

Draft recommendation to the European Personnel Selection Office in complaint 2028/2003/(MF)PB

Recommendation

Case 2028/2003/(MF)PB - Opened on 24/11/2003 - Recommendation on 07/10/2004 - Decision on 14/09/2005

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

THE COMPLAINT

The complainant participated in competition COM/B/1/02, the written examination of which she failed. On 8 August 2003, she asked the European Personnel Selection Office (hereafter EPSO) to send her a copy of her marked examination paper, the evaluation sheet and the selection criteria established and applied by the selection board. On 10 September 2003, EPSO sent the complainant a copy of her examination paper, without annotations, and the evaluation sheet. On 15 September 2003, the complainant sent a further letter to EPSO. In her letter, the complainant repeated her request for access to her examination paper, specifying that she wanted a marked copy. She also repeated her request for the selection criteria established by the selection board. On 13 October 2003, EPSO replied that it had sent her all the documents to which it could give her access. It explained that the examination paper had been anonymously assessed by two evaluators on the basis of the selection criteria, and that the selection board had established the mark on the basis of those evaluators' statements. EPSO also informed the complainant that she was free to make a confirmatory application to the Secretariat General of the European Commission in accordance with Article 7 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2) .

On 20 October 2003, i.e. the date of her complaint to the Ombudsman, the complainant made a confirmatory application to the Secretary General of the European Commission, repeating her request for a copy of her marked examination paper and the selection criteria established by the selection board.

In her complaint to the Ombudsman, she alleged that :

- 1) EPSO failed to give her access to her marked examination paper of competition COM/B/1/02
- 2) EPSO failed to give her access to the selection criteria used by the selection board.



The complainant claims access to her marked examination paper and to the selection criteria used by the selection board for competition COM/B/1/02.

THE INQUIRY

EPSO's opinion

EPSO enclosed a copy of the Commission's reply to the complainant's confirmatory application, made in accordance with Article 7 of Regulation 1049/2001. EPSO stated that it had nothing further to add to the content of that reply.

The Commission's reply to the complainant's confirmatory application contained, in summary, the following comments:

With regard to the complainant's request for her *marked* examination paper, the Commission first explained that the individual evaluators do not make their remarks on the examination paper itself but on separate evaluation sheets. The selection board examines these separate evaluation sheets to make its evaluation. The Commission noted that EPSO had already sent the complainant a copy of the examination paper that was evaluated, without annotations, as well as the final evaluation sheet. As regards the latter, the Commission pointed out that the sheet contained the items that had been evaluated, i.e. the following: knowledge in the field, writing skills, ability to develop ideas, analytical skills and the ability to argue. It stated that this constituted an overall evaluation of the examination paper that enabled the applicants to understand the reasons for the mark that they had received.

The Commission further explained that the separate evaluation sheets filled in by the evaluators constitute preparatory documents that assist the selection board in its assessment. They contain advice intended for internal use in the selection board's deliberations. The Commission stated that to make them public would therefore seriously undermine the decision-making process, for instance by creating a risk of external pressure that would undermine the independence and objectivity of the selection board's work. It referred to the exception provided for in Article 4(3)(ii) of Regulation 1049/2001, which provides that *"Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

The Commission also referred to Article 6 of annex III to the Staff Regulations, which establishes the secret nature of the selection board's work to protect the members of the selection board against external interference and pressure. The Commission referred to case law on this issue (3).

As regards the selection criteria applied by the selection board, these criteria had been established in advance by the selection board itself. The Commission referred to the *Innamorati* case of 1996 (4), in which the Court of Justice held that such criteria constitute an integral part



of the deliberations of the selection board, and as such are covered by secrecy (5) . With reference to this decision, the Commission considered that access to the selection criteria had to be refused under Article 4(3) of Regulation 1049/2001 (quoted above), as their release would seriously undermine the decision-making process of the board.

The Commission also informed the complainant that it had considered the possibility of giving partial access to the documents requested in accordance with Article 4(6) of Regulation 1049/2001. It had concluded, however, that the information in the documents concerned was inseparable, and that partial access was therefore not possible.

The Commission also informed the complainant that it had considered, in accordance with Article 4(3)(ii) of Regulation 1049/2001, whether an "overriding public interest in disclosure" would justify giving access the documents requested. The Commission had concluded, however, that the complainant's interest was individual rather than public, and that this provision therefore did not apply.

The complainant's observations

The Commission's opinion was forwarded to the complainant, from whom the Ombudsman received no observations.

THE DECISION

1 Introductory remarks

1.1 In its reply to the complainant's confirmatory application, which was referred to in EPSO's opinion as containing the reasons for the refusal to provide access, the Commission addressed the issue of access to the separate evaluation sheets filled in by the evaluators.

1.2 This issue was not addressed in the complaint, which concerned access to the marked examination paper and the selection criteria, nor has it been addressed by the complainant subsequently. It therefore concerns a hypothetical question, the review of which would not respond to allegations or claims put forward by the complainant. As the Ombudsman's present inquiry is aimed at reviewing the actual dispute referred to in the complainant's letter of 20 October 2003, the Ombudsman does not, therefore, consider that it would be appropriate to assess the question of access to the separate evaluation sheets filled in by the evaluators. The complainant remains free, however, to make an application for access to those evaluation sheets, and to ask for review of any rejections of such an application.

1.3 The Ombudsman furthermore notes that EPSO and the Commission decided to respond to the complainant's request for access to the documents concerned on the basis of Regulation 1049/2001 regarding public access to documents (6) . It appears that the complainant accepted that her request was dealt with under Regulation 1049/2001, which is therefore the legal basis for the Ombudsman's review in the present case.

The Ombudsman nevertheless considers it relevant to draw attention to Article 41(2)(ii) of the European Union's Charter of Fundamental Rights, which refers to the right of "every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of



professional or business secrecy". In the Ombudsman's view, it is open to individuals who have participated in recruitment competitions to request access to their application file on the basis of this right.

2 Alleged failure to give access to the marked examination paper

2.1 The complainant participated in competition COM/B/1/02, organised by the European Personnel and Selection Office (EPSO). Not having passed the competition successfully, she asked EPSO to give her access to her marked examination paper. EPSO sent the complainant a copy of her examination paper without annotations, together with the evaluation sheet. The complainant wrote to EPSO again, explaining that she wanted a *marked* copy of the examination paper. EPSO thereupon informed the complainant that it had sent her all the documents to which it could give her access. It also informed the complainant that she was free to introduce a confirmatory application to the Secretary General of the European Commission in accordance with Article 7 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (7) . The complainant made such an application to the Secretary General of the Commission on 20 October 2003. In her complaint to the Ombudsman, she alleged that EPSO had failed to give her access to her marked examination paper.

2.2 In its opinion, EPSO enclosed a copy of the Commission's reply to the complainant's confirmatory application of 20 October 2003. EPSO stated that it had nothing further to add to the content of that reply, dated 14 November 2003.

In its reply to the complainant's confirmatory application, the Commission explained that the individual evaluators do not make their remarks on the examination paper itself but on separate evaluation sheets. The Commission noted that EPSO had already sent the complainant a copy of the examination paper and of the final evaluation sheet agreed by the selection board.

2.3 On 18 October 1999, the European Ombudsman sent a special report to the European Parliament following the own-initiative inquiry into the secrecy which formed part of the Commission's recruitment procedure (8) . The special report included a formal recommendation that in future recruitment competitions, the Commission should give candidates access to their own marked examination papers on request. On 7 December 1999, the President of the European Commission wrote to the European Ombudsman to inform him that:

"The Commission welcomes the recommendations you made in this report and will propose the necessary legal and organisational arrangements to give candidates access to their own marked examination papers, upon request, from 1 July 2000 onwards." (9)

2.4 The Ombudsman notes that the complainant requested EPSO to give her access to her own marked examination paper. In response to her request, she was provided with copies of her written examination paper and of the evaluation sheet. The selection board wrote its comments relating to its assessment of the examination paper of the complainant on this evaluation sheet, a copy of which was submitted to the Ombudsman together with the present complaint. The Ombudsman is not aware of any rule that would oblige the selection board to write its comments relating to the assessment of a candidate on the examination paper. In the light of the clear and



consistent remarks on the evaluation sheet, the Ombudsman considers that the Commission's response appears to be reasonable.

2.5 In these circumstances, the European Ombudsman considers that there appears to have been no maladministration with regard to the complainant's first allegation.

3 Alleged failure to give access to the selection criteria

3.1 The complainant alleged that EPSO had failed to give her access to the selection criteria used by the selection board.

3.2 In its reply to the complainant's confirmatory application, referred to in EPSO's opinion, the Commission explained that these criteria had been established in advance by the selection board itself. It cited the decision of the Court of Justice in the *Innamorati* case against the European Parliament (10) , in which it was found that such criteria constitute an integral part of the deliberations of the selection board, and as such are covered by the secrecy pertaining to those deliberations (11) . With reference to this case, the Commission considered that access to the selection criteria had to be refused under Article 4(3)(ii) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (12) .

3.3 As regards the Commission's view that it had to refuse access in the light of the *Innamorati* case, the Ombudsman considers it useful to quote the following paragraphs of the judgement:

"29 The criteria for marking adopted by the selection board prior to the tests form an integral part of the comparative assessments which it makes of the candidates' respective merits. They are designed to guarantee, in the candidates' own interests, a certain consistency in the board's assessments, especially where there is a large number of candidates. Those criteria are therefore covered by the secrecy of the proceedings in the same way as the selection board's assessments.

30 The comparative assessments made by the selection board are reflected in the marks it allocates to the candidates. The marks are the expression of the value judgments made concerning each of them.

31 Having regard to the secrecy which must surround the proceedings of a selection board, communication of the marks obtained in the various tests constitutes an adequate statement of the reasons on which the board's decisions are based." (Emphasis added.)

3.4 It is clear from the above that the *Innamorati* case only concerned the duty to state reasons for individual decisions taken specifically in the context of recruitment competitions. The decision in the *Innamorati* case does not, therefore, concern the issue of access to documents. In the Ombudsman's view, the decision in the *Innamorati* case cannot therefore be invoked as a legal precedent obliging the institutions to keep selection criteria secret under Regulation 1049/2001.

3.6 The Ombudsman notes that recent decisions of the Court of First Instance appear to support this finding. In the *Pyres* case (13) and the *Alexandratos and Panagiotou* case (14) ,



the Court of First Instance found that although the communication of the mark obtained by candidates in the various tests constitutes an adequate statement of the reasons on which the selection board's decision is based, this does not imply that a candidate who so requests cannot be informed about the selection board's selection criteria.

3.7 The Ombudsman furthermore notes that to allow access to selection criteria appears to be consistent with the European Union's policy and legislation on transparency and public access to documents, which have developed significantly since the Court's decision in the *Innamorati* case in 1996.

In 1997, the Treaty of Amsterdam amended the Treaty on European Union, inserting the following principle into Article 1 of the Common Provisions of that Treaty:

"This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen ." (Emphases added.)

The Treaty of Amsterdam also inserted Article 255 into the Treaty establishing the European Communities. Article 255 of the Treaty provides that:

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined ...".

Article 255(2) provides that "General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam."

On the basis of this provision, the Council and the Parliament adopted Regulation 1049/2001 regarding public access on 30 May 2001 (15) .

The preamble of Regulation 1049/2001 confirms that "openness ... guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system" (recital 2, emphases added), and that "in principle, all documents of the institutions should be accessible to the public" (recital 11). Article 1(b) expressly provides that Regulation 1049/2001 is intended to "establish rules ensuring the easiest possible exercise of this right".

3.8 In the light of the above, the Ombudsman considers that EPSO and the Commission were wrong to consider that the decision in the *Innamorati* case obliged them to refuse access to the selection criteria under Article 4(3)(ii) Regulation 1049/2001. EPSO and the Commission therefore failed to give adequate reasons for refusing access. This constitutes an instance of maladministration, and the Ombudsman therefore makes the draft recommendation below.



3.9 The Ombudsman furthermore wishes to add that the exception contained in Article 4(3)(ii) does not appear to apply to the kind of document here concerned. Article 4(3)(ii) applies to "*documents containing opinions*". In the Ombudsman's view, a document containing selection criteria cannot be considered a "document containing opinions" (16) .

4 Conclusion

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

EPSO should reconsider its refusal to provide the complainant access to the selection criteria established by the selection board, and give access unless valid grounds prevent their disclosure under any of the exceptions in Regulation 1049/2001 regarding European Parliament, Council and Commission documents.

EPSO and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, EPSO shall send a detailed opinion by 31 December 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, 7 October 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) Official Journal 2001 L 145, p. 43.

(3) Case T-53/00 *Angioli* [2000] ECR 2003 II-73; Case T-33/00, *Martínez Paramo and others* [2000] ECR 2003 II-541; Case T-72/01, *Pyres* , judgement of 25 June 2003.

(4) Case C-254/95 P *Innamorati* [1996] ECR I-3423.

(5) *Ibid.*, paragraph 29.

(6) Official Journal 2001 L 145, p. 43.

(7) Official Journal 2001 L 145, p. 43.

(8) Special Report of the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedure: <http://www.ombudsman.europa.eu/special/en/default.htm> [Link].



- (9) See press release no. 16/99 of the European Ombudsman of 15 December 1999.
- (10) Case C-254/95 P *Innamorati* [1996] ECR I-3423.
- (11) *Ibid.*, paragraph 29.
- (12) Official Journal 2001 L 145, p. 43.
- (13) Case T-72/01, *Pyres*, judgement of 25 June 2003, paragraphs 70 - 71.
- (14) Case T-233/02, *Alexandratos and Panagiotou*, judgement of 17 September 2003, paragraph 31.
- (15) Official Journal 2001 L 145, p. 43.
- (16) Other language versions of Regulation 1049/2001 appear to support the Ombudsman's finding, for instance "des avis" (French), "Stellungnahme" (German), "yttranden" (Swedish), "meningstilkendegivelser" (Danish), "opiniones" (Spanish), "riflessioni" (Italian).