

Decision of the European Ombudsman concerning complaint 966/2009/JMA against the European Commission

Decision

Case 966/2009/JMA - Opened on 12/05/2009 - Decision on 08/02/2010

BACKGROUND

1. On 27 July 2005, the Commission published a call for expressions of interest in order to select a firm to carry out a study on national regulatory restrictions in the pharmaceutical field. From among the various applicants, the Commission chose the Dutch firm Ecorys Nederland BV, which completed the study on 22 June 2007. On 31 January 2008, the Commission's Directorate-General for the Internal Market and Services (DG Internal Market) posted the study report on its webpage.

2. On 23 October 2008, acting on behalf of the Pharmaceutical Association of Valencia (MICOV), the complainant asked the Commission for access to the documents drawn up by Ecorys Nederland BV in preparation of the final report. These consisted of the first and second interim versions, the draft final report and the power point presentation of the final report.

3. On 22 December 2008, the Commission rejected the complainant's request on the grounds that: (i) the disclosure of the requested documents would undermine the protection of commercial interests, as set out in Article 4(2) of Regulation 1049/2001 ('the Regulation') [1], since they would reveal a methodology specific to Ecorys and thus, part of its intellectual property; (ii) the examination of the complainant's request had not led it to believe that an overriding public interest in disclosure of the requested documents existed; and (iii) no partial access was possible in this case.

4. On 19 January 2009, the complainant submitted a confirmatory request to the Commission's Secretary-General and noted that: (i) the Commission had not identified the specific interests that would be undermined by the disclosure of the requested documents, given that the methodology developed by Ecorys was already disclosed to the public by the company itself in the final report and is widely known among economists and researchers; (ii) the Commission did not give reasons in support of its conclusion that an overriding public interest in disclosure was not present in this case; and (iii) the Commission did not justify why a partial disclosure would



not be possible.

5. On 15 April 2009, in the absence of any reply from the Commission, the complainant submitted a complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

5. In his complaint, the complainant made the following allegations and claim:

- The Commission failed to reply to his initial request for access to documents in due time (within 15 days);
- The Commission failed to reply to his confirmatory request of 19 January 2009;
- The Commission's decision to reject his request to access the documents on the grounds of protection of commercial interests (Article 4.2 of Regulation 1049/2001) was wrong, since: (a) it did not identify any specific interest which might be undermined, taking into consideration that its stated justification, namely the protection of the methodology developed by Ecorys, was not valid considering that the methodology in question had already been publicly disclosed by the company itself and it is widely known among economist and researchers; (b) it did not explain why it concluded that an overriding public interest in disclosure was not present in this case; and (c) it did not justify why a partial disclosure would not be possible.

The complainant therefore claimed that the requested documents should be disclosed.

THE INQUIRY

6. On 12 May 2009, the Ombudsman opened an inquiry and sent the complaint to the European Commission with a request for an opinion. On 8 October 2009, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations before 31 November 2009. On 3 November 2009, the complainant sent his observations on the Commission's opinion.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation that the Commission failed to reply to the complainant's initial request in due time

Arguments presented to the Ombudsman

7. The complainant argued that, despite having submitted his initial request for access on 23 October 2008, the Commission did not respond within the deadline established in the Regulation (15 days), but only on 22 December 2008.



8. The Commission acknowledged that it was not able to handle the request within the deadline prescribed by the Regulation. It explained, however, that the complainant requested access to complex documents originating from a third party. It pointed out that the delay was a result of the analysis of the documents and consultation with the author in order to establish whether any of the exceptions applied.

9. In his observations, the complainant restated the arguments made in the complaint.

The Ombudsman's assessment

10. The Ombudsman notes that, according to Article 7(1) of Regulation 1049/2001, an application for access to a document must be handled promptly. Accordingly, an acknowledgement of receipt must be sent to the applicant and, within 15 working days from registration of the application, the institution must either grant access to the document requested and provide access or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his right to make a confirmatory application.

11. In exceptional cases, such as applications relating to very long documents or to a very large number of documents, Article 7(3) of the Regulation 1049/2001 foresees that:

"[T]he 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."

12. The Ombudsman finds that, in this case, the complainant submitted his request for access on 23 October 2008 and the Commission only replied to that request on 22 December 2008, well beyond the 15 working days established in the Regulation. Although the Commission has argued that such a delay was justified because of the nature of the requested documents, it neither informed the complainant of the need to extend the 15-day deadline, nor of the reasons in support of the extension, as required by Article 7(3) of the Regulation.

13. 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 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. The Commission also agreed that it should give the applicant concerned more detailed explanations as to the reasons for extending a time limit. The Commission's reply is included in the study of the follow-up to critical and further remarks in 2008, which is available on the Ombudsman's website.

14. In view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, issued on the same date as the complainant files his confirmatory application, 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 these circumstances, the Ombudsman does not consider it necessary to issue a critical remark in the present case.

B. Allegation that the Commission failed to reply to the confirmatory request

15. The complainant argued that the Commission failed to reply to his confirmatory request of 19 January 2009.

16. The Commission pointed out that it was not able to handle the confirmatory request within the deadlines prescribed by the Regulation and that its services were only able to reply to the complainant's confirmatory application on 15 June 2009 because they needed considerable time to examine the documents requested in order to determine whether exceptions applied and if partial access could be granted.

17. In his observations, the complainant welcomed that the Commission had finally replied to his confirmatory application, albeit after several months.

The Ombudsman's assessment

18. The Ombudsman notes that the procedure for the processing of confirmatory applications is set out in Article 8 of the Regulation, which, in paragraph 1, establishes as a general rule that that the institution shall either grant access to the document requested and provide access to it, or, in a written reply, state the reasons for the total or partial refusal within 15 working days from the registration of the confirmatory application. Article 8(2) foresees that, 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.

19. The Ombudsman notes that, following his inquiry, the Commission proceeded to reply to the complainant's confirmatory application and, therefore, resolved the issue at hand. Despite the fact that the delay in the reply to the confirmatory application was not part of the complainant's original allegation, the Ombudsman is mindful of the fact that such a late reply did not comply with the procedural rules set out in paragraphs 1 and 2 of Article 8. Nevertheless, in view of the Commission's reply to the Ombudsman's remarks in his decision on complaint 3697/2006/PB mentioned above, the Ombudsman is confident that the Commission will handle future applications for access to documents in accordance with the practices to which it referred to in that response. Under these circumstances, the Ombudsman does not consider it appropriate to pursue further inquiries as regards this aspect of the case.

C. Allegation that the Commission wrongly refused to grant full access to the requested documents and claim that these



documents should be disclosed.

20. The complainant considered that the Commission's refusal of his request for access was ungrounded. He outlined that the commercial interests and intellectual property of the contractor (that is, the methodology of the study) could not be undermined by the disclosure of the requested documents, since this document had already been described in detail in the final report, which had been made public. The complainant also noted that the Commission's reply (i) did not address why partial access was not possible, and (ii) did not take into account the overriding public interest in disclosure. Accordingly, he claimed that the documents requested should be fully disclosed.

21. The Commission acknowledged that the methodology applied in the study concerned was described in detail in the final report and relies on well-known analytical tools. It explained, however, that the contractor requested not to disclose the documents because he considered that they would give the public and the competitors an insight into the internal workings of his firm, thus undermining its competitive advantage.

22. The Commission explained that, following the complainant's confirmatory application, it discussed the matter with the Dutch firm Ecorys Nederland BV and decided to grant partial access to the requested documents. The Commission argued that public disclosure of incomplete and preliminary findings and assessments, which are subject to final checks, could give rise to a potential misrepresentation of the quality of the study performed by the contractor. It would also reveal its know-how for drawing up the final report. Consequently, the non-disclosed parts fell under the exception of Article 4(2), first indent of Regulation 1049/2001 aimed at protecting commercial interests of a natural or legal person.

23. The Commission also found that there was no overriding public interest in disclosure of the withheld parts of the reports. The Interim Report and the Draft Main Report were submitted to the Commission service merely to inform it about the progress of the research and did not serve as a basis of any policy decisions.

24. As a result, the Commission considered that the decision not to grant full access to the documents requested was adequate and in line with the provisions of the Regulation.

25. In addition, the Commission informed the Ombudsman that the subject matter of the complaint submitted to him was also the subject of a legal action which the complainant had brought before the General Court (formerly the Court of First Instance) and which had been registered under reference number T-337/09.

26. In his observations, the complainant repeated the arguments made in his complaint. He confirmed that he had appealed against the Commission's decision to grant only partial access before the Union courts and that the object of this appeal was identical to that of his complaint to the Ombudsman.

The Ombudsman's assessment



27. The Treaty on the functioning of the European Union and the Statute of the European Ombudsman set precise conditions as to the admissibility of a complaint. The Ombudsman can only start an inquiry if these conditions are met. Article 228 of the Treaty on the Functioning of the European Union (former Article 195 EC) empowers the European Ombudsman to receive complaints:

"[C]oncerning instances of maladministration in the activities of the Community institutions or bodies ... except where the alleged facts are or have been the subject of legal proceedings."

28. Furthermore, Article 1(3) of the Statute of the European Ombudsman establishes that:

" The Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. "

29. In those situations, Article 2(7) of the Statute of the European Ombudsman foresees that:

" When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action. "

30. In view of the above considerations, it appears that the subject matter of this aspect of the complaint before the Ombudsman has been the object of an action brought by the complainant before the General Court and registered under reference number T-377/09. Accordingly, in view of the applicable legal provision referred to above, the Ombudsman cannot deal any further with this aspect of the complaint and, therefore, closes it.

D. Conclusion

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

As regards the first allegation, on the basis of his inquiries into this complaint, and as set out more specifically under paragraph 12 of this decision, the Ombudsman identified a shortcoming in the Commission's procedural handling of the complainant's request for access to documents. In view of the Commission's response to the Ombudsman's remarks in his decision on complaint 3697/2006/PB, which postdates the shortcoming identified above, the Ombudsman trusts that the Commission will handle applications for access to documents in the future in accordance with the practices that it referred to in that response. In these circumstances, the Ombudsman does not consider it necessary, in the present case, to issue a critical remark corresponding to his finding in paragraph 12.

As regards the second allegation, the Ombudsman does not consider it necessary to pursue



further inquiries as regards this aspect of the case.

As regards the third allegation and related claim, in view of the fact that the complainant has brought a legal action before the General Court (formerly the Court of First Instance) concerning identical facts, pursuant to Article 228 of the Treaty on the Functioning of the European Union (former Article 195 EC) and Article 2(7) of his Statute, the Ombudsman closes this aspect of the case.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 8 February 2010

[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 L 145, 31.5.2001, pp. 43-48.