

Decision of the European Ombudsman closing his inquiry into complaint 1202/2009/GG against the European Commission

Decision

Case 1202/2009/GG - Opened on 02/06/2009 - Decision on 15/02/2010

THE BACKGROUND TO THE COMPLAINT

1. The complainant, who appears to be a citizen of the Czech Republic, considers that a road building project in the Czech Republic (the "Prague Ring Road") infringes his rights and the rights of citizens in general. In this context, the complainant already approached the European Commission's Directorate-General Regional Policy ("DG Regio") on several occasions.
2. On 16 September 2008, the complainant asked DG Regio for access to the correspondence of JASPERS concerning the Prague Ring Road. On 18 September 2008, the complainant provided further details concerning his request in a letter to DG Regio.
3. JASPERS ("Joint Assistance to Support Projects in European RegionS") is a technical support facility set up in 2006 to help the 12 Member States which joined the EU in 2004 and 2007 identify and prepare projects potentially eligible for assistance under the EU Structural Funds. It is managed by the European Investment Bank ("EIB"). The other partners are the European Commission, the European Bank for Reconstruction and Development and Kreditanstalt für Wiederaufbau, which joined JASPERS in 2008 as an associate partner.
4. On 20 November 2008, the complainant made a confirmatory application for access.
5. On 27 February 2009, the complainant addressed a reminder to DG Regio.
6. On 3 April 2009, the Commission informed the complainant that JASPERS was a unit within the EIB, which was financed by a grant from the Commission. It added that there was no correspondence with the EIB concerning the issue mentioned by the complainant. The Commission advised the complainant to turn to the EIB.

THE SUBJECT MATTER OF THE INQUIRY



7. In his complaint, the complainant in essence put forward the following allegation:

The Commission has failed to deal with his request for access to the correspondence of JASPERS concerning the Prague Ring Road and his confirmatory application properly and within the deadlines foreseen by Regulation 1049/2001.

In this context, the complainant submitted (i) that no acknowledgment of receipt was sent as regards his initial request of 16 September 2008; (ii) that this request was not handled within the period of time foreseen by Regulation 1049/2001; (iii) that no acknowledgment of receipt was sent as regards his confirmatory application of 20 November 2008; (iv) that this confirmatory application was not handled within the period of time foreseen by Regulation 1049/2001; (v) that it was not imaginable that the Commission or DG Regio as one of the three partners making up JASPERS did not hold any correspondence; and (vi) that DG Regio's letter of 3 April 2009 failed to inform him about the possibilities of appeal foreseen by Article 8(1) of Regulation 1049/2001.

8. According to Article 7(1) of Regulation 1049/2001, requests for access are to be dealt with within 15 working days after registration. In cases where this deadline is not respected, citizens have the possibility to make a confirmatory application. This is what the complainant did in the present case. In these circumstances, the Ombudsman considered that there was no need for an inquiry into point (ii), i.e., the alleged delay as regards the handling of the original request for access.

THE INQUIRY

9. The complaint was lodged on 6 May 2009. On 7 May 2009, the complainant submitted further evidence concerning his complaint.

10. The complainant had previously submitted another complaint (complaint 3085/2008/GG), which he had asked to be treated confidentially. In response to a question to that effect in the present case, the complainant requested confidentiality for his address and e-mail address, but not for his name. He further suggested that the Ombudsman should carefully handle the (private) e-mail address of a Czech minister that was mentioned in his complaint. In view of the above, the Ombudsman decided that it was appropriate to treat the complaint as being confidential in its entirety.

11. On 2 June 2009, the Ombudsman asked the Commission for an opinion on this complaint.

12. The Commission sent its opinion on 5 November (English original) and 1 December 2009 (German translation). The opinion was forwarded to the complainant with an invitation to submit observations by 31 December 2009. No observations were received from the complainant.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS



A. Allegation of failure to deal with the request for access properly and within the deadlines foreseen by Regulation 1049/2001

Arguments presented to the Ombudsman

13. In its opinion, the Commission accepted that it had failed to deal with the complainant's request for access of 16 September 2008 and his confirmatory application of 20 November 2008 within the deadlines foreseen in Regulation 1049/2001 and in line with the procedural requirements laid down in Commission Decision 2001/937/EC of 5 December 2001 amending its rules of procedure [1] ("Decision 2001/937"). The Commission added that it regretted the delay that had occurred.

14. The Commission pointed out, however, that the Cabinet of the Commissioner responsible and DG Regio had received a considerable number of letters, e-mails and telephone calls from the complainant concerning sections 518 and 519 of the Prague Ring Road. In the Commission's view, the complainant had made repetitive requests concerning these sections. The Commission explained that he had therefore been informed, by e-mail of 3 June 2008 and by letter of 6 August 2008, that its services would discontinue any further exchange of correspondence concerning these sections. The Commission explained that its services did not, therefore, initially realise that the letter of 16 September 2008 concerned a different subject. It submitted that DG Regio acted diligently once it understood what the request was about. The Commission added that the delay that occurred was mainly due to the large number of letters, e-mails and calls from the complainant and the wide scope of his requests.

15. As regards the request for access as such, the Commission explained that DG Regio was not in possession of the documents requested by the complainant.

16. The Commission noted that, in his e-mail to the Ombudsman of 7 May 2009, the complainant referred to a letter from JASPERS to a Czech Ministry and the JASPERS action plan attached to it. In this action plan, the Prague Ring Road was mentioned among other projects. A copy of this letter had been sent to DG Regio by JASPERS. The Commission explained that DG Regio did not consider the information in the JASPERS action plan to be of relevance to the Prague Ring Road, as no action had been taken by the EIB yet concerning this project. It added that DG Regio was not in possession of any correspondence related to the Prague Ring Road between the EIB and the Czech Ministry of Transport, the Czech Ministry of Regional Development, Czech politicians and private persons from the Czech Republic.

17. As regards the alleged failure to inform the complainant about the possibilities of appeal foreseen in Article 8(1) of Regulation 1049/2001, the Commission submitted that DG Regio had not refused access to any documents in its letter of 3 April 2009. In the Commission's view, there had therefore not been any need to inform the complainant about the means of redress.



The Ombudsman's assessment

18. As regards *procedural* aspects, the Ombudsman notes that the Commission has admitted that it failed to deal with the complainant's request for access of 16 September 2008 in line with the procedural requirements laid down in Commission Decision 2001/937. Article 3 of the detailed rules for the handling of applications under Regulation 1049/2001 annexed to that decision stipulates that, "as soon as the application is registered, an acknowledgement of receipt shall be sent to the applicant, unless the answer can be sent by return post". This reflects what is said in Article 7(1) of Regulation 1049/2001, according to which an acknowledgment of receipt is to be sent to the applicant. The Ombudsman further notes that the Commission accepted that it failed to deal with the complainant's confirmatory application of 20 November 2008 within the deadline foreseen in Regulation 1049/2001. According to Article 8(1) of Regulation 1049/2001, confirmatory applications are to be dealt with within 15 working days after registration.

19. The Ombudsman concludes that, by omitting to send an acknowledgment of receipt as regards the complainant's request for access of 16 September 2008 and by omitting to reply to the complainant's confirmatory application of 20 November 2008 within the relevant deadline, the Commission failed to comply with Articles 7(1) and 8(1) of Regulation 1049/2001. These omissions constitute two instances of maladministration.

20. The Ombudsman notes that the Commission has expressed its regrets for the delay that occurred as regards the handling of the complainant's confirmatory application. However, regard should be had to Article 12(3) of the European Code of Good Administrative Behaviour, [2] which provides as follows: "If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it (...)". No such apology has been presented in the present case. On the contrary, the Commission has argued that the delay that occurred was mainly due to the large number of letters, e-mails and calls from the complainant and the wide scope of his requests. The Ombudsman understands that the fact that the complainant had approached DG Regio on numerous occasions may have caused the latter a considerable amount of work. However, he is unable to understand why the Commission failed to deal with the complainant's application of 16 September 2008, which was clearly marked as a request for access pursuant to Regulation 1049/2001, in accordance with the rules applicable in this field. It is true that the complainant extended the scope of his request for access in his subsequent letter of 18 September 2008. [3] However, this fact does not alter the conclusion that the complainant's request of 16 September 2008 was intended to constitute a request for access to documents under Regulation 1049/2001, was clearly recognizable as such and should therefore have been dealt with accordingly. In any event, the Ombudsman notes that the Commission has not apologized or at least expressed regrets in so far as its failure to send an acknowledgment of receipt is concerned. In these circumstances, the Ombudsman considers that a critical remark needs to be made as regards the above-mentioned instances of maladministration.

21. As regards the alleged failure to send an acknowledgment of receipt concerning the complainant's confirmatory application, the Ombudsman notes that neither Regulation



1049/2001 nor Decision 2001/937 explicitly require that an acknowledgement of receipt be sent upon receipt of a confirmatory application. The Ombudsman considers it possible to argue that Article 7(1) of Regulation 1049/2001, which provides that an acknowledgment of receipt be sent upon receipt of the initial application for access, should be applied by analogy. After all, the date when the confirmatory application is registered is relevant as regards the period of time within which the institution must deal with this application. This, in turn, is of immediate relevance for the period of time that an applicant has in order to decide whether he wishes to bring an action before the Community courts or complain to the Ombudsman. The Ombudsman notes, however, that the complainant has only invoked Article 8(1) of Regulation 1049/2001 in this context, without arguing that the obligation to send an acknowledgment of receipt set out in Article 7(1) should be applied by analogy. Given that the Commission has not addressed this issue, that the complainant has not presented any further observations and that the relevant issue would in any event appear to constitute a minor aspect of the present complaint, the Ombudsman takes the view that there are no grounds to deal with it further in the present inquiry.

22. As regards the alleged failure to inform the complainant about the possibilities of appeal foreseen by Article 8(1) of Regulation 1049/2001, this provision stipulates that, in the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution or making a complaint to the Ombudsman. The Ombudsman notes that the Commission's letter of 3 April 2009 does not contain any such information. At first sight, the Commission's argument that the complainant did not need to be informed of the above-mentioned remedies since DG Regio did not have the documents the complainant was looking for appears attractive. Where a document to which an applicant asks to be given access is not in the possession of the institution concerned, bringing an action before the Community courts or submitting a complaint to the Ombudsman will normally not be helpful to the applicant. However, regard should be had to the fact that it cannot be excluded that a review by the Community courts or by the Ombudsman might lead to the result that a document that the institution believed not to be in its possession is after all to be found in its archives. Informing an applicant of his remedies under Article 8(1) of Regulation 1049/2001 can thus be useful even where an institution believes that the relevant document is not in its possession. The Ombudsman notes, however, that the Commission's failure to provide information on the remedies set out in Article 8(1) of Regulation 1049/2001 did not negatively affect the complainant. After all, the complainant was clearly well-informed about his rights under that Regulation. The Ombudsman therefore considers that there are no grounds for further inquiries concerning this aspect of the present case.

23. As regards the *substantive* aspect of the present case, the Ombudsman notes that the complainant had asked for access to the correspondence of JASPERS concerning the Prague Ring Road. The Ombudsman notes that the complainant has not challenged the Commission's statement that JASPERS was a unit within the EIB. However, in its letter of 3 April 2009 DG Regio stated that there was no correspondence with the EIB concerning the issue mentioned by the complainant. This would seem to suggest that DG Regio interpreted the complainant's request for access as concerning correspondence between the Commission and the EIB in relation to the Prague Ring Road. This is clearly an unduly narrow interpretation of the



complainant's request. The complainant's request referred to JASPERS' correspondence concerning the said issue. It therefore also covered copies of correspondence between JASPERS and third parties that had been forwarded to DG Regio. The fact that this was not a merely hypothetical possibility is shown by the copy of a letter dated 4 July 2008 from JASPERS to a Czech authority that the complainant submitted to the Ombudsman. The enclosure of this letter, the JASPERS action plan, mentions the Prague Ring Road project. The Ombudsman notes that the Commission explained that DG Regio did not consider the information in the JASPERS action plan enclosed with the said JASPERS letter to be of relevance to the Prague Ring Road, as no action had been taken by the EIB yet concerning this project. The Ombudsman does not consider this to be a convincing explanation. In its opinion, the Commission stated that DG Regio was not in possession of any correspondence related to the Prague Ring Road between the EIB and the Czech Ministry of Transport, the Czech Ministry of Regional Development, Czech politicians and private persons from the Czech Republic. The Ombudsman presumes that what the Commission intended to state was that it did not possess any such correspondence other than the copy of JASPERS' letter of 4 July 2008.

24. According to the case-law of the Community courts, a presumption of legality attaches to any statement made by the institutions relating to the non-existence of documents requested. This presumption can be rebutted on the basis of relevant and consistent evidence. [4] As the General Court has recently held, that presumption must be applied by analogy where the institution declares that it is not in possession of the documents requested. [5]

25. The Ombudsman notes that the complainant has not submitted any indications that could suggest that the Commission's statement that it did not possess any other relevant documents might be incorrect. In these circumstances, the Ombudsman considers that there are no grounds for further inquiries into this aspect of the present case.

B. Conclusions

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

Article 7(1) of Regulation 1049/2001 provides that an acknowledgment of receipt is to be sent to the applicant in case of a request for access to documents. According to Article 8(1) of Regulation 1049/2001, confirmatory applications are to be dealt with within 15 working days after registration. In the present case, the Commission failed to acknowledge receipt of the complainant's request for access of 16 September 2008 and failed to deal with his confirmatory application of 20 November 2008 within the period laid down by Regulation 1049/2001. This constitutes two instances of maladministration.

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



P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 15 February 2010

[1] OJ 2001 L 345, p. 94. This Decision sets out detailed rules for the application of Regulation 1049/2001 by the Commission.

[2] The Code is available at the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

[3] This extension is not relevant for the present inquiry, given that the complaint submitted to the Ombudsman exclusively concerns the handling of the original request for access made on 16 September 2008.

[4] Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429 paragraph 29.

[5] Judgment of 19 January 2010 in Joined Cases T-355/04 and T-446/04 *Co-Frutta v Commission* , paragraph 155.