Court of First Instance. It appeared that the Commission might have done so because that judgment had been appealed to the Court of Justice, the decision of which could, of course, change the relevant parts of the challenged judgment.



The Ombudsman expressed, in a further remark, his understanding that the existence of an appeal to the Court of Justice does not justify a decision to ignore an interpretation set out in the judgment against which an appeal is made. The Ombudsman invited the Commission to provide relevant information and comments on its position and practices regarding this issue.

As regards the complainant's argument of an "overriding public interest", the Ombudsman considered that this argument was unfounded.

## THE BACKGROUND TO THE COMPLAINT

1. On 23 October 2006, the complainant submitted, in accordance with 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 ('Regulation 1049/2001') [1], a request to the Commission for access to a copy of an application that Ireland made to the Court of Justice. The application sought the annulment of Directive 2006/24/EC of the European Parliament and the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (Case C-301/06 *Ireland v Council and Parliament* [2]).

2. On 16 November 2006, on the basis of the exception intended to protect "court proceedings" (Article 4(2), second indent of Regulation 1049/2001), the Commission rejected the complainant's request. It cited two main concerns: *first*, the parties to such a court case had to be able to act independently of any external influences, especially those potentially emanating from interest groups, and, *second*, the court proceedings had to be able to take place in an undisturbed atmosphere.

3. The Commission further stated that an overriding public interest in disclosure could not be identified, and that partial access could not be granted because the entirety of the document concerned was covered by the above exception.

4. The Commission also pointed out that the key points of Ireland's application for annulment had already been published in the Official Journal.

5. On 16 November 2006, the complainant submitted a confirmatory request under Regulation 1049/2001, arguing that the exception invoked by the Commission did not apply. The complainant also considered, in summary, that the public interest in disclosure was *overriding* because data protection is a particularly important fundamental right on which the Court of Justice had already issued a decision (he appeared to refer to Joined Cases C-317/04 and C-318/04 *Parliament v Council* (C-317/04) and *Commission* (C-318/04) [3]), and because there was intense public discussion in relation to the directive challenged by Ireland.

6. On 19 March 2007, the Commission replied to the complainant's confirmatory request for



access and essentially confirmed its refusal.

7. In his complaint to the Ombudsman, the complainant put forward that the exception invoked by the Commission was invalid, and that, even if it was valid, the Commission wrongly concluded that there was no 'overriding public interest' in granting access.

## **THE SUBJECT MATTER OF THE INQUIRY**

8. On 29 May 2006, the Ombudsman opened an inquiry into the following allegation and claim:

*The Commission failed to act in accordance with Regulation 1049/2001 in rejecting the complainant's confirmatory application.*

*The Commission should grant him access to the document requested in his confirmatory application.*

## **THE INQUIRY**

9. On 29 May 2007, the Ombudsman forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 13 September 2007. On 28 September 2007, the Ombudsman conducted further inquiries, and informed the complainant accordingly. On 22 January 2008, the Commission sent its complementary opinion in reply to those further inquiries. The Ombudsman sent the Commission's initial and complementary opinions to the complainant, with an invitation to submit observations. The complainant submitted his observations on 3 February 2008. Following a preliminary assessment of the case, and related correspondence with the complainant, on 25 June 2008, the latter informed the Ombudsman that the oral hearing in case C-301/06 would take place on 1 July 2008. In his view, the Commission would thereafter be obliged to disclose Ireland's application. In light of this information, on 15 July 2008, the Ombudsman wrote to the Commission asking whether it was considering to disclose the said document following the oral hearing in Case C-301/06. On 1 December 2008, the Commission replied negatively to the Ombudsman's question. The Ombudsman then forwarded the reply to the complainant, who, following a reminder, submitted his observations on 1 April 2009, stating that, since the whole procedure in Case C-301/06 had ended, the disputed document should now be disclosed.

## **THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS**

**A. Allegation of failure to act in accordance with Regulation 1049/2001 in rejecting the complainant's confirmatory application**



### *Arguments presented to the Ombudsman*

10. The Commission rejected the complainant's confirmatory request for access to an application submitted by Ireland in the course of the court proceedings in Case C-301/06 *Ireland v Council and Parliament* [4] . It took the position that this document was covered by Article 4, second indent, of Regulation 1049/2001 (protection of court proceedings) [5] . The complainant argued that the exception invoked by the Commission did not apply. He also considered that the public interest in disclosure was *overriding* - in the sense of Article 4(2), final paragraph [6] - because, in summary, data protection is a particularly important fundamental right on which the Court of Justice had already issued a decision (he appeared to refer to Joined Cases C-317/04 and C-318/04 *Parliament v Council* (C-317/04) and *Commission* (C-318/04) [7] ), and because there was intense public discussion in relation to the directive challenged by Ireland.

11. In its complementary opinion, the Commission stated that it understood the decision of the Court of First Instance in Case T-36/04 *Association de la Presse Internationale v Commission* [8] to imply that, until the oral hearing, submissions of the parties to the court case are covered by the exception laid down in Article 4(2), second indent, of Regulation 1049/2001. At that time, the court case concerned, namely, Case C-301/06 *Ireland v Council and Parliament* [9] , had not yet been heard by the Court of Justice. The Commission, therefore, confirmed its refusal not to grant access to the application lodged by Ireland. The institution further confirmed its view that there was no 'overriding public interest' in disclosure.

12. In his observations, the complainant expressed understanding for the Commission's reading of Case T-36/04 *Association de la Presse Internationale v Commission* [10] . However, he pointed out that he still did not share the Commission's view regarding the absence of an 'overriding public interest' in disclosure.

13. The complainant subsequently drew the Ombudsman's attention to the fact that the oral hearing in C-301/06 would take place on 1 July 2008, and that, in his view, the Commission should thereafter disclose the Irish application. The Ombudsman asked the Commission to comment on this development in the case.

14. The Commission subsequently submitted a reply, in which it put forward the following position:

15. In its Judgment in Case T-36/04 *Association de la Presse Internationale v Commission* [11] , which concerned possible public access to the Commission's own pleadings, the Court of First Instance ruled that: " *after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates* " (paragraph 82). It cannot be inferred from this Judgment that written submissions to the Court should automatically be disclosed after the oral hearing.



16. In that same Judgment, the Court recalled that the Courts themselves treat the parties' pleadings as confidential, pursuant to the Statute of the Court of Justice, which is also applicable to the Court of First Instance, the Rules of Procedure of the Court of Justice and of the Court of First Instance and the Instructions of the Registrar of the Court of First Instance (paragraph 87).

17. The Court ruled that the provisions mentioned above:

*" do not, however, prohibit parties from disclosing their own pleadings, since the Court of Justice has stated that no rule or provision authorises or prevents parties to proceedings from disclosing their own written submissions to third parties and that, apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which was not the position in the case before it, the principle is that parties are free to disclose their own written submissions (Order in Germany v Parliament and Council, (...)). "*

The Court did not rule that parties are free to disclose submissions of *other* parties to the proceedings.

18. Regardless of the fact that the Judgment of the Court of First Instance in Case T-36/04 is currently under appeal (Cases C-514/07, C-528/07 and C-532/07), the Commission considers that it cannot be inferred from this Judgment that the Commission is under an obligation to disclose the written submissions of another party after the oral hearing has taken place.

19. The reply containing the Commission's above position was forwarded to the complainant. He maintained his allegation and added that Case C-301/06 had been closed. Access should, therefore, in any case be granted.

#### *The Ombudsman's assessment*

20. In light of this development in the present inquiry, and the related external events, the Ombudsman's assessment necessarily covers two questions: First, whether the Commission's decision on the complainant's confirmatory application was consistent with Regulation 1049/2001 at the time it was taken. Second, whether the position which the Commission formulated in the course of the present inquiry and which related to events subsequent to the opening of the present complaint, is consistent with Regulation 1049/2001.

21. In order to carry out the first part of the assessment, it is useful to recall in detail the content of the Commission's decision of 19 March 2007 on the complainant's confirmatory application.

22. In its decision, the Commission confirmed its position that Ireland's application in Case C-301/06 could not be disclosed, in light of the exception in Article 4(2), second indent, of Regulation 1049/2001, concerning the protection of court proceedings. It stated the following grounds in support of that position: first, the parties to such a court case had to be able to act independently of any external influences; second, disclosure of applications and other documents during the court proceedings would undermine the rights of defence of the parties,



and would influence the formulation and use of legal arguments submitted to the Court.

23. In support of its above position, the Commission referred to Case T-92/98, *Interport II* , paragraph 40, and Case T-174/95, *Svenska Journalistförbundet v Council* , paragraph 10.

24. In the first case cited by the Commission, *Interport II* , the Court of First Instance made the following relevant findings:

*" 40 In the light of those considerations and in view of the requirement to interpret the exception strictly, the expression 'court proceedings' must be interpreted as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up by the Commission solely for the purposes of specific court proceedings.*

*41 The words 'documents drawn up by the Commission solely for the purposes of specific court proceedings' must be understood to mean not only the pleadings or other documents lodged, internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers. "*

25. In the second case cited, *Svenska Journalistförbundet v Council* , the Court of First Instance made the following relevant findings:

*" Findings of the Court*

*135 Under the rules which govern procedure in cases before the Court of First Instance, parties are entitled to protection against the misuse of pleadings and evidence. Thus, in accordance with the third subparagraph of Article 5(3) of the Instructions to the Registrar of 3 March 1994 (OJ 1994 L 78, p. 32), no third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President, after the parties have been heard. Moreover, in accordance with Article 116(2) of the Rules of Procedure, the President may exclude secret or confidential documents from those furnished to an intervener in a case.*

*136 These provisions reflect a general principle in the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public.*

*137 It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing his own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case.*

*138 In the present case, it is clear that the actions of the applicant in publishing an edited version of the defence on the Internet in conjunction with an invitation to the public to send their*



*comments to the Agents of the Council and in providing the telephone and telefax numbers of those Agents, had as their purpose to bring pressure to bear upon the Council and to provoke public criticism of the Agents of the institution in the performance of their duties.*

*139 These actions on the part of the applicant involved an abuse of procedure which will be taken into account in awarding costs (see below, paragraph 140), having regard, in particular, to the fact that this incident led to a suspension of the proceedings and made it necessary for the parties in the case to lodge additional submissions in this respect. "*

26. The Ombudsman notes that the Court of Justice, in an Order of 3 April 2000 in Case C-376/98 *Germany v Parliament and Council* [12] , made the following findings (emphasis added):

*" So far as infringement of the principle of confidentiality is concerned, there is no rule or provision under which parties to proceedings are authorised to or prevented from disclosing their own written submissions to third parties. Apart from **exceptional cases** where disclosure of a document might adversely affect the proper administration of justice, which is not the case here, **the principle is that parties are free to disclose their own written submissions.** "*

27. Thus, the Court of Justice found that there is a principle, according to which parties are free to disclose their own written submissions , and adverse effects on the proper administration of justice can only be expected to occur in exceptional cases.

28. In the present case, the Commission does not appear to have taken into account the above case-law of the Court of Justice when it decided on the complainant's confirmatory application. If proper consideration had been given to the above-mentioned Order of the Court of Justice, an important procedural step foreseen in Regulation 1049/2001 would have been more obvious, namely, the consultation of the relevant third party, in this case Ireland, regarding disclosure (Article 4(4)). It is true that this consultation is only obligatory " *unless it is clear that the document shall or shall not be disclosed* ". However, in light of the principle referred to by the Court of Justice in the Order cited above, it cannot reasonably be argued that it was 'clear' that the document should not be disclosed. Accordingly, the Commission should have consulted Ireland under the above-mentioned Article 4(4) of Regulation 1049/2001. Its failure to do so at the time of its decision on the confirmatory application constituted, in the Ombudsman's view, a shortcoming in its handling of the complainant's application for access.

29. The Ombudsman notes, however, that the Judgment of the Court of First Instance in Case T-36/04 *Association de la Presse Internationale v Commission* [13] appears to confirm that applications made before the Community Courts must, as a category, remain undisclosed until the relevant court has decided whether or not an oral hearing should take place. The Commission's negative decision on the complainant's confirmatory application was taken at a time when no such decision had been taken. It was, therefore, substantively valid.

30. With regard to the question of a possible overriding public interest in disclosure, the Ombudsman does not consider that the complainant has put forward information or arguments





that demonstrate the existence of such an interest within the meaning of Regulation 1049/2001. In reaching this finding, the Ombudsman points to the relevant considerations and findings of the Court of First Instance in *Association de la Presse Internationale v Commission* [14] , in particular, to its remarks concerning the existing level of openness surrounding court cases at the EU level (paragraphs 98-99), its finding that the restriction of access is, at any rate, not absolute (paragraph 100), and the standard of assessment that it applied in that case regarding the Commission's decision (" *did not commit a manifest error of assessment* ", paragraph 101).

31. With regard to the second question to be assessed here, namely, whether the Commission has put forward a valid position in light of the relevant developments that were subsequent to the present complaint, the specific issue to be examined is the Commission's position following the oral hearing in Case C-301/06.

32. As noted further above, the Court of First Instance, in Case T-36/04 *Association de la Presse Internationale v Commission* [15] , appeared to confirm that applications made before the Community Courts must, as a category, remain undisclosed until the relevant court has decided whether or not an oral hearing should take place. The Ombudsman considers it natural that the complainant expected the Commission to at least revise its decision on possible access, in light of the finalisation of the oral hearing in Case C-301/06. The Ombudsman, therefore, asked the Commission to respond to this matter in a letter of further inquiry.

33. The Commission's response cannot be considered satisfactory. It stated, first, that it cannot be inferred from the Judgment of the Court in *Association de la Presse Internationale v Commission* that written submissions to the Court " *should automatically be disclosed after the oral hearing* " (emphasis added). It referred to the following statement in that judgment: " *after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates* " (paragraph 82). Second, referring to the Order of the Court of Justice cited in paragraph 26 above, the Commission stated that " *the Court did not rule that parties are free to disclose submissions of other parties to the proceedings* " (emphasis added); third, the Commission stated, again with regard to the judgment in *Association de la Presse Internationale v Commission* , that " *it cannot be inferred from this judgment that the Commission is under an obligation to disclose the written submissions of another party after the oral hearing has taken place* " (emphasis added).

34. For the purpose of a request for public access to documents under Regulation 1049/2001, the Commission's above statements are not helpful. The Commission submitted three statements on what the Court did 'not' say, and each of these statements is of no obvious relevance with respect to the application of Regulation 1049/2001. The relevant obligation, which in the Ombudsman's view, can logically be derived from the case-law referred to above, is contained in the following previously cited statement, also quoted by the Commission itself: " *after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would*





undermine the court proceedings to which it relates " (paragraph 82).

35. Taken together with the previously quoted principle - formulated by the Court of Justice - that that parties are free to disclose their own written submissions, it appears that the Commission was under an obligation, following the hearing in Case C-301/06 *Ireland v Council and Parliament* , to consult Ireland under Article 4(4) of Regulation 1049/2001 regarding disclosure of the document here concerned, and to subsequently carry out a concrete assessment of that document's public or confidential nature. Its failure to do so constitutes an instance of maladministration, and the Ombudsman will make a corresponding critical remark below.

36. In addition to the above finding, the Ombudsman points out that the Commission's response may convey the impression that, in light of the fact that *Association de la Presse Internationale v Commission* was appealed to the Court of Justice, it effectively decided to ignore the above-mentioned rule. The Ombudsman does not consider it appropriate to disregard this aspect of the case. Specifically, it is the Ombudsman's understanding that the existence of an appeal to the Court of Justice does not justify a decision to ignore the interpretation set out in the court judgement against which an appeal has been made. The Ombudsman, therefore, considers it appropriate to issue a further remark at the end of the decision, to which the Commission will be asked to respond in the framework of the follow-up procedure for critical and further remarks for the year 2009.

37. With regard to the facts of the present case, the Ombudsman notes that the court proceedings in Case C-301/06 have in the meantime ended, but the complainant has apparently not received any additional relevant reply from the Commission, formulated in light of this development. Given that the Ombudsman's above findings in paragraphs 35-36 specifically concern the failure to fulfil obligations relating to the ongoing court proceedings referred to above, it would not be appropriate to issue a friendly solution proposal or a draft recommendation at this point in the present case. The Ombudsman nevertheless trusts that, in light of the fact that the proceedings in C-301/06 have come to an end, the Commission will inform the complainant of its position on his access request, and do so in a timely manner.

## C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

Taken together with the previously quoted principle - formulated by the Court of Justice - that parties are free to disclose their own written submissions, it appears that the Commission was under an obligation, following the hearing in Case C-301/06 *Ireland v Council and Parliament* , to consult Ireland under Article 4(4) of Regulation 1049/2001 regarding disclosure of the document here concerned, and to subsequently carry out a concrete assessment of the



document's public or confidential nature. Its failure to do so constitutes an instance of maladministration.

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

## FURTHER REMARK

It is the Ombudsman's understanding that the existence of an appeal to the Court of Justice does not justify a decision to ignore the interpretation set out in the court judgment against which an appeal has been made. The Ombudsman would be grateful if the Commission could provide relevant information and comments on its position and practices on that issue.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 December 2009

[1] OJ 2001 L 145, p. 43.

[2] Case C-301/06 *Ireland v Council and Parliament* , OJ 2006 C 237, p. 5.

[3] Joined Cases C-317/04 and C-318/04 *Parliament v Council* (C-317/4) and *Commission* (C-318/04) [2006] ECR I-4721.

[4] Case C-301/06 *Ireland v Council and Parliament* , cited above.

[5] The Commission also made certain comments concerning Article 4(5) of Regulation 1049/2001 (regarding a Member State prior agreement for disclosure). In light of the findings below, it has not been necessary to examine those comments in the present decision.

[6] " 2. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

- *commercial interests of a natural or legal person, including intellectual property,*
- *court proceedings and legal advice,*
- *the purpose of inspections, investigations and audits,*

*unless there is an overriding public interest in disclosure. "*



[7] Joined Cases C-317/04 and C-318/04 *Parliament v Council* (C-317/4) and *Commission* (C-318/04) [2006], cited above.

[8] Case T-36/04 *Association de la Presse Internationale v Commission* [2007] ECR II-3201.

[9] Case C-301/06 *Ireland v Council and Parliament* , cited above.

[10] Case T-36/04 *Association de la Presse Internationale v Commission* , cited above.

[11] Case T-36/04 *Association de la Presse Internationale v Commission* , cited above.

[12] Order of the Court of 3 April 2000 *Germany v Parliament and Council* [2000] ECR I-2247.

[13] Case T-36/04 *Association de la Presse Internationale v Commission* , cited above.

[14] Case T-36/04 *Association de la Presse Internationale v Commission* , cited above.

[15] Case T-36/04 *Association de la Presse Internationale v Commission* , cited above.