Draft recommendation of the European Ombudsman in his inquiry into complaint 56/2007/PB against the European Commission

Recommendation
Case 56/2007/PB - **Opened on** 07/02/2007 - **Recommendation on** 11/05/2010 - **Decision on** 09/02/2011

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

THE BACKGROUND TO THE COMPLAINT

1. This case concerns a request for information and documents, submitted to the Commission in late 2006. The complainant, who is a retired official, asked the Commission to provide him with detailed information relating to the work of the Common Sickness Insurance Scheme or, alternatively, documents from which he himself could extract that information. The Commission provided the complainant with certain reports which it considered to contain relevant information regarding his request. However, it considered that it was not obliged to meet his request in full because it was excessive.

2. The complainant contacted the Ombudsman, who eventually reached the provisional conclusion that the Commission had not, in summary, adequately justified its refusal to grant access to the information or the documents concerned. The Ombudsman therefore made a proposal for a friendly solution, which was essentially rejected by the Commission. The Ombudsman subsequently carried out an inspection at the Commission, which revealed a number of shortcomings in the Commission's handling of the case.

3 The detailed facts of the case are set out further in the inquiry section of the present draft recommendation.

THE SUBJECT MATTER OF THE INQUIRY

4. On 7 February 2007, the Ombudsman opened his inquiry into the complainant's following allegation and claim:

Allegation :

The Commission failed to deal with his confirmatory application of 22 November 2006 in accordance with Regulation 1049/2001 [2] .

Claim :

The Commission should grant him access, full or partial, in response to his requests of 14 September and 22 November 2006.

THE INQUIRY

5. On 7 February 2007, the Ombudsman asked the Commission for an opinion on the complaint. On 10 April 2007, the Commission sent its opinion, which was forwarded to the complainant. The complainant submitted his observations on the opinion on 21 April 2007. Due to (i) an attempt by the complainant to seek a global solution to his numerous disputes with the Commission, and (ii) the Ombudsman's support for this attempt, the latter suspended his handling of all complaints from this complainant for a period of several months in 2007. On 17 June 2008, the Ombudsman made a proposal for a friendly solution. The Commission sent its observations on 18 February 2009, which were forwarded to the complainant on 24 February 2009. The complainant sent his comments on the Commission's observations on 1 March 2009. On 8 June 2009, the Ombudsman's services carried out an inspection at the Commission. The inspection report was forwarded to the complainant, who submitted his observations on 24 June 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation that the Commission failed to deal properly with the complainant's confirmatory application under Regulation (EC) No 1049/2001

Arguments presented to the Ombudsman

6. On 14 September 2006, the complainant made the following requests to the European Commission:

A. Access to all statistics of the Common Sickness Insurance Scheme for the preceding five years and in particular to:
- the number of applications;
- the average volume (requested/paid);
- the minimal, maximal and average time for handling applications, from their registration until the decision and payment, as well as the evolution of the case-processing over time;

- the number of applications requiring previous agreement and their results (by categories);
- the number of applications with advance payment, their results and volumes;
- the applications for recognition of accidents (including the processing time and the decision);
- an overview of further available statistical data;
- the number of members of staff in charge of handling applications;
- in case these data are not available, access to all applications and decisions for the last year.

B. Access to all statistics concerning applications for recognition of professional illness for the preceding 15 years, in particular concerning:
- the number of applications;
- their volume;
- the time for handling them;
- the rate of successful applications and the payments made;
- the number of complaints or decisions taken by a medical panel;
- broken down according to the type of illness;
- in case these data are not available, access to all files (applications and decisions) for the preceding five years.

7. The complainant stated that he preferred to be given the above data on CD/DVDs.

8. The Commission replied on 17 October 2006. A copy of that reply was not attached to the complaint, but summarised in the Commission's reply to the complainant's " *confirmatory application* ". The Commission's PMO [3] informed the complainant that (a) the statistical information that he had requested did not exist, and (b) his request had therefore not been handled as an application for access to documents under 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 ("Regulation 1049/2001") [4] , but rather as a request for information. The PMO sent the complainant the relevant annual reports for 2001 to 2004, and indicated that it would send him the annual report for 2005 once that report had been finalised. The PMO also sent the complainant an " *overview of the last years* ". Finally, the PMO noted that the complainant had requested access to all requests and decisions, in case the requested data did not exist. Such access was rejected in order to protect personal data.

9. On 22 November 2006, the complainant submitted what he referred to as a " *confirmatory application for access to files and/or documents under Regulation 1049/2001* ". The complainant made the following comments.

10. He first noted that he had received some documents in response to his above-mentioned request, but that, contrary to his express request for electronic copies, (i) these had been in hard-copy format, and (ii) the documents did not, in any way, meet his requests.

11. The complainant furthermore raised, as follows, a number of points in response to the Commission's reply of 17 October to his letter of 14 September 2006:
- In its reply, the Commission requested the complainant to distribute/pass on the delivered documents only after consultation with the PMO. The Commission argued that this request was

in accordance with Article 19 of the Staff Regulations [5] . The complainant considered that such a limitation could not be requested, since his request had been made under Regulation 1049/2001 on *public* access to documents.
- The complainant noted that the Commission had furthermore informed him that no systematically structured data concerning requests relating to occupational diseases existed, but that he had been sent an overview covering the preceding ten years. The complainant considered that the information contained in the latter was totally inadequate, since it was in French and consisted merely of case numbers.

12. The complainant also noted that the purpose of his request was not, as such, to obtain access to the files referred to, but to gain access to statistical information (in the event that the above-mentioned information did not exist as such). He further noted that his request for access to the files had been rejected. He argued that the information that he had requested was in fact contained in databases from which the Commission could easily have retrieved that relevant information in the form of documents, and that its failure to do so was in breach of Regulation 1049/2001. He noted that the information that he wanted to have retrieved was apparently of no interest to the Commission, but that this was irrelevant under Regulation 1049/2001.

13. Referring to the information that he had already been given, the complainant noted that the number of cases involving occupational disease was around 235. He argued that it would not involve a disproportionate work burden for the Commission to give partial access to the relevant files.

14. At the time he submitted his complaint to the Ombudsman, the complainant had not yet received a reply from the Commission a reply to his " *confirmatory application* ". However, on 10 January 2007, the complainant forwarded to the Ombudsman the Commission's reply of that date. The complainant pointed out that, notwithstanding that reply, he maintained his complaint. The complainant's e-mail of 10 January 2007, and its annexes, was therefore included in the file as part of the complaint.

15. The Commission's reply of 10 January 2007 to the complainant was sent by the Commission's Secretary-General, and contained, in bold font, the indication " *Confirmatory application for access to documents under Regulation 1049/2001* ". It contained a first part entitled " *Scope of your request* ", in which the various points of the complainant's request were summarised. The request was thereafter discussed in points 2 and 3 of the letter, as follows:

Handling of the first application

The statistical data that the complainant requested did not exist as such. Producing the statistical data would involve considerable work in terms of searching and processing. The PMO therefore did not deal with the first request as a first application under Regulation 1049/2001, but instead as an information request. The PMO sent the complainant the relevant annual reports for 2001 to 2004, and would send him the annual report for 2005 once it was finalised. In addition, the PMO sent him an overview of the applications for the last 15 years.

The complainant also formulated a conditional application to the effect that, in case these data were not available, he would like access to all files (applications and decisions) for the preceding five years. This application was rejected by the PMO with a view to protecting personal data.

Examination of the complainant's first request

In his e-mail of 22 November 2006, the complainant maintained his first application of 14 September 2006. With regard to access to the applications and decisions, he explained that he was not interested in obtaining access to the files referred to as such, but in gaining access to statistical information which is contained in, or can be retrieved from, a database. The Secretary-General " *therefore presume* [d] *that* [the complainant had] *dropped* [his] *application for access to 'all applications and decisions', requested in* [his] *first application* ".

The scope of the complainant's application and the nature of the requested data went far beyond the scope of the application of Regulation 1049/2001. Attention was drawn to Article 10(3) of Regulation 1049/2001, according to which " *documents shall be supplied in an existing version and format* ".

The data requested by the complainant were not available as such, nor were they contained in existing documents. This was also the case for the statistical data which could be drawn from the applications and the decisions. The complainant argued that the definition of " *document* " in Article 3(a) of Regulation 1049/2001 included electronic documents, and that the requested information was therefore within the scope of the Regulation.

The Commission could not agree with this view. Article 3(b) of Regulation 1049/2001 only provides that the medium is not important for the definition of a document. An electronic document, for instance a PDF file or a Word document, is a document within the meaning of the Regulation. A database, on the other hand, is not a document but a collection of documents and data. The complainant was applying for an extract of the data for each member of the sickness insurance. It is clear that, in order to grant such a request, data would have to be searched, selected and processed. The request could therefore not be considered as an application for documents in an existing format within the meaning of Article 10(3) of Regulation 1049/2001, but instead as a request for the processing of data with a view to providing the complainant with statistical information. Such a request does not fall within the application of Regulation 1049/2001.

The PMO acted correctly by replying to the complainant under the Commission's Code of Good Administrative Behaviour [6] ('the Code'). His e-mail of 22 November 2006 could therefore not be considered and replied to as a confirmatory application under Regulation 1049/2001.

The complainant argued that the PMO acted unlawfully by asking him to request its permission before passing-on the aforementioned annual reports. It can be left open to further examination whether Article 19 of the Staff Regulations applied specifically. However, it remains the case that the annual reports were given to the complainant in his capacity as an official of the

Commission, and not on the basis of Regulation 1049/2001. They were therefore given to him exclusively for his personal information and are therefore not public. The request to treat reports as confidential was therefore permissible.

In a final separate point, entitled " *Complaints* ", the Commission informed the complainant that, under the Code, he could complain about the PMO's decision of 17 October 2006. He was referred to the Commission's website containing complaint forms.

16. In a short e-mail dated 10 January 2007, the complainant responded to the Commission's above reply. In his reply, the complainant:

(i) repeated his view that his request of 14 September 2006 fell under Regulation 1049/2001; and

(iii) argued that the Commission had clearly committed an " *interpretation mistake* " by operating on the presumption that he no longer maintained his request for access to " *all applications and decisions* " (cf. above).

17. In its opinion, the Commission first provided the following background information, and then stated its position on the complainant's complaint.

Background information

On 14 September 2006, the complainant made his request (the Commission re-stated the background to the complainant's request as summarised above under " *The Complaint* ").

The PMO replied on 17 October 2006. A copy of this letter was attached to the Commission's opinion. It confirmed that the statistical data requested by the complainant did not exist as such. However, the PMO provided the complainant with the annual reports for 2001 to 2004 and announced that it would send him the annual report for 2005 once it had been finalised. Furthermore, the PMO sent the complainant an overview of the number of accidents, of professional sickness applications and of natural deaths for the preceding ten years, a copy of which was attached. Access to individual applications and decisions was denied on the ground that these documents contain personal data, the disclosure of which would harm the privacy of the individuals concerned. The PMO considered that it would not be possible to provide anonymous copies of these applications and decisions.

The complainant submitted a confirmatory application by e-mail on 22 November 2006. He complained about the fact that the documents were delivered on paper and not in electronic format and that they fell far short of satisfying his request. The complainant reiterated his above-mentioned request. As regards access to applications and decisions, he clarified that he was not seeking access to the complete sickness files of all affiliates, but rather sought to obtain anonymised statistical data, which were presumably available in a database or could be retrieved from it.

On 10 January 2007, the Secretary-General confirmed that the complainant's request did not fall within the scope of Regulation 1049/2001 and considered that the PMO had adequately handled his request for information in accordance with the Code.

1.5 On the same day, the complainant stated that, in his view, Regulation 1049/2001 did apply to his request. He informed the Secretary-General that, in the meantime, he had lodged a complaint with the Ombudsman. The Commission took note of this and did not pursue any further correspondence with the complainant.

The Commission's position

The complainant requested very extensive statistical data regarding the Common Sickness Insurance Scheme. Such statistics did not exist as such. The complainant's request could only be satisfied by retrieving and processing data for the specific purpose of providing him with the requested statistics. Since his request did not concern an existing document in an existing format, it did not fall within the scope of Regulation 1049/2001.

The PMO tried to satisfy the complainant's request for information, by providing him with existing annual reports on the Common Sickness Insurance Scheme. In addition, it drafted an overview of applications for recognition of professional sickness made during the previous 15 years.

The PMO acted in full compliance with the provisions of the Code.

18. In his observations on the Commission's opinion, the complainant made, in summary, the following observations.
- The facts referred to by the Commission were by and large accurate, apart from its point that, in his e-mail of 22 November 2006, the complainant had withdrawn his request for all the applications and decisions mentioned in this point. This was by no means the case, and could simply not be inferred from the said e-mail. Furthermore, the Commission did not mention that the complainant expressly stated in his e-mail of 10 January 2007 that he maintained all his conditional applications in full.
- The Commission's opinion raises the following issues, but discusses them only in a rudimentary fashion:

(a) Are there documents containing the statistical data requested by the complainant to which he was not granted access?

(b) Are electronic data " *documents* " within the meaning of Regulation 1049/2001?

(c) Has the Commission complied with its obligations under Article 6 of Regulation 1049/2001?

(d) Did the Commission properly handle the conditional applications?

(e) Did the Commission act in accordance with its Code of Good Administrative Behaviour?

The complainant considered the replies to these questions to be the following:

(a) It must be taken for granted that the Commission possesses " *documents* ", within the meaning of Regulation 1049/2001, which contain the data requested. This can be deduced from, amongst other things, the fact that Commissioner Kallas, in his response to a question put by an MEP (P-5444/06), provided information concerning the medical care scheme which is much more detailed than the information provided to the complainant. When such figures can be communicated externally, it must be presumed that much more detailed information is held by the Commission internally.

Generally, it is not possible to imagine how the Commission would control its medical care scheme internally if it were only in possession of the " *documents* " provided to the complainant in this case.

(b) Article 3(b) of Regulation 1049/2001 provides as follows:

" *(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility* ".

This broad definition must be understood to encompass databases and their data content as well.

(c) The Commission failed to act in accordance with its obligation to find a " *fair solution* " as envisaged under Article 6 of Regulation 1049/2001. It should have helped the complainant by actively retrieving the relevant data from the databases concerned.

(d) The complainant's " *conditional applications* " referred to classical paper documents. Thus, even though the Commission may be right with respect to access to data contained in databases, the fact remains that the complainant had made proper applications for public access to documents under Regulation 1049/2001.

Furthermore, the Commission appeared to refer to the impossibility of blackening – that is, giving partial access to – documents. This, however, is not compliant with the case-law of the Community Courts, which contains a requirement to grant partial access even in the case of very large numbers of documents.

(e) Even if one were (wrongly) to accept the Commission's view that Regulation 1049/2001 was not applicable in this case, the Commission would still clearly have failed to respect its Code. In particular, it did not offer the complainant the assistance that it should have given him.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

19. The Ombudsman made a proposal for a friendly solution, based on the following findings:

20. In its reply to the complainant's confirmatory application of 22 November 2006, the Commission, first, noted that the statistical data that the complainant requested did not exist as such and that producing these data would involve considerable work in terms of searching and processing. In this regard, the complainant essentially argued that the broad definition of 'documents' in Article 3(a) of Regulation 1049/2001 [7] encompasses databases and their data content. He also made the point that the Commission could easily have retrieved from its database the information that he requested. In its opinion on the complaint, the Commission referred, in essence, to the position taken in its decision on the confirmatory application.

21. The Ombudsman recalled that, in another inquiry concerning access to documents or data in a Commission database (complaint 1693/2005/PB), the Commission stated in specific terms that it had adopted a general practice " *according to which the result of a normal search in the database ("routine operations" (...)) is considered a document in the sense of Regulation 1049/2001. However, the Commission will not modify the existing search parameters of the database in order to be able to retrieve the information requested.* " In that case, the Ombudsman noted that, according to principles of good administration, the Commission had a duty to provide valid and adequate grounds for the rejection of the complainant's access application. However, the Commission essentially considered that what the complainant had requested could not be retrieved from the database concerned through a " *normal search* " or " *routine operations* ". Moreover, it stated that the provision of what the complainant wanted would require a modification of the existing search parameters in the database and would necessitate considerable new programming, which was not necessary for the performance of the Commission's tasks. The Ombudsman found (in paragraph 1.5 of his closing decision) that, by making these statements, the Commission failed properly to discharge its duty indicated above. The statements in question could be considered to amount to valid grounds to the extent that they pertained to the unreasonableness of the administrative burden that the provision of what the complainant had asked for would impose on the institution [8] . However, the Commission had failed to put forward sufficiently specific and duly substantiated arguments to the effect that retrieval of what the complainant had requested implied the imposition of an unreasonable administrative burden upon it.

22. In the present case, the Ombudsman arrived at the preliminary conclusion that a similar instance of maladministration had occurred, in that the Commission had not put forward sufficiently specific and duly substantiated arguments to the effect that retrieval of what the complainant requested implied the imposition of an unreasonable administrative burden upon it. The Commission's references to " *considerable work in terms of search* [ing] *and processing* " are formulated in general terms and thus did not constitute such arguments. The Ombudsman therefore made the preliminary finding that the Commission's above-mentioned failure to put forward sufficiently specific and duly substantiated arguments constituted an instance of maladministration.

23. Second, the complainant had requested access to " *all applications and decisions/files* ", in case the specific data asked for would not be available (points A.9 and B.7 of the request). The Commission rejected this request in order to protect personal data. In his confirmatory

application, the complainant remarked, in this regard, that the purpose of his request was not to obtain access to the files referred to as such, but rather to obtain the statistical information he wanted. In its decision on the confirmatory application, the Commission relied on this remark in order to reach the conclusion that the complainant had essentially dropped his above-mentioned request. In the present complaint, the complainant strongly contested the Commission's interpretation of his aforementioned statement. In its opinion on the complaint, the Commission referred, in essence, to the position taken in its decision on the confirmatory application.

24. The Ombudsman noted that the above-mentioned statement in the complainant's confirmatory application does not contain an express withdrawal of the request at issue. Moreover, one cannot reasonably infer from this statement that it involved an abandonment of this request. The complainant appeared to have made the above statement in order to indicate that he did not seek personal data, but rather statistical data which could be gathered from the study of the " *applications and decisions/files* " referred to in his request. On a preliminary finding, the Ombudsman accordingly found that the Commission committed a further instance of maladministration by failing to deal properly with the complainant's confirmatory application, to the extent that it considered that the complainant had, in essence, dropped his above-mentioned request.

25. In its first reply of 17 October 2006, to which it attached copies of the annual reports (2001-2004) mentioned above, the Commission requested the complainant not to distribute/pass on the said reports without first consulting it. It based its request on Article 19 of the Staff Regulations [9] . In his confirmatory application, the complainant challenged this restriction, noting that the reports had been given to him in response to his request, under Regulation 1049/2001, for *public* access to documents. In its decision on the complainant's confirmatory application, the Commission stated that the issue of whether Article 19 of the Staff Regulations specifically applied could be left open to further examination. However, it considered that the annual reports had been given to the complainant in his capacity as an official of the Commission, and not on the basis of Regulation 1049/2001. They were therefore given to him exclusively for his personal information and are therefore not public, and that, as a result, the request to treat the reports as confidential was permissible. The complainant contested this approach taken by the Commission. In its opinion on the complaint, the Commission referred, in essence, to the position taken in its decision on the confirmatory application.

26. The Ombudsman noted that the Commission had simply not provided any specific, convincing reasons as to why the complainant should be considered as having received the annual reports here concerned in his capacity as an official rather than as a member of the public. Also taking into account that the complainant is not an active but a retired Community official, the Ombudsman made the preliminary finding that the Commission committed an instance of maladministration by failing to give valid and adequate grounds for its rejection of the part of the complainant's confirmatory application challenging the above-mentioned restriction.

27. In light of these findings, the Ombudsman made the following proposals:
- With regard to the preliminary finding of maladministration in paragraph 22 above, the Commission could consider providing the access requested, or submitting sufficiently specific and duly substantiated arguments for not doing so.
- With regard to the preliminary finding of maladministration in paragraph 24 above, the Commission could consider revising its understanding of the complainant's relevant statement in his confirmatory application, and examining the complainant's request concerned.
- With regard to the preliminary finding of maladministration in paragraph 26 above, the Commission could reconsider the part of the complainant's confirmatory application challenging the restriction indicated at the beginning of paragraph 25 above.

The arguments presented to the Ombudsman after his friendly solution proposal

28. In its opinion on the proposal for a friendly solution, the Commission made, in summary, the following points:

29. In accordance with Article 72 of the Staff Regulations, officials of the EU Administration are guaranteed reimbursement of their medical expenses. The handling of personal data is made with due consideration to Article 26a of the Staff Regulations, which confirms that every official has a right of access to his/her medical file, and Regulation 45/2001 concerning the protection of personal data.

30. The administration of the common sickness insurance scheme takes place through the data-processing system 'ASSMAL'. This system was developed in 1992 on the basis of a computer programme, which was based on an Oracle database platform. The data contained in this system can only be retrieved through a limited number of options aimed at producing the annual report. The statistics requested by the complainant cannot be produced on the basis of this system.

31. In accordance with Article 10(3) of Regulation 1049/2001 regarding public access to documents, documents " *shall be supplied in an existing version and format* ". The institutions are not obliged to make new documents, or new versions of existing ones.

32. Accordingly, the Commission is not obliged to make statistics, based on criteria communicated to it by the complainant. The request made by the complainant therefore does not fall under Regulation 1049/2001, but only under the Commission's Code of Good Administrative Behaviour.

33. Thus, since the Commission is not, in the first place, under an obligation to produce the statistics requested by the complainant, it is not required to reason its refusal with reference to the disproportionate work burden that producing the statistics would involve.

34. Notwithstanding the fact that there is no such obligation, it should be noted that it would in fact involve a disproportionate administrative burden to produce the statistics requested by the complainant. The Commission considers that it would be contrary to good administration to

meet the complainant's request. To meet the request, which was made by one single person for his personal interests in one specific area, and in which there is no general public interest, would involve the investment of considerable staff resources. Some of the statistics would even have to be produced by hand.

35. With regard to the issues mentioned in paragraphs 2.6 and 2.7 of the friendly solution proposal (see paragraph 9 above of the present decision), the Commission acknowledged that there had in effect been a misunderstanding, and that the complainant had not withdrawn his (conditional) request for public access to documents under Regulation 1049/2001. With regard to the substance of that request, the Commission stated that public access could not be granted. The object of the complainant's request concerned documents containing personal data. Public disclosure of those documents would harm the protection of the privacy and the integrity of individuals in the sense of the exception laid down in Article 4(1)(b) of Regulation 1049/2001.

36. With regard to the issue mentioned in paragraph 2.9 of the friendly solution proposal (see paragraph 9 above of the present decision), the Commission maintained that the reports in question had been sent to the complainant in the latter's capacity as an official. However, the Commission stated that it accepted to remove the restriction based on Article 19 of the Staff Regulations. It insisted, however, that the reports cannot be used for commercial purposes.

The Ombudsman's further inquiries

37. The Ombudsman decided that, in order to carry out his assessment, it was necessary to visit the Commission and examine the database and the documents/data concerned in the present case. On 8 June 2009, his responsible legal officer carried out the visit at the Commission's premises. The Commission staff present were from the Secretariat-General and the PMO. The Ombudsman's legal officer explained the purpose of the visit, and agreed with the Commission staff that it could be carried out through (a) a short presentation of the relevant data retrieval tools and (b) an examination, point by point, of the complainant's request for information and documents.

38. With regard to the relevant data retrieval systems used by the PMO, the following information was obtained:

39. As of 1994, the Accident & Occupational Disease (AMP) Sector of PMO.3 records its data, for each application and file, on occupational diseases and accidents in a system called 'ASSMAL'. This system contains a number of fields with standard data and a number of fields with free text (for comments and so on). In order to improve the data processing and retrieval, the AMP Sector started to use (at approximately the end of 2006) a new application called 'Business Objects'. That system imports standard data (but not free text) from 'ASSMAL' into a number of categories. On the basis of these, the PMO can carry out searches more efficiently. The PMO provided relevant print-screen print-outs from the above-mentioned systems.

40. With regard to the examination of the complainant's specific request for information and

documents, the following information (listed after each separate part of the request) was obtained.

A. Access to all statistics of the Common Sickness Insurance Scheme for the last five years and in particular to:
- the number of applications: The PMO already gave this information to the complainant.
- the average volume (requested/paid): The PMO was not entirely clear as to what the complainant meant by this request.
- the minimal, maximal and average time for handling applications, from their registration until the decision and payment, as well as the evolution, of the case-processing, over time: The above-mentioned IT-systems were not conceived to provide such information, and case-handling members of staff at the PMO would not be able to retrieve any meaningful and/or reliable relevant data in this regard. The involvement of IT-staff might, however, make such retrieval possible, but no assessment has been made in this respect. Finally, it was noted that the PMO asked the private insurer to provide, as from 2007, its relevant data on case-processing time and the outcomes. The PMO provided an example of data that it had produced on the basis of such information.
- the number of applications requiring previous agreement and their result (by categories): The PMO stated that such information could not be obtained by its staff present during the inspection, since this subject matter fell specifically within the remit of the 'Settlements Office'. The latter was not asked to take part in the inspection.
- the number of applications with advance payment, their results and volume: The remarks relevant to the previous point apply.
- the applications for recognition of accidents (including the processing time and the decision): The remarks relating to point (3) above apply.
- an overview of further available statistical data: This request was not entirely clear. The PMO drew attention to the fact that it had already given the complainant a number of relevant annual reports. It would be ready to give the complainant its latest statistics relating to the years 2007 and 2008. However, the PMO noted that this information relates to accidents declared since 1 January 2007 and concerns cases that have not been closed.
- the number of members of staff in charge of handling applications: The AMP Sector comprises 17 staff members, who also cover other functions, in addition to case handling (in particular subrogation).
- in case these data are not available, access to all applications and decisions for the last year: The PMO could not (for obvious reasons) comment on the accessibility of these applications under Regulation 1049/2001. However, in relation to the question of possible partial access to the applications, the PMO provided copies (non-confidential) of the relevant standard forms that staff must fill in when they submit their applications.

B. Access to all statistics concerning applications for recognition of professional illness for the preceding 15 years to the date of the complaint, in particular concerning:
- the number of applications: The remark relevant to point A. (1) above applies.
- their volume: The remark relevant to point A. (2) above applies.
- the time for handling them: The remarks relevant to point A. (3) above apply.
- the rate of successful applications and the payments made: The remarks relevant to point A.

(3) above apply.
- the number of complaints or decisions taken by a medical panel: The PMO indicated that it would probably be able to retrieve the information fairly easily.
- broken down according to the type of illness: The PMO stated that the list of categories originally introduced into 'ASSMAL' did not prove useful, and that the information contained in that system is, as regards this issue, not reliable at all. However, as from 2007, the Commission's private insurer has provided the PMO with a more detailed break-down of types of illness.
- in case these data are not available, access to all files (applications and decisions) for the preceding five years: The remarks relevant to point A. (9) above apply.

The complainant's observations on the content of the inspection report

41. The inspection report was sent to the complainant, whose observations can be summarised as follows:

With regard to the organisation of the inspection, the complainant criticised the fact that the Commission did not ensure that IT-staff were present, given that the case concerns access to a database.

With regard to the above-listed points, the complainant noted that, for point A. (2) (average volume, requested/paid) the PMO did not know what he had meant by this request. The complainant criticised the fact that the Commission had not previously informed him that it did not understand this part of his request. He explained, in summary, that he sought the average of the applications (of the type here concerned, made to the PMO), and the average of the sums actually paid.

With regard to point A. (7), the complainant again noted that the PMO apparently did not know what he meant by this request. He suggested that he could be given information on the fields used in the database and on the nature of the data saved therein. On that basis, he would be able to know what further available statistical data could be retrieved.

With regard to point A. (8), the complainant considered that he now appeared to have received a reply to his question, provided, however, that the number covered all the services involved and was constant over the five year period mentioned in his request.

With regard to point A. (9), the complainant suggested that the Commission should find a way to retrieve the information from its database.

With regard to point B. (5) (the number of complaints or decisions taken by a medical panel), the complainant noted that the information could apparently be retrieved " *fairly easily* ". He expressed, in summary, surprise over the fact that he had not been given this information which could be retrieved " *fairly easily* ".

With regard to point B. (6), the complainant stated that he would agree to just receive the data

for 2007.

The Ombudsman's assessment after his friendly solution proposal

42. The present case raises important issues regarding the application of Regulation 1049/2001 and the handling of requests for information. The main issues are most usefully dealt with under the following three headings: (a) Access to documents in their existing format; (b) access to data 'normally'/'routinely' retrieved; and (c) access to information.

Access to documents in their existing format

43. The Commission refused access to the complainant's conditional application, made at the end of 2006, for access to the following documents: All applications and decisions for the year previous to the one in which he made his request in the Common Sickness Insurance Scheme; and all applications and decisions regarding the recognition of professional illness for the preceding five years.

44. The Commission failed to handle properly this conditional request in its response to the complainant's confirmatory application, but finally gave reasons for non-disclosure in its reply to the Ombudsman's friendly solution proposal. In that reply it stated that public disclosure of the above-mentioned documents would harm the protection of the privacy and the integrity of individuals in the sense of the exception laid down in Article 4(1)(b) of Regulation 1049/2001. The Commission also appears to have taken the view that, in order to grant partial access, the content of the edited documents would be so limited that it could not serve any real purpose.

45. The requirements under Regulation 1049/2001 concerning the need to give reasons are particularly strict with regard to the invocation of exceptions to public access. The documents here concerned are, however, clearly of a medical and personal nature and, therefore, obviously covered by the exception cited by the Commission. The mere reference to the exception therefore suffices, in this case, for refusing full access to the documents. With regard to the duty to consider granting partial access to the documents, the same approach appears to be justified in the present case. Granting access, even partial, to highly sensitive medical documents relating to individual officials of that same single institution would arguably potentially harm 'the protection' of the interests cited above.

46. In light of the foregoing, the Ombudsman cannot find that the Commission's refusal to grant access, including partial, to the documents here concerned constituted an act of maladministration.

Access to data 'normally'/'routinely' retrieved

47. In his proposal for a friendly solution, the Ombudsman referred to the Commission's practice of applying Regulation 1049/2001 to the output resulting from a 'normal'/'routine' search in a given database.

48. Having examined the Commission's response to the friendly solution proposal, the Ombudsman agrees that an assessment of the application of this practice must, in the first place, turn on the question of whether a given output results (or would result) from a 'normal'/'routine' search. Specifically, therefore, if the Commission can convincingly demonstrate or argue that the data is not 'normally' or 'routinely' extracted, the data can, in principle, reasonably be considered not to fall under the above-mentioned Commission practice.

49. In the present case, the complainant has pointed to several types of information he requested that could reasonably be presumed to constitute information that the Administration itself would regularly retrieve through 'normal'/'routine' searches.

50. The present inquiry has not, however, confirmed this presumption. On the contrary, the Commission's database systems, such as they were at the time of the complainant's request, appear to have both been inadequate and underused. This effectively resulted in a retrieval practice that was focused on the statistics set out in the annual reports the complainant received copies of.

51. The inadequacy of the Commission's databases at the time of the complainant's request is a separate issue and not subject to review in the present inquiry. That inadequacy nevertheless convincingly underpins the Commission's factual position that retrieval of the information concerned would not fall under its above-mentioned practice. The Ombudsman therefore accepts the Commission's position on this point.

Access to information

52. Once the Commission concluded that the complainant's request was primarily for information, and that the related conditional request for access to documents had to be rejected, it had a duty to examine whether the request could be met as a request for access to information. This duty derives from the general principle of good administration requiring civil servants to act as openly as possible, and more specifically from the applicable codes of conduct [10] .

53. The duty to respond to requests for information (as opposed to documents) has not, however, been defined in any greater detail in the written rules. This lack of specific written rules may be considered useful to the extent that it allows for a degree of flexibility in the handling of such requests.

54. It is a misunderstanding, however, to consider the absence of specific written rules to constitute a rule-gap that allows for arbitrariness. At the very least, the application of this general duty to provide information must take account of other clearly applicable duties of good administration, notably the duties of openness, diligence, service-mindedness, and objectivity.

55. In light of the Commission's opinion and the information obtained at the inspection carried out in this inquiry, the Ombudsman regrets having to conclude that the handling of the complainant's request for information fell short of these duties.

56. Before going into detail regarding those shortcomings, the Ombudsman would like to point out and recognise here that the complainant's information request was undeniably quite detailed and extensive. To the extent that the information concerned did not already exist, a case would have to be made in favour of a duty to collate and provide that information.

57. In this regard, the complainant pointed out that most of the information requested was information that one could normally expect the Commission to consider important for its own use. In the present case, this point has considerable merit. The complainant could not, for instance, be reasonably expected to know, or accept without clear explanations, that the Commission's relevant services handling sickness applications were effectively incapable of retrieving sufficiently reliable information on the types of illnesses or its own case-processing time. The Commission may have felt uncomfortable about this state of affairs. However, it would have been appropriate to inform the complainant early on of the concrete technical difficulties that it would face in meeting his request. Instead, it conveyed the message to him that it would simply require too much work to provide the information concerned. Its response was therefore not sufficiently open and frank. Moreover, this shortcoming may help to explain why the complainant – with whom the Commission has had numerous and serious disputes for several years – found it difficult not to believe that the Commission was deliberately withholding the information from him personally.

58. The level of service-mindedness has also not been convincing. As revealed during the inspection carried out by the Ombudsman, the Commission services were not sure about the meaning of certain important parts of the complainant's information request. There are no indications, however, that the Commission ever considered simply contacting the complainant – even by telephone – to obtain the relevant clarifications.

59. The level of diligence in the Commission's handling of the information request is similarly unconvincing. With regard to certain entirely unequivocal parts of the request, the inspection of the Ombudsman brought to light that these could have been fairly easily satisfied. Again, there are no indications as to why those parts ended up being covered by the overall refusal, which was underpinned by the argument that providing the information requested would constitute an excessive work burden. Relatedly, the Ombudsman notes that not all of its relevant staff was present at the inspection carried out in this inquiry. Notably absent were IT-staff and staff from the 'Settlements Office'. This obviously does not help to convey the impression that the Commission wanted to handle the case diligently.

60. Finally, the Commission placed unconvincing limitations on the information that it provided to the complainant through the annual reports of the insurance sickness scheme [11] . The limitation imposed was based on Article 19 of the Staff Regulations, which provides that (emphasis added) "[a] *n official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any* legal proceedings *information of which he has knowledge by reason of his duties.* " Even if one were to accept that the classification ' *document à usage interne* ' (stated on the first internal page of the reports) implied that such reports were not 'public' documents in the sense of Regulation 1049/2001, it is notable that the Commission

invoked Article 19 of the Staff Regulations, and not the more general confidentiality provision in Article 17 of that regulation (" *1. An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public* "). The Commission services involved presumably knew about the complainant's various ongoing or intended court cases against it. In the absence of any genuine attempt by the Commission to explain its above-mentioned invocation of Article 19, the impression too easily conveyed therefore is that the Commission intended to limit the complainant's use of the annual reports in support of any legal action that he may have wanted to take against the institution. This is obviously not compatible with the above-mentioned duty of objectivity.

61. Relatedly, although the Commission has, in the course of this inquiry, stated that the applicability of Article 19 of the Staff Regulations " *could be left open to further examination* ", any impression of objectivity in the handling of the information request has not been reinforced by the Commission's subsequent remark that, at any rate, the reports cannot be used for commercial purposes. Unless the Commission is in possession of any information to the effect that the complainant might wish to sell the information in these annual reports, the relevance of the above remark escapes the Ombudsman.

62. In light of the above findings from paragraph 48 onwards, the Ombudsman finds that the Commission failed to respond adequately to the complainant's information request, and that this constituted an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman. The draft recommendation takes into account the information obtained during the Ombudsman's inspection at the Commission, concerning the apparently significant improvements made recently to the Commission's information gathering and retrieval systems in the field of sickness applications and insurance.

B. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the European Commission:

1. The Commission should give the complainant the information that it expressly or implicitly found easy and apparently unproblematic to provide. Specifically, the Commission considered it possible to provide the information on the number of (present) staff in charge of handling the applications here concerned, (cf. its comments relating to point A. (8) of the complainant's request). The Commission should provide the complainant with the information as of the date when he made his request. Additionally, the Commission should grant the complainant information on the number of complaints or decisions taken by a medical panel. The Commission indicated at the Ombudsman's inspection that it would probably be able to retrieve that information fairly easily (cf. its comments relating to point B. (5) of the complainant's request).

2. The Commission should contact the complainant in order to obtain clarifications of any points in his information request that it may still not understand, in particular the points that were described by the Commission as being unclear.

3. When the Commission contacts the complainant, it should discuss with him any changes that may be relevant in light of the time that has passed since his initial request, and in light of the improvements made to the Commission's information gathering and retrieval systems in the field of sickness applications and insurance.

4. If the Commission concludes that certain information can still not be provided because it would imply an excessive work burden or changes to its information retrieval systems, the institution should ensure that it adequately justifies its relevant refusal. Specifically, the Commission should provide sufficient information to render any such refusal reviewable, meaning in practice that it should indicate at least an approximate estimation of the time and resources needed for the information to be retrieved.

5. The Commission should provide clear and precise information as to why it specifically invoked Article 19 of the Staff Regulations to limit the complainant's use of the annual reports of the insurance sickness scheme, and state in clear terms why this provision could potentially be applicable if it maintains that this is the case. Relatedly, the Commission should provide information on why it considered it relevant to inform the complainant, in its reply to the Ombudsman's proposal for a friendly solution, that he cannot use the information in the annual reports of the insurance sickness scheme for commercial purposes.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 August 2010. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 11 May 2010

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] It should be noted at this point that, due to overlapping rights relevant to the issue of access to documents and access to information, and in light of the implicit obligations of good administration in the handling of such confirmatory applications, the scope of this allegation has necessarily been interpreted broadly throughout the inquiry.

[3] PMO stands for the 'Office for administration and payment of individual entitlements'.

[4] OJ 2001 L 145, p. 43.

[5] " *An official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service.* "

[6] The " *Code Of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public* ", Commission Decision of 17 October 2000, amending its Rules of Procedure, (2000/633/EC, ECSC, Euratom), OJ 2000 L 267, p. 63.

[7] " *'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility* ".

[8] Relatedly, the Ombudsman recalled that to limit the right of access to information that can be extracted using existing search tools would risk undermining the usefulness of the right of access, because such tools will normally have been developed only with the needs of internal information management in mind.

[9] " *An official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service.* "

[10] The " *Code Of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public* ", Commission Decision of 17 October 2000, amending its Rules of Procedure, (2000/633/EC, ECSC, Euratom), OJ 2000 L 267, p. 63. See also the European Code of Good Administrative Behaviour, available on http://www.ombudsman.europa.eu/resources/code.faces [Link].

[11] It may be considered a moot point whether the complainant received these reports under Regulation 1049/2001, given that he had not specifically asked for access to these. The Commission rather intended to provide information, by giving him the reports, in partial response to his information request. The issue does not here require a conclusive finding.