

Draft recommendation to the European Commission in complaint 617/2003/IP

Recommendation

Case 617/2003/IP - Opened on 28/04/2003 - Recommendation on 16/11/2005 - Decision on 20/12/2006

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

THE COMPLAINT

Background information

On 31 January 2002 (2) , the European Commission's Joint Research Centre ("JRC") launched a call for tenders for small and medium-sized construction, restructuring and maintenance works for various buildings and drainage systems at the JRC's Ispra site.

One of the complainant's clients (3) , the Italian company M.P.M. *Costruzioni Edili s.r.l.* ("M.P.M."), which had set up a consortium with three other companies ("the consortium"), participated in the call for tenders. However, this consortium was not selected.

In a complaint lodged with the Ombudsman on 25 July 2002 (1368/2002/IP), the complainant alleged a lack of transparency in the tender procedure and a consistent failure by the JRC to reply to his correspondence from 17 June 2002 onwards. Furthermore, the complainant claimed that, in accordance with the rules governing the tender, M.P.M. should have been awarded the contract.

On 30 August 2002, the Ombudsman informed the Commission of the complaint and asked the institution to submit an opinion by the end of November 2002. The Commission sent its opinion on 12 November 2002. This opinion was forwarded to the complainant who sent his observations on 31 December 2002.

From the complainant's observations, it appeared that, on 12 November 2002, M.P.M. had submitted its dispute with the Commission to the Italian Administrative Court of Lombardia.

On the basis of this information, the Ombudsman decided to close the case, in accordance with Article 2 (7) of the Statute of the Ombudsman (4) . In his observations of 31 December 2002, the complainant had however raised a new allegation concerning the Commission's handling of a request for access to documents that he had made on 31 July 2002. Since this allegation was not part of the original complaint, the Ombudsman informed the complainant that he would not



deal with it in his decision concerning case 1368/2002/IP. He furthermore informed the complainant that he was free to lodge a new complaint on this issue, if he so wished.

Complaint 617/2003/IP

On 1 April 2003, the complainant made a new complaint to the Ombudsman, registered with complaint reference 617/2003/IP.

According to the complainant, the relevant facts underlying this new complaint were as follows:

On 31 July 2002, the complainant asked the Commission to give him access to the documents concerning the procedure related to the call for tenders for small and medium-sized construction, restructuring offers and maintenance works for various buildings and drainage systems at the JRC's Ispra site, launched by the Commission on 31 January 2002. On 28 August 2002, the Commission gave him access to some of the documents that he had requested. However, it refused to allow the complainant access to the documents concerning the offers made by companies other than M.P.M., which had participated in the tender. The Commission based its refusal on the argument that these documents were covered by the exception laid down in Article 4 (2) of Regulation 1049/2001 which foresees that *"the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person (...)"*.

On 6 September 2002, the complainant made a confirmatory application to the Secretary-General of the Commission to have full access to the requested documents. In his confirmatory application, the complainant pointed out the following:

- (i) the request for access to documents had been made after the conclusion of the procedure. Directive 93/37/EEC of 14 June 1993 (5), as amended by Directive 97/52/EEC (6) concerning the coordination of procedures for the award of public works contracts, establishes that the confidentiality of tenders is maintained pending their evaluation. However, according to the complainant, there was no legal provision that this confidentiality should be maintained after the conclusion of the relevant procedure. Furthermore, in accordance with Article 4 (7) of Regulation 1049/2001, the exceptions to the general principle of access to documents shall only apply for the period during which protection is justified on the basis of the content of the document.
- (ii) As foreseen by Article 4 (4) of Regulation 1049/2001, in the case of third-party documents, the institution shall consult the third party with a view to assessing whether an exception is applicable, unless it is clear that the document shall or shall not be disclosed.
- (iii) M.P.M. had a special interest in having access to the relevant documents because it was one of the participants in the tender procedure and because it was relevant to its rights of defence.

By letter of 13 November 2002, the Commission rejected the complainant's confirmatory application.



In his complaint to the Ombudsman, the complainant alleged that: (i) when dealing with his confirmatory application, the Commission did not comply with the deadline foreseen by 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 (7) ; and (ii) the Commission's decision not to allow him full access to the requested documents was unfair and inadequately reasoned.

The complainant claimed that the Commission should reconsider its position and give him full access to the requested documents.

THE INQUIRY

The European Commission's opinion

In its opinion on the complaint, the Commission made the following points:

On 31 July 2002, the complainant, in his capacity as legal representative of M.P.M which had participated in the call for tenders launched by the JRC, made a request for access to documents.

On 5 August 2002, the JRC asked the complainant to specify his request which, according to the JRC, had been formulated in broad terms. The complainant replied on 6 August 2002. He specified the documents to which he had asked to have access and stressed that his request was also based on the Italian Law regarding citizens' rights to information in order to safeguard their rights vis-à-vis the administration.

On 28 August 2002, the JRC replied to the complainant. The JRC provided the complainant with the full report from the JRC's technical services to the Advisory Committee on Procurement and Contracts and its annexes. This documentation included:

- the minutes of a technical meeting which had been held with representatives of the bidding firms;
- a list of the bidding firms;
- the report of the selection panel;
- the report of the evaluation committee;
- the opinion of the Advisory Committee on Procurement and Contracts; and
- the draft contract.

Access to the proposals made by the bidding firms was however denied to the complainant since, according to the JRC, disclosure of the information contained in these proposals would have undermined the protection of the commercial interests of the bidders.

On 6 September 2002, the complainant made a confirmatory application to the Secretary-General of the Commission and asked to have access to the documents which the JRC had not given to him on 28 August 2002. The complainant stated that his request was also based on Italian legislation and that M.P.M had a privileged right to have access to these documents since they would be relevant for its defence in the framework of legal proceedings



before the administrative court of Lombardia. The complainant also took the view that the JRC should have consulted the other firms involved before deciding that, by disclosing the documents requested by the complainant, their commercial interests would be undermined.

The Commission thereupon consulted the firms involved and on the basis of this consultation, it reached the conclusion that the disclosure of their submissions would affect their commercial interests.

As regards the complainant's allegation that it did not reply to his confirmatory allegation within the deadline foreseen by Article 8 of Regulation (EC) 1049/2001, this reply had been indeed delayed. The confirmatory application for access to documents had been received by fax on 6 September 2002. However, in view of the time required to consult the firms involved by the request, the Commission decided to extend the deadline to provide a reply to the complainant by 15 working days. The complainant had been informed accordingly by letter of 26 September 2002. The final deadline for reply was therefore 18 October 2002. However, the reply was sent to the complainant on 13 November 2002, 17 working days later. The Commission regretted the delay which had occurred in this case and explained that it was due to the length of time necessary for the consultation process. However, this delay had not prejudiced the complainant's rights in view of the fact that, as established by Article 8 of Regulation 1049/2001, the failure to reply within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to bring proceedings before the Court of First Instance or to complain to the Ombudsman.

As regards the complainant's allegation that the decision not to allow him full access to all the documents requested was unfair and inadequately reasoned, the Italian legislation referred to by the complainant in his complaint did not apply to documents held by the Commission. The applicable legislation in this case was Regulation 1049/2001 which does not grant specific rights of access to interested parties. In accordance with Article 6(1) of the Regulation, the applicant is not obliged to state reasons for his request. A decision to grant or deny access to the documents requested cannot therefore be based on the specific interests of the applicant. When a document is disclosed pursuant to Regulation 1049/2001, it becomes public and it can be accessed by any other applicant.

The exception laid down in Article 4(2), first indent of Regulation 1049/2001 protects the commercial interests of a natural or legal person. The documentation provided by the firms which participated in the relevant call for tenders contained confidential business information and the disclosure of such information would have adversely affected their commercial interests. The interest of the complainant's client in obtaining access to these documents was a private interest and could not be invoked as an overriding public interest. When deciding on the complainant's request, the Commission had to find a fair balance between, on the one hand, the legitimate interest of the complainant's client in understanding the reasons for awarding the contract to another firm and, on the other hand, the legitimate expectations of the bidding firms that the information provided for the purpose of the tender would be handled adequately. The Commission considered that the JRC had provided the complainant with all the relevant documentation explaining the procedure that had been followed, the criteria for assessing the



tenders, the evaluation of the proposal and the final conclusion of the advisory committee.

Furthermore, in accordance with Article 4(4) of (EC) Regulation 1049/2001, in the case of a third-party document, the author of the document had to be consulted on the disclosure of its document, *"unless it is clear that the document shall or shall not be disclosed"*. When handling the initial application made by the complainant, the JRC had not consulted the firms which were the authors of the requested documents, since it had taken the view that the exception laid down in Article 4(2) first indent was applicable. However, when the complainant made a confirmatory application, such a consultation was carried out in order to make a new assessment to ascertain whether the disclosure of the requested documents would have caused prejudice to the commercial interests of the firms concerned.

The Commission finally recalled that the complainant's client M.P.M. had not been selected because it had not met one of the selection criteria announced in the call for tenders. The content of the documentation submitted by the other firms would therefore have no relevance in this respect.

The complainants' observations

In his observations, the complainant stated that the Commission had given its opinion in English and not in Italian, which was the language chosen by him, in accordance with Article 21 of the EC Treaty. He had therefore had to translate the Commission's opinion into Italian for his client M.P.M., on whose behalf he complained to the Ombudsman.

The complainant further took note of the fact that the Commission acknowledged that its reply to his confirmatory application had been delayed. However, he stated that the Commission had informed him that it could not reply within the deadline when that deadline had already expired and it failed to give reasons for this delay. This was contrary to Article 8(2) of Regulation 1049/2001 which 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"*. The complainant further stated that he had received the Commission's reply only on 27 November 2002. Contrary to what had been stressed by the Commission in its opinion, his client, M.P.M., had suffered damages because of the Commission's failure to reply within the deadline, since it had not been aware of relevant elements which could have been taken into account when starting legal proceedings before the administrative court in Italy, for which the deadline had been 12 November 2002. The complainant also considered that the Commission was wrong in affirming that this delay in replying did not prejudice the complainant's rights.

As regards the allegation concerning the Commission's decision on his request for access to documents, the complainant stated that the Commission maintained the same position that it had taken in its letter of 13 November 2002. According to the complainant, the Commission failed to give reasons on how the disclosure of the requested documents could have caused prejudice to the commercial interests of the bidding firms, given that the tender procedure had already been carried out. The complainant argued that such a prejudice could have been possible during the relevant procedure but not after its conclusion. The complainant also pointed out that the balance sheet of a company, which was among the documents to which the Commission denied access, is a public document in Italy. The complainant therefore took the



view that it was a contradiction on the part of the Commission to deny access to a public document. He further considered that, in view of the nature of the requested documents, consultation by the Commission with the third parties who had authored them was unnecessary.

The complainant finally asked the Ombudsman to make use of all the instruments foreseen by his Statute and by the implementing provisions for cases of maladministration.

Further inquiries Request for further information

The Ombudsman considered that, in order to pursue his inquiries into the present complaint, it was necessary to ask the Commission for further information. On 8 December 2004, he therefore wrote to the Commission, asking the institution to comment on the complainant's observations and, more specifically, on the complainant's argument that some of the documents (or parts thereof) to which he asked to be given access were public documents in Italy and that it therefore was a contradiction on the part of the Commission to deny public access to a public document.

The Commission's reply

In its reply to the Ombudsman's letter of 8 December 2004, the Commission stated that, in accordance with Italian law, most companies must deposit their balance sheets at the Companies' Register (*Registro delle Imprese*) and that any person may request access to these balance sheets from any Chamber of Commerce in Italy, regardless of the place of registration of the company. Any interested person can therefore easily obtain all information regarding the balance sheets of a company from his local Chamber of Commerce.

According to the Commission, such balance sheets were possibly included in the documentation submitted by the tendering companies. However, the Commission was not in a position to determine which documents had been or should have been deposited at the Companies' Register. It was not possible for the institution to distinguish between documents to which the public might have access through the Chambers of Commerce and those which cannot be disclosed in order to protect the commercial interests of the tendering companies.

The Commission considered that it correctly applied Regulation 1049/2001 by considering the relevant documents to be covered by the relevant exception (8) .

The complainant's observations

In his observations on the Commission's reply, the complainant took the view that the Commission had essentially confirmed his position. He further considered that the position adopted by the Commission regarding his request to have access to the relevant documents could not be accepted. According to the complainant, the Commission's argument that it was not in a position to distinguish between documents to which the public might have access through the Chambers of Commerce and those which cannot be disclosed was unacceptable, unless it is accepted that the Commission is not expected to be cognisant of the national law applicable in the Member States. According to the complainant, the Commission had all the possibilities, in terms of human resources and structures, to obtain the relevant information with regards to requests for access to documents.

As regards the alleged failure by the Commission to comply with the deadline foreseen in Regulation (EC) No 1049/2001 when dealing with his confirmatory application, the complainant



noted that the institution had not made any further comments.

The complainant maintained his complaint and insisted that the Ombudsman should make use of all the instruments foreseen by his Statute and by the implementing provisions for cases of maladministration.

THE DECISION

1 Preliminary remarks

1.1 The Ombudsman notes that in his observations, the complainant stated that the Commission had given its opinion in English and not in Italian, which was the language chosen by him, in accordance with Article 21 of the EC Treaty. He had therefore had to translate the Commission's opinion into Italian for his client M.P.M., on whose behalf he had complained to the Ombudsman.

1.2 In this regard, the Ombudsman would like to clarify that, as a general procedure, the Commission sends him its opinions in English or French, followed by a translation of the opinion into the language of the complaint.

1.3 It is certain that the translation into Italian of the Commission's opinion should have been sent to the complainant and not the English version which appears to have been sent to him by mistake. In view of the fact that the complainant, in his observations, had stressed that he had already provided M.P.M with a translation of the Commission's opinion, the Ombudsman assumed that he was no longer interested in receiving the Italian version of the Commission's opinion. The Ombudsman apologizes to the complainant for the mistake which occurred in the transmission of the Commission's opinion.

2 Alleged failure by the Commission to deal with the complainant's confirmatory application within the foreseen deadline

2.1 The Italian company M.P.M., a client of the complainant, which had set up a consortium with three other companies, participated in a call for tenders launched by the Commission. The consortium of the complainant's client was not selected.

The complainant therefore asked the Commission to give him access to the documents concerning the procedure related to the relevant call for tenders. The Commission gave him access to some of the documents that he had requested. However, it refused to allow the complainant access to the documents concerning the offers made by the companies other than M.P.M. which had participated in the tender, including the company which had been awarded the contract. The complainant then made a confirmatory application. In its reply of 13 November 2002, the Commission maintained its position.

In his complaint, the complainant alleged that, when dealing with his confirmatory application, the Commission did not comply with the deadline provided for by 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 (9) .



2.2 The Commission agreed that its reply had been delayed. The confirmatory application for access to documents had been received by fax on 6 September 2002. However, in view of the time required to consult the firms involved by the request, the Commission had decided to extend the deadline to provide a reply to the complainant by 15 working days. The complainant had been informed accordingly by letter of 26 September 2002. According to the Commission, the final deadline for reply was therefore 18 October 2002. However, the reply had been sent to the complainant on 13 November 2002, 17 working days later. The Commission regretted the delay which had occurred in this case and explained that it had been due to the length of time necessary for the consultation process.

The Commission took the view that this delay had not prejudiced the complainant's rights in view of the fact that, as established by Article 8 of Regulation 1049/2001, failure to reply within the prescribed time-limit has to be considered as a negative reply and entitles the applicant to bring proceedings before the Court of First Instance or to complain to the Ombudsman.

2.3 In his observations, the complainant stated that the Commission had informed him that it could not reply within the deadline when that deadline had already expired and it had failed to give reasons for this delay. This was contrary to Article 8(2) of Regulation 1049/2001 which 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*".

2.4 As already stated in previous decisions (10) , the Ombudsman considers that the rule that the lack of a reply to a confirmatory application constitutes a negative decision has the purpose of protecting the person concerned from further delay in case the authority fails to act within the time-limit foreseen by Regulation 1049/2001. The Ombudsman takes the view, however, that principles of good administration require that the institutions reply to requests made by citizens and give reasons for their decisions. The above-mentioned rule does not entitle the authority to depart from its obligation to follow principles of good administrative behaviour (11) .

2.5 The Ombudsman furthermore considers that, although a failure to reply to a confirmatory application does not prevent an applicant from instituting court proceedings or from pursuing his application before the Ombudsman, the complainant would in such a case be unable to know on what substantive reasons the refusal to grant or to deny access was based. Failure to reply to a confirmatory application would therefore be likely to impair the applicant's capacity to pursue his case.

2.6 The Ombudsman therefore considers that, as a general rule, failure by an institution to provide a reasoned reply to a confirmatory application within the time-limit of 15 working days constitutes an instance of maladministration.

2.7 In the present case, the complainant made a confirmatory application for access to documents on 6 September 2002. In view of the time required to consult the firms involved by the request, the Commission decided to extend the deadline to provide a reply to the complainant and informed the complainant by letter of 26 September 2002. According to the Commission, the final deadline for reply was therefore 18 October 2002. However, as the



Commission acknowledged in its opinion, the reply to the complainant's confirmatory application was sent to him on 13 November 2002, 17 working days later.

2.8 In view of the above, it appears that a substantial delay occurred when the Commission handled the complainant's confirmatory request and that the Commission thus failed to act in accordance with Article 8(2) of Regulation 1049/2001. This constitutes an instance of maladministration.

2.9 As regards the complainant's point that, when the Commission informed him that it could not reply within the deadline, that deadline had already expired, the Ombudsman notes that the Commission has not dealt with this aspect of the case either in its opinion or in its reply to the Ombudsman's request for further information.

However, in view of the wording of the letters sent to the Commission by the Ombudsman when opening the present inquiry and when asking for further information, it appears possible that the Commission did not understand that it should reply to this point as well.

2.10 However, in view of the fact that there was in any event maladministration by the Commission when dealing with the complainant's request for access to documents (see point 2.8 above), the Ombudsman does not consider it necessary to pursue his inquiry as far as this aspect of the case is concerned.

3 The Commission's decision concerning the complainant's request for access to documents and the complainant's claim

3.1 In his complaint, the complainant alleged that the Commission's decision not to allow him full access to the requested documents was unfair and inadequately reasoned. He claimed that the Commission should reconsider its position and give him full access to the requested documents.

3.2 In its opinion, the Commission stated that the applicable legislation in the present case was Regulation 1049/2001 and that the Italian legislation to which the complainant had referred in his request for access to documents and in his complaint to the Ombudsman was not relevant and could therefore not be taken into account.

As regards the substance of its decision concerning the request for access, the Commission stated that Regulation 1049/2001 does not grant specific rights of access to interested parties. A decision to grant or to deny access to the document requested cannot therefore be based on the specific interest of the applicant. The Commission justified its decision not to disclose all the documents requested by the complainant on the basis of the exception laid down in Article 4(2) first indent of Regulation 1049/2001, which protects the commercial interests of a natural or legal person. The Commission took the view that the documentation provided by the firms which participated in the relevant call for tenders contained confidential business information and that the disclosure of such information would have adversely affected their commercial interests. When deciding on the complainant's request, the Commission had to find a fair balance between, on the one hand, the legitimate interest of the complainant's client in understanding the reasons for awarding the contract to another firm and, on the other hand, the legitimate



expectations of the bidding firms that the information provided for the purpose of the tender would be handled adequately. The Commission further considered that the JRC had provided the complainant with all the relevant documentation explaining the procedure that had been followed in the selection procedure related to the call for tenders in which the complainant's client had participated, the criteria for assessing the tenders, the evaluation of the proposal and the final conclusion of the advisory committee.

Furthermore, the Commission stated that, in accordance with Article 4(4) of (EC) Regulation 1049/2001, in the case of a third-party document, the author of the document has to be consulted on the disclosure of his document, *"unless it is clear that the document shall or shall not be disclosed"*. The Commission pointed out that, when handling the complainant's confirmatory application, it had carried out this consultation in order to ascertain whether the disclosure of the requested documents would cause prejudice to the commercial interests of the firms concerned.

The Commission finally recalled that the complainant's client M.P.M. had not been selected because it had not met one of the selection criteria announced in the call for tenders. The content of the documentation submitted by the other firms would therefore have no relevance in this respect.

3.3 In his observations, the complainant took the view that the Commission had failed to give reasons on how the disclosure of the requested documents could have caused prejudice to the commercial interests of the bidding firms, given that the tender procedure had already been carried out. The complainant argued that such a prejudice could have been possible during the relevant procedure but not after its conclusion. The complainant also pointed out that the balance sheet of a company, which was among the documents to which the Commission had denied access, was a public document in Italy. The complainant therefore took the view that it was a contradiction on the part of the Commission to deny access to a public document. He further considered that, in view of the nature of the requested documents, consultation by the Commission with the third parties who had authored them had been unnecessary.

3.4 In its reply to the Ombudsman's request of 8 December 2004 for further information, the Commission explained that, in accordance with Italian law, most companies must deposit their balance sheets at the Companies' Register (*Registro delle Imprese*) and that any person may request access to these balance sheets from any Chamber of Commerce in Italy. Any interested person can therefore easily obtain all information regarding the balance sheets of a company from his local Chamber of Commerce.

According to the Commission, such balance sheets were possibly included in the documentation submitted by the tendering companies. However, the Commission was not in a position to determine which documents had been or should have been deposited at the Companies' Register. It was not possible for the institution to distinguish between documents to which the public might have access through the Chambers of Commerce and those which cannot be disclosed in order to protect the commercial interests of the tendering companies.



3.5 In his observations on the Commission's reply, the complainant took the view that the Commission had essentially confirmed his position. He further considered that the position adopted by the Commission regarding his request to have access to the relevant documents could not be accepted. According to the complainant, the Commission's argument that it was not in a position to distinguish between documents to which the public might have access through the Chambers of Commerce and those which cannot be disclosed was unacceptable, unless it is accepted that the Commission is not expected to be cognisant of the national law applicable in the Member States. According to the complainant, the Commission had all the possibilities, in terms of human resources and structures, to obtain the relevant information on the issue concerned.

3.6 As regards the complainant's allegation that the Commission's decision to refuse full access to the requested documents was unfair, the Ombudsman notes that the unfairness alleged by the complainant appears to consist in the wrong interpretation of Regulation 1049/2001 which regulates public access to European Parliament, Council and Commission documents.

The Ombudsman further notes that in its opinion the Commission stated that the applicable legislation in the present case was Regulation 1049/2001 and that the Italian legislation to which the complainant had referred in his request for access to documents and in his complaint to the Ombudsman was not relevant and could therefore not be taken into account. In his observations, the complainant has not made comments on the Commission's statement as regards this point. The Commission's position appears to be correct.

In these circumstances, the Ombudsman's examination is therefore limited to ascertaining whether Regulation 1049/2001 has been respected.

3.7 The purpose of Regulation 1049/2001 is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty. However, Regulation 1049/2001 contains certain exceptions which, as consistently held by the Community courts, have to be interpreted and applied restrictively so as not to frustrate the application of the general principle of giving the public the widest possible access to documents held by the Commission (12) .

One of these exceptions is foreseen by Article 4(2) first indent which provides that *"the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person (...)"* .

3.8 In view of the position taken by the complainant that consultation by the Commission with the third parties who had authored these documents had been unnecessary given the nature of the requested documents, the Ombudsman will first discuss the procedural aspects of the Commission's handling of the complainant's confirmatory request before dealing with the substantive aspect of the Commission's decision.

3.9 As regards the *procedural* aspects of the Commission's handling of his confirmatory request, the Ombudsman considers that the Commission's decision to carry out such a



consultation in order to dispel any doubts on the nature of the relevant documents and to examine the possibility of granting wider access than that accorded at the initial stage was not in contradiction with Regulation 1049/2001. The Ombudsman therefore considers that there has been no maladministration by the Commission as regards this aspect of the case. Furthermore, he notes that the complainant himself, in his confirmatory application, appeared to suggest that the Commission should consult the relevant third parties with a view to assessing whether an exception was applicable in the present case.

3.10 As regards the *substance* of the case, the documents to which the Commission refused to grant access essentially consisted in the offers made by the companies other than M.P.M. which had participated in the relevant call for tenders. In view of their nature, it can reasonably be assumed that these documents contained information (such as the prices they quoted), the disclosure of which could affect the commercial interests of the concerned firms. The Ombudsman therefore considers that the Commission's view that the exception foreseen by Article 4 (2) first indent of Regulation 1049/2001 applied in the present case was therefore, in principle, correct.

3.11 As regards the complainant's point that the commercial interests of the other firms participating in the same call for tenders as his client could only have been affected by a disclosure during the relevant procedure but not after its conclusion, the Ombudsman takes the view that, in the light of the information which these documents contained, it does not appear unreasonable to assume that the risk of prejudice for the commercial interests of the firms which had taken part in a call for tenders should persist even after the conclusion of the tender procedure.

It appears appropriate to point out that the present allegation is directed at the Commission's decision of 13 November 2002 to reject the complainant's confirmatory application for access to documents concerning the relevant tender. The Ombudsman's inquiry thus has to focus on examining whether this decision was correct. However, it appears that the tender procedure was only concluded on 17 July 2002, that is to say less than four months before the Commission adopted its decision. The time that has elapsed since this decision was taken is thus irrelevant for determining whether there was maladministration as regards the Commission's decision of 13 November 2002.

3.12 Concerning the exception laid down by Article 4 (2) first indent of Regulation 1049/2001, it has to be noted that, in accordance with the same article, access to documents has to be granted to the applicant even where the relevant exception applies if there is an overriding public interest in disclosure.

As the Ombudsman has already held in previous decisions, it follows from the structure and the wording of the provision concerned that the presence of an overriding public interest in disclosure normally has to be established by the person seeking access (13). In the present case, the Ombudsman takes the view that the complainant has not established that there was an overriding public interest in the disclosure of the requested documents.



The Ombudsman notes that, in his confirmatory application for access, the complainant argued that his company had a special interest in being given access to the documents concerned on account of the fact that it had taken part in the tender and that access to these documents was relevant to its rights of defence. However, any such interest would (if established) in any event not constitute a *public* interest that could override the exception laid down in Article 4 (2) of Regulation 1049/2001.

3.13 Furthermore, the Ombudsman would like to stress that, as correctly pointed out by the Commission, Regulation 1049/2001 does not grant specific rights of access to interested parties. The reasons for which access is requested are therefore irrelevant under Regulation 1049/2001 and a request for access does thus not depend on the existence of any specific or legitimate interest on the part of the applicant.

For this reason, the Ombudsman considers that the Commission's argument that the content of the documentation submitted by the other firms that had taken part in the same call for tenders as M.P.M was not relevant for the complainant's client is thus without any relevance to the present case.

3.14 The Ombudsman recalls, however, that Article 4(6) of Regulation 1049/2001 provides that *"if only parts of the requested document are covered by any of the exceptions laid down in paragraph 1 or 2, the remaining part of the document shall be released"*.

In its reply to the complainant's confirmatory application, the Commission stated that partial access was not possible because the relevant documents were entirely covered by the exception foreseen by Article 4(2) first indent of Regulation 1049/2001.

3.15 However, in its reply to the Ombudsman's letter of 8 December 2004, the Commission admitted that balance sheets accessible to the public under Italian law were possibly included in the documentation submitted by the tendering companies. The Ombudsman therefore takes the view that, as regards these documents, there were no reasons to deny access to the complainant.

3.16 The Ombudsman takes note of the Commission's submission that it was not in a position to distinguish between those documents to which the public might have been given access through the Chambers of Commerce and those which cannot be disclosed in order to protect the commercial interests of the tendering companies.

However, Article 4 (2) first indent of Regulation 1049/2001 only allows the Commission to refuse access to those documents the disclosure of which would undermine the protection of commercial interests of the natural or legal person concerned. The burden of proof is thus clearly on the Commission. Access therefore has to be granted where the Commission cannot show that the said exception applies. It should further be noted that the Commission had the possibility of addressing itself to the companies that had submitted the relevant documents or to the Italian authorities if it considered that it needed further clarification in this regard in order to deal with the complainant's request for access.



3.17 As regards the possibility of granting access to parts of the relevant documents other than access to balance sheets that may be available to the public under Italian law, the Commission limited itself to stating that partial access was not possible since the documents requested by the complainant contained information affecting commercial interests and should therefore be covered by the exception provided for in Article 4(2). Principles of good administration require, however, that a decision adversely affecting an individual shall state the grounds on which it is based in sufficient detail in order to enable the persons concerned to ascertain the reasons on which the relevant decision is based and to make it possible for the competent authorities to exercise their power of review.

In the present case, the Ombudsman notes that the Commission limited itself to stating the no partial access could be granted without providing information as to whether the relevant exception invoked covered each and every part of the requested documents.

3.18 On the basis of the above, the Ombudsman takes the view that the Commission has failed to handle properly the application for access to documents made by the complainant. This conclusion is based on the considerations that, first, the Commission itself has accepted that among the documents in its possession, some of them could be documents which are public documents under Italian law and for which refusal to grant access does thus not appear to be justified, and that, secondly, the Commission has failed to provide adequate reasons for its refusal to grant partial access to other parts of the relevant documents.

The Ombudsman understands that an examination of all the documents requested on an individual basis with a view to establishing which of them could be disclosed might constitute a serious administrative burden for the Commission. However, the Commission has not shown that this examination would constitute a disproportionate administrative burden in the present case. It should also be noted that Article 6 (3) of Regulation 1049/2001 foresees that, in the event of an application relating to very long documents or to a very large number of documents, the institution may confer with the applicant informally, with a view to finding a fair solution.

4 Conclusion

In view of the above, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the European Ombudsman.

The draft recommendation

The Commission should reconsider its decision of 13 November 2002 on the complainant's confirmatory application for access and grant access to those documents or parts thereof that are not covered by the exception set out in Article 4 (2), first indent of Regulation 1049/2001 or provide sufficiently detailed explanations to show that some or all of these documents or parts thereof are covered by the said exception.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 28 February 2006. The detailed opinion could consist of the acceptance of the Ombudsman's decision and of a description of the specific measures taken to implement the draft recommendation.



Strasbourg, 16 November 2005

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(2) OJ S 22 of 31.1.2002.

(3) The complainant is an Italian lawyer.

(4) Article 2.7 of the Ombudsman's statute is worded as follows: "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 definitively".

(5) OJ L 199 of 9.8.1993, pp. 54-83.

(6) OJ L 328 of 28.11.1997, pp. 1-59.

(7) OJ L 145 of 31.5.2001, pp. 43-48.

(8) Article 4(4) of (EC) Regulation 1049/2001.

(9) OJ L 145 of 31.5.2001, pp. 43-48.

(10) The Ombudsman has taken a similar position in case 322/2003/IP. The text of this decision can be found at the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(11) The Ombudsman has taken a similar position in cases 1479/99/(OV)MM and 729/2000/OV concerning the failure to reply to a complaint made under Article 90(2) of the Staff Regulations. The texts of these decisions can be found at the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(12) Case T-309/97 *Bavarian Lager Company Ltd v Commission of the European Communities* [1999] ECR II-3217, paragraph 39.

(13) See decisions of the European Ombudsman 412/2003/GG and 2403/2003/MF, available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).