

## Draft recommendation to the European Commission in complaint 1874/2003/GG

Recommendation

**Case 1874/2003/GG - Opened on 17/10/2003 - Recommendation on 15/07/2004 -**

**Decision on 14/12/2004**

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

### THE COMPLAINT

#### *Background*

The complainant is a non-governmental organisation (NGO) from Germany working in the field of humanitarian aid. The present complaint is linked to a complaint lodged in 2002 (589/2002/GG). This complaint concerned a project in Kazakhstan with the title 'Organisation of the Centre for Rendering Preventive, Medical and Diagnostical Help for Children and their Mothers, ill with Viral Hepatitis and Viral Carriers (Viral Hepatitis Associated Aids)' which was co-financed by the EU. The relevant contract (the "LIEN contract 97-2011") was signed on 28 April 1998 by the complainant on the one hand and IBF (a body based in Brussels) acting on behalf of the European Commission on the other. The supervision of the project had been entrusted to a technical assistance unit, namely the Centre Européen du Volontariat (CEV) in Brussels.

In the spring of 1999, a monitoring mission was carried out with regard to the project. On 1 October 1999, IBF informed the complainant that the Commission had decided to cancel the project as of that day.

In an undated letter that appears to have been sent in October 2001, the Commission explained that it would ask the complainant to reimburse the sum of EUR 37 741.07, that is to say the difference between the advance payment (EUR 50 902) and the costs that were accepted by the Commission (EUR 16 451.16).

In its complaint to the Ombudsman lodged in March 2002, the complainant took the view that the behaviour of the Commission in this case constituted an instance of maladministration.

On 14 October 2002, the Ombudsman made a proposal for a friendly solution according to which the Commission should consider reviewing its decision to ask the complainant to pay back the sum of EUR 37 741.07.



In its reply, the Commission expressed its willingness to abandon its claim if and to the extent it could be shown that the funds had been used in the overall interest of the ultimate beneficiaries of the project. To this end, the complainant would have to submit a global financial report on this project which would allow the Commission's services to verify the use of the funds already paid.

In these circumstances, the Ombudsman considered that a friendly solution to the complaint had been agreed between the European Commission and the complainant. The Ombudsman therefore closed the case on 21 March 2003 (2) .

#### *The present complaint*

Whilst the above-mentioned complaint was being examined by the Ombudsman, the complainant asked the Commission for access to its file concerning the relevant contract. On 8 July 2002, the Commission sent the complainant an inventory of the documents on its file. There were three files containing documents and correspondence plus a fourth one which, according to the Commission, consisted of "internal documents, including those between the Commission and the external offices IBF and CEV".

Access was granted to all the documents in files 1 to 3 apart from those which the Commission considered should not be disclosed on the grounds of Article 4 (3) of Regulation 1049/2001. No access at all was granted to file 4.

Subsequent requests by the complainant to be shown the remaining documents were unsuccessful.

In its complaint to the Ombudsman, the complainant alleged that the Commission's refusal to grant full access to its file concerning LIEN contract 97-2011 was arbitrary and constituted an infringement of Regulation 1049/2001. It claimed that it should be granted access to the documents in files 1 to 3 in respect of which access had been denied by the Commission and to the documents in file 4. The complainant further asked the Ombudsman to seize the relevant files.

In a further letter dated 14 October 2003, the complainant pointed out that it had discovered a document relating to LIEN contract 97-2011 in the Commission's file concerning another case which did not appear to be contained in the file at issue in the present case. A copy of this document (a "Background note" dated 3 August 2001 (3) and drawn up by the Commission) was submitted to the Ombudsman by the complainant.

## **THE INQUIRY**

The complaint was sent to the Commission for its opinion on 17 October 2003. The complainant was informed accordingly by a letter sent the same day. In this letter, the Ombudsman explained that he had no power to seize any documents.

#### **The Commission's opinion**

In its opinion, the Commission made the following comments:



On 9 March 2002, the complainant had asked the Commission's EuropeAid Co-operation Office for access to the documents concerning LIEN contract 97-2011. EuropeAid had understood this as a request to identify the documents composing the relevant file. In order to organise access, the Commission had written to the complainant on 22 and 23 April 2002, proposing to send an inventory of the file. On 8 July 2002, the Commission had forwarded the complete inventory of the documents composing the file to the complainant.

On 21 and 22 July 2002, the Commission and the complainant had agreed on the practical details of the on-the-spot access. The on-the-spot access had taken place on 26 July 2002.

As regards the allegation that the inventory sent on 8 July 2002 had been incomplete, the note dated 3 August 2001 to which the complainant had referred was mentioned in this list as document number 37 of file number 3.

Although the principle was that all documents should be accessible, the institution inevitably had to refuse to disclose certain documents in order to protect its internal deliberations. The inventory accordingly identified both the documents that were accessible and those that were covered by one of the exceptions set out in Article 4 of Regulation 1049/2001. The refusal to grant access to the latter was based on Article 4 (3) of Regulation 1049/2001. The Commission considered that the disclosure of these documents which contained opinions for internal use as part of deliberations and preliminary consultations would seriously undermine the decision-making process of the Commission.

All the documents were however available to the Ombudsman if he should wish to ascertain that the Commission's position was well-founded.

#### **The complainant's observations**

In its lawyer's letter of 24 February 2004 and in its letters of 25 February and 10 March 2004, the complainant made the following comments on the Commission's opinion:

##### *The complainant's lawyer's letter of 24 February 2004*

It was not clear what the "decision-making process" was to which the Commission referred. If no decision had yet been taken, Article 4 (3) first sub-paragraph of Regulation 1049/2001 applied. If a decision had already been taken, Article 4 (3) second sub-paragraph was applicable. It appeared that the present case concerned a decision that had already been taken, given that the Commission had decided to cancel the relevant contract on 1 October 1999. In that case, it had to be noted that the Commission had not explained why and with regard to what decision-making process the disclosure of the documents could still have detrimental effects.

The aim of Regulation 1049/2001 was to ensure the widest possible access to documents (Article 1 a of the Regulation). According to recital 11 of the Regulation, all the documents of the institutions should in principle be accessible to the public whilst certain private and public interests should be protected by way of exceptions.

In point 3.4.4 of its Report of 30 January 2004 on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2004) 45 final), the Commission pointed out that the exception



under Article 4 (3) enabled the institutions “to protect internal deliberations held prior to decision-making” and that the objective of this exception was “to ensure that the decisions taken are shielded from undue external pressure”. Although this aim was understandable in principle and legitimate, it had to be asked why the Commission had to fear that the decision it had adopted in 1999 had to be shielded from external “pressure”. Such a risk existed neither at the time of the decision nor today.

The Commission’s Report noted that the conditions for applying the exception set out at Article 4 (3) were “very strict”. Access could only be denied if the disclosure would “seriously” undermine the decision-making procedure. It had to be asked on what the Commission based its affirmation that the disclosure would seriously undermine its decision-making process in the present case.

In its Report, the Commission accepted that the existence of “serious harm” was particularly difficult to demonstrate when, pursuant to Article 4 (3) second sub-paragraph, the refusal of access concerned a decision that had already been taken. The Commission there noted the following: “The decision-making process of the institution relating to this particular issue has been completed, and the disclosure of a preparatory document drawn up for internal deliberations concerning this matter should seriously undermine the institution’s capacity to take future decisions. Analysing the harm could thus become much too abstract an exercise.” It was therefore to be questioned whether in the present case the Commission had carefully examined the issue of access in the light of the criteria mentioned in its Report or had simply carried out an ‘abstract exercise’.

Both sub-paragraphs of Article 3 (4) obliged the Commission to examine whether there was an “overriding” public interest in disclosure. In its Report, the Commission explained that this meant that any harm that could possibly be caused by disclosure and the public interest therefore had to be balanced. As far as could be seen, such a balancing exercise had never been carried out although the termination of the project had led to serious doubts on the part of the government in Kazakhstan and to a considerable loss of prestige for the complainant.

The Commission had only made a summary statement without examining the request for access with due care and without distinguishing between the situation existing in 2002 and the present situation.

*Letter of 25 February 2004*

Only after having obtained access to the Commission’s file had it been possible to prove that the Commission had brazenly and deliberately lied to both the complainant and the Ombudsman. Access to the complete file would hopefully provide information as to why the Commission had failed to conduct its monitoring mission in a neutral way.

It was strange that the Commission had allowed the complainant to have access to some communications between the Commission and its Delegation in Kazakhstan but not to others. This showed that the Commission was not in the least disposed to respect Regulation 1049/2001.



The complainant had been exposed to a concerted campaign of defamation by several Directorates-General of the Commission for more than 10 years.

Regulation 1049/2001 provided for access to the complete file. It did not provide for the arbitrary curtailment of the right of access to the file by a Commission that was acting in a more and more feudalistic manner towards the complainant.

The Commission's excuse that access to certain documents had to be denied in order to protect the Commission's internal deliberations only increased the suspicion that the Commission had even more to hide than the complainant itself expected.

Access to the file was necessary in all cases where manipulations, wrong suspicions and boundless lies had been shown to exist in administrative procedures.

It was unclear what "decision-making process" still needed to be protected, given that the Commission maintained its brazen demand that the complainant should repay EUR 37 741.07 plus interest.

The termination of the project in Kazakhstan had resulted in severe damage to the complainant's reputation. The complainant was therefore entitled to see the documents withheld by the Commission in order to be able to correct this.

#### *Letter of 10 March 2004*

The Ombudsman himself had acknowledged the complainant's right of *complete* access to the file in his decision of 17 October 2003. It was suspicious that the services in charge of the contract had, on 23 September 1999, addressed a "request info about a contractor" to another Directorate-General of the Commission. This document was among the documents appearing on the list for file 4 that were not accessible.

#### **Further inquiries**

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

#### *The inspection of the file*

On 9 March 2004, the Ombudsman's services inspected the Commission's file. It was found that a document in file 1 for which the exception of Article 4 (3) had been invoked also contained factual information and that several documents in file 4 had not been mentioned in the inventory for this file.

#### *Request for further information*

On 18 March 2004, the Ombudsman asked the Commission for information on (1) why it did not consider the possibility of granting partial access to the note of Mrs S. of 30 April 1999 mentioned in part VII of the list of documents on file 1 and (2) on why it did not provide the complainant with a complete list of the documents in file 4.

#### *The Commission's reply*

In its reply, the Commission pointed out that when the inventory list had been prepared in July 2002, the Commission had been of the opinion that the note prepared by Mrs S. was to be considered as a document not for disclosure because of its internal nature and of the subjective comments that were included in it. However, this document also contained the minutes of a



meeting held on 29 April 1999 between CEV and the complainant. The Commission agreed that this part of the document should be made accessible to the complainant. As regards file 4, the Commission submitted that the documents mentioned by the Ombudsman as not listed were kept in the file for a better understanding of other documents which were listed in the inventory. However, the Commission agreed that the list provided for file 4 should mention all documents contained in the file.

With its reply, the Commission provided a copy of the document dated 30 April 1999 on which the comments of CEV had been made unreadable and a revised list of the documents in file 4.

#### *The complainant's observations*

In his observations, the complainant maintained its complaint and made the following further comments:

When deciding to terminate the project, the Commission had failed to comply with its duty to hear the complainant before taking a measure negatively affecting the latter. The Commission had also infringed Article 6 of the European Code of Good Administrative Behaviour, given that the measure was not reasonably proportionate to the purpose of the action pursued. Article 21 of the Code (regarding data protection) had also been infringed.

The request for access had been made on 9 March 2002, whereas the Commission had only given a relevant answer on 29 August 2002. This was a further instance of maladministration that the Ombudsman had not yet included in his inquiry.

The Commission had failed to provide a complete list of the documents on its file. This was a further instance of maladministration.

## **THE DECISION**

### **1 Preliminary remarks**

1.1 The complainant is a non-governmental organisation (NGO) from Germany which had worked on a project in Kazakhstan with the title 'Organisation of the Centre for Rendering Preventive, Medical and Diagnostical Help for Children and their Mothers, ill with Viral Hepatitis and Viral Carriers (Viral Hepatitis Associated Aids)' which was co-financed by the EU. The relevant contract (the "LIEN contract 97-2011") was signed on 28 April 1998 by the complainant on the one hand and IBF (a body based in Brussels) acting on behalf of the European Commission on the other. The supervision of the project had been entrusted to a technical assistance unit, namely the Centre Européen du Volontariat (CEV) in Brussels. In the spring of 1999, a monitoring mission was carried out with regard to the project. On 1 October 1999, IBF informed the complainant that the Commission had decided to cancel the project as of that day. The present complaint concerns the issue of access to the Commission's file concerning LIEN contract 97-2011.

1.2 In its observations of 15 June 2004 on the Commission's reply to a request for further information made by the Ombudsman, the complainant expressed the view that the Commission's decision to terminate the project in Kazakhstan infringed certain legal obligations



and various provisions of the European Code of Good Administrative Behaviour. It should be recalled that the present complaint concerns the issue of access to the file. The question as to whether the Commission's decision to cancel the project in Kazakhstan was correct is the subject of another complaint currently pending before the Ombudsman (complaint 49/2004/GG). The complainant's criticisms of the Commission's decision to cancel LIEN contract 97-2011 will therefore not be dealt with in the present inquiry. The complainant is however free to introduce these comments in his observations on the Commission's opinion in case 49/2004/GG.

1.3 In its observations of 15 June 2004, the complainant also made a further allegation concerning the length of time that had passed between the date when it made its request for access (9 March 2004) and the date when access was granted (26 August 2004). The Ombudsman considers that extending his inquiry to this further allegation would delay his decision on the original complaint and that this would not be in the complainant's interest. The additional allegation will therefore not be dealt with in the present inquiry. The complainant is however free to submit this allegation in a new complaint, if it so wishes.

## **2 Failure to grant full access to the file**

2.1 The complainant alleges that the Commission failed to grant full access to its file concerning LIEN contract 97-2011.

2.2 The Commission points out that the complainant was given an inventory of all the documents on all the four files of which its file was composed. The inventory identified both the documents that were accessible and those that were covered by one of the exceptions set out at Article 4 of Regulation 1049/2001. The refusal to grant access to the latter was based on Article 4 (3) of Regulation 1049/2001. The Commission considered that the disclosure of these documents which contained opinions for internal use as part of deliberations and preliminary consultations would seriously undermine the decision-making process of the Commission. As regards a specific document that according to the complainant was missing, this document was mentioned in this list as document number 37 of file number 3.

2.3 Article 1 (a) of Regulation 1049/2001 provides that the aim of this regulation is to ensure the widest possible access to documents held by the Council, the European Parliament and the Commission. According to the established case-law of the Community courts, any exceptions to this principle have to be interpreted strictly (4) . Where the Commission invokes an exception, it is required, at the very least for each category of documents concerned, to indicate the specific reasons for which it believes that the refusal to grant access is justified (5) . The Commission must therefore make it clear in the grounds stated for in its decision that it has carried out an assessment of the documents at issue in the particular case (6) .

2.4 In the present case, the letter of 8 July 2002 in which the Commission replies to the complainant's request for access does not contain any reasons for the refusal to disclose certain documents but merely refers to the fact that certain documents listed in the inventory would not be disclosed. The inventory annexed to this letter lists 17 documents in file 1 and one document in file 3 which are marked as inaccessible on the grounds of "Reg. 1049/2001, Art. 4, par. 3". For some of these documents, the words "part of decision-making process" are added in what appears to be the description of the contents. File 4, which contains at least 67 identified





documents, is simply marked “not for disclosure” in the header.

2.5 The Ombudsman considers that this reasoning is manifestly inadequate to allow the complainant (and the Ombudsman himself) to understand why no access could be granted to these documents. It should further be noted that in its opinion, the Commission limits itself to repeating the wording of Article 4 (3) of Regulation 1049/2001 without providing any further explanations as to why the disclosure of the documents concerned would seriously undermine its decision-making process.

2.6 There is thus nothing to show that the Commission examined for each of the documents concerned or at least for categories thereof whether the conditions in which Article 4 (3) of Regulation applies were fulfilled. In this context, it should be noted that the documents to which access was refused comprise a variety of types, for example internal notes of the Commission service in charge of LIEN contract 97-2011, reports, correspondence (mostly by e-mail) between the Commission, CEV and IBF and various other matters (see for example the document dated “12/11/99” listed in file 4 and described as “Chronology of events”). It should further be noted that the complainant correctly observes that the Commission did not explain why some documents belonging to a certain category were accessible while others were not (7)

2.7 The Ombudsman further notes that the Commission does not appear to have considered whether the fact that its decision to cancel LIEN contract 97-2011 had already been adopted in 1999 affected the analysis to be carried out under Article 4 (3) of Regulation 1049/2001. He further observes that the Commission has still not clarified whether it wished to rely on the first or the second sub-paragraph of that provision.

2.8 In these circumstances, the Ombudsman concludes that the Commission has failed to handle the complainant’s request for access to the documents on the file concerning LIEN contract 97-2011 properly and that this constitutes an instance of maladministration.

### **3 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 Ombudsman:

#### **The draft recommendation**

The Commission should reconsider the complainant’s request to grant full access to its file concerning LIEN contract 97-2011 and grant access to these documents unless it can show that they are covered by one of the exceptions set out in Regulation 1049/2001.

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 15 October 2004. The detailed opinion could consist of the acceptance of the Ombudsman’s decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 15 July 2004





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) The complainant has since submitted a new complaint regarding the termination of LIEN contract 97-2011 (complaint 49/2004/GG). In this case, the Commission submitted its opinion on 30 March 2004. On 22 April 2004, and at the complainant's request, the Ombudsman decided that the complainant could await the outcome of his inquiry into complaint 1874/2003/GG before submitting observations on the Commission's opinion in case 49/2004/GG.

(3) In his letter of 14 October 2003, the complainant erroneously referred to 3 "September" 2001.

(4) Cf. Case T-105/95 *WWF UK v Commission* [1997] ECR II-313 paragraph 56; Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1 paragraph 27.

(5) See Case T-124/96 *Interporc v Commission* [1998] ECR II-231 paragraph 54.

(6) Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269 paragraph 65.

(7) As regards file 2 for example, two fax messages from the Commission's Delegation in Kazakhstan to CEV (of 10 June and 26 July 1999, listed under II 5 and 6) were accessible to the complainant whereas an e-mail from the Delegation to CEV (of 17 or 19 November 1999, listed under III 14) was not.