



Draft recommendation to the European Personnel Selection Office in complaint 413/2004/(MF)PB

Recommendation

Case 413/2004/(MF)PB - **Opened on** 30/03/2004 - **Recommendation on** 28/10/2004 - **Decision on** 22/09/2005

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

The complainant participated in open competition COM/LA/3/02 launched by the European Commission to constitute a reserve list of French language translators.

By letter dated 16 January 2004, the complainant was informed that she would not be admitted to the oral tests because she had failed to obtain the minimum points required for written test c).

The complainant wrote to the Director of the newly established European Personnel Selection Office (EPSO) - which had taken over the organisation of the competition - requesting a copy of her marked examination paper. On 26 January 2004, EPSO sent the complainant an unmarked copy of her examination paper, together with the selection board's final evaluation sheet ("*fiche d'évaluation*").

The complainant wrote to the Ombudsman on 11 February 2004. On 30 March 2004, the Ombudsman asked EPSO to submit an opinion on the following allegations and claims:

"In her complaint, [the complainant] alleges that the Selection Board has failed to provide her with the information which would have enabled her to understand the errors she had made.

The complainant claims that the Selection Board should send her a copy of her marked examination paper and a detailed evaluation sheet."

THE INQUIRY

The complaint was sent to EPSO for an opinion. The opinion that the Ombudsman received was however written by the European Commission.

The Commission's opinion

The Commission outlined the facts of the case and stated that the complainant had made a complaint under Article 90(2) of the Staff Regulations and a confirmatory application for documents under Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents. Both procedures had been concluded at the time of the Commission's opinion. The Commission therefore enclosed its decisions on the Article 90(2) complaint and the confirmatory application so that these could serve as its substantive views on the present complaint. These are summarised in the following.



Decision on the confirmatory application

The complainant's confirmatory application for documents under Regulation 1049/2001 included a request for access to the marked examination paper in test c) and a "*grille d'évaluation détaillée*".

In its decision on the confirmatory application, the Commission explained that the corrections were not made directly on the examination paper. Instead, the corrections are made on separate evaluation sheets that are filled in by the individual independent evaluators. These, according to the Commission, constitute preparatory documents that serve as a basis for the selection board's internal deliberations. To make these evaluation sheets public would create a risk of external pressure and interference in the selection board's deliberations. Access to the separate evaluation sheets therefore had to be refused on the basis of the exception contained in Article 4(3)(ii) of Regulation 1049/2001.

The Commission also referred to Article 6, Annex III, of the Staff Regulations, which establishes the secrecy of the selection board's deliberations. The Commission stated that the provision in Article 6 effectively constituted a specific application of the exception contained in Article 4(3)(ii) of Regulation 1049/2001 regarding public access to documents. The Commission also noted that the case-law of the Community courts had in several cases confirmed the secrecy of the selection board's deliberations. It referred to the Court's decision in the *Innamorati* case.

As regards the claim for a "*grille d'évaluation détaillée*", the Commission's opinion clarified that a "*grille d'évaluation*" is a list of the detailed evaluation criteria established by the selection board. The Commission therefore responded to the claim as a claim for access to the evaluation criteria.

The Commission informed the complainant that it was established case-law that it would be contrary to the secrecy provided for in Article 6, Annex III, of the Staff Regulations to make the evaluation criteria public. It referred to the Court's decision in the *Innamorati* case, and stated that giving access would also be a breach of Article 4(3)(iii) of Regulation 1049/2001 regarding public access to documents.

On the issue of partial access (which must be considered under Article 4(6) of Regulation 1049/2001 regarding public access to documents), the Commission informed the complainant that the exceptions referred to above applied to the entire documents to which access was refused. Partial access was therefore not given.

On the issue of whether an "*overriding public interest in disclosure*" should have allowed the complainant access to the documents refused, the Commission stated that (1) the complainant's interest in obtaining access to the documents concerned was an individual interest rather than a public one and that (2) the Commission had in any case not been able to identify any public interest in disclosure.

Decision on the complainant's Article 90(2) complaint

In her complaint under Article 90(2) of the Staff Regulations, the complainant had challenged the selection board's decision to exclude her from further participation in the competition,



and to deny her access to the evaluation criteria. The Commission rejected both parts of her complaint. With regard to the evaluation criteria, the Commission referred to the case-law according to which the evaluation criteria are covered by the secrecy pertaining to the deliberations of the selection board (*Innamorati* case).

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 The complaint concerns a refusal of the European Personnel Selection Office (EPSO) to provide access to documents and information. The complaint was therefore sent to EPSO for an opinion. The opinion was submitted by the European Commission, i.e. the Community institution originally responsible for the competition here concerned. The Ombudsman considers it appropriate to continue the inquiry on the basis of the Commission's opinion, and the complainant has not objected to this. However, in the light of the fact that it was EPSO that refused the complainant access in the first place, and the fact that EPSO is now the main body for the organisation of recruitment competitions, the Ombudsman considers that EPSO remains the relevant addressee of the findings and the draft recommendation in the present case.

1.2 Another issue was the Commission opinion's statements related to access to the separate evaluation sheets filled in by the individual independent evaluators. It is not clear from the complaint - and the Ombudsman has received no remarks on this from the complainant - that the complainant wishes the Ombudsman to examine this issue. The Ombudsman therefore considers that it would not be appropriate in the present case to assess the question of access to the separate evaluation sheets filled in by the independent evaluators.

1.3 The complainant has furthermore submitted no specific allegations related to the Commission's decision to reject her Article 90(2) complaint against the decision to exclude her from the competition. The Ombudsman has therefore not inquired into the Commission's assessment of the selection board's decision. With regard to the complainant's request for documents in her Article 90(2) complaint, this request was, as noted in the Commission's opinion, similar to the complainant's request made under Regulation 1049/2001 regarding public access to documents. The Ombudsman's review in this inquiry therefore applies to both these requests.

1.4 A final question concerns terminology. When opening the present inquiry, the Ombudsman stated in his letter to EPSO that the complainant claimed that she should be given "a detailed evaluation sheet". This was intended to translate the complainant's request for a "*grille d'évaluation détaillée*". It appears from the Commission's opinion that a "*grille d'évaluation*" contains the detailed evaluation criteria established by the selection board. The Commission has therefore responded to the claim as a claim for access to the evaluation criteria. The Ombudsman has reviewed the case accordingly.

2 Alleged failure to provide the complainant with information

2.1 Following her exclusion from competition COM/LA/3/02, the complainant requested information from EPSO. EPSO sent her an unmarked copy of her examination paper and the



selection board's final evaluation sheet. The complainant did not consider this information satisfactory. In her complaint to the Ombudsman, she alleged that the selection board had failed to provide her with the information which would have enabled her to understand the errors she had made. She claimed that the selection board should send her a copy of her marked examination paper and a "*grille d'évaluation détaillée*".

2.2 In its opinion, the Commission informed the Ombudsman that the complainant had submitted similar claims in a request for access to documents under Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents, and in a complaint under Article 90(2) of the Staff Regulations. The respective procedures had been concluded at the time of the opinion, and the Commission therefore enclosed copies of its decisions.

2.3 In its reply to the complainant's confirmatory application, the Commission had informed the complainant that the individual evaluators make their remarks on separate evaluation sheets, and that the examination paper itself had therefore remained unmarked.

2.4 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 (2). 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." (3)

2.5 One aspect of the arrangements that were adopted by the Commission was the practice of giving applicants who so request a copy of the selection board's final evaluation sheet.

2.6 It is the Ombudsman's understanding that the Commission's commitment here referred to has been adopted by EPSO as part of its own practice.

2.7 In the present case, EPSO gave the complainant an unmarked copy of her written examination paper and a copy of the selection board's final evaluation sheet. 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. The commitment referred to above therefore appears to have been respected in the present case.

2.8 With regard to the refusal to give the complainant access to the evaluation criteria (cf. preliminary remark in paragraph 1.5 above), the Commission has referred to Article 4(3)(ii) of Regulation 1049/2001 regarding public access to documents, Article 6, Annex III, of the Staff Regulations, and the Court's decision in the *Innamorati* case.



2.9 The Ombudsman has already examined the issue of access to evaluation criteria in his draft recommendation in complaint 2028/2003/(MF)PB, submitted to EPSO on 7 October 2004 (still pending). In that case, EPSO and the Commission had taken the view that the decision in the *Innamorati* case obliged them to refuse access to the selection criteria under Article 4(3)(ii) Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (4) . In his draft recommendation, the Ombudsman made the following comments:

"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.)

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.

The Ombudsman notes that recent decisions of the Court of First Instance appear to support this finding. In the *Pyres* case (5) and the *Alexandratos and Panagiotou* case (6) , 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.

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 (7) .

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'.

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.

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*' (8) ."

2.10 On the basis of the above findings, the Ombudsman made the following draft recommendation:

"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."

2.11 The Ombudsman considers that the findings in his draft recommendation to EPSO in the case referred to above are equally relevant and applicable to the present case. The Ombudsman therefore considers that the reasons for not giving the complainant access to a copy of the detailed evaluation sheet were inadequate. This constitutes an instance of maladministration, and the Ombudsman therefore makes the draft recommendation below.

3 Conclusion

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

EPSO should reconsider its refusal to give the complainant access to a copy of the detailed evaluation sheet, and give access unless valid grounds prevent its disclosure.

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 January 2005. 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, 28 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) 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> .

(3) See press release no. 16/99 of the European Ombudsman of 15 December 1999.

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

(5) Case T-72/01, *Pyres* , judgement of 25 June 2003, paragraphs 70 - 71.

(6) Case T-233/02, *Alexandratos and Panagiotou* , judgement of 17 September 2003, paragraph 31.

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

(8) 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).