

Draft recommendation to the European Commission in complaint 1368/2004/GG

Recommendation

**Case 1368/2004/GG - Opened on 19/05/2004 - Recommendation on 29/04/2005 -
Decision on 15/12/2005**

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

THE COMPLAINT

Introduction

The present complaint is related to another complaint (complaint 402/2004/GG) that was submitted by the same complainant, a German company.

Complaint 402/2004/GG

On 3 August 1999, the Commission concluded a service contract with RRI (Rhein-Ruhr Ingenieur-Gesellschaft mbH, a German company) as the leader of a consortium including the complainant. The contract was for the provision of two EU experts, a Co-director and a financial/administrative manager for technical assistance to the EU-China Liaoning Integrated Environment Project (LIEP), lot a: Management of the Programme Office and Environmental Awareness Project. Mr W., an expert employed by the complainant, became financial/administrative manager in September 2000. Further to an addendum to the contract signed in September 2001, Mr W. became Deputy Co-Director.

On 15 September 2003, the Commission's Delegation in Beijing informed RRI by registered letter that it had decided to terminate the contract on the basis of Article 15 of the latter and on the grounds that the Deputy Co-Director had failed to fulfil his tasks as modified in addendum no 2. The Commission explained that in two letters sent on 6 June 2002 and 30 January 2003, it had pointed out that the services delivered by the complainant were not performed to the satisfaction of the Commission and had warned that unless the Deputy Co-Director fulfilled his duties, it would consider the consortium led by RRI in breach of contract.

In a letter sent on 22 September 2003, RRI disputed this decision and asked the Commission to give more precise information as to its reasons. In its reply of 26 September 2003, the Delegation pointed out that the Deputy Co-Director had, among other things, the "procurement and contracting responsibility". According to the Delegation, the complainant's expert had failed to fulfil this duty.

RRI addressed a further letter to the Delegation on 10 November 2003. In its reply of 18



November 2003, the Delegation did not provide any further details regarding the reasons for its decision to terminate the contract.

As a result of the termination of the technical assistance contract, the complainant considered it necessary to terminate its employment contract with Mr W. The latter appealed against this decision to the Arbeitsgericht (Employment Tribunal) in Bonn (Germany). It appeared that in the course of these proceedings the complainant had to provide detailed information as regards Mr W.'s alleged refusal to carry out his duties.

In complaint 402/2004/GG, the complainant basically alleged that the Commission had failed to provide sufficiently precise information concerning the reasons for terminating the technical assistance contract.

The Ombudsman decided that an inquiry should be conducted. He therefore sent the complaint to the Commission for its opinion. This opinion was then forwarded to the complainant for its observations. On the basis of the results of these inquiries, the Ombudsman took the view that the Commission had provided sufficiently precise information as to its reasons for terminating the contract and that there was thus no maladministration as regards the allegation made by the complainant. The case was therefore closed by decision of 12 August 2004 (2) .

The complainant's letter of 19 March 2004

In its complaint, the complainant had mentioned that it had submitted, on the basis of Regulation 1049/2001, a request for access to the documents concerning the termination of the contract to the Commission on the very day on which it had written to the Ombudsman (5 February 2004).

In a further letter of 19 March 2004, the complainant informed the Ombudsman that this request had been rejected on 26 February 2004, that a confirmatory application had been made on 4 March 2004 and that the Ombudsman's inquiry should be extended so as to cover the Commission's refusal to grant access.

Given that the period of time within which the Commission had to deal with the confirmatory application in accordance with Regulation 1049/2001 (15 working days after registration) had not yet expired at the time when the complainant had written this letter, the Ombudsman informed the complainant that he was not yet able to deal with this further allegation but that the complainant could resubmit this issue as soon as the relevant deadline had expired.

The present complaint

In a letter of 3 May 2004, the complainant renewed its complaint as regards the issue of access to documents, pointing out that the confirmatory application had been rejected on 26 April 2004. This letter was therefore registered as a new complaint (complaint 1368/2004/GG).

In its decision, the Commission distinguished between three categories of documents. The documents belonging to the first two categories (1: Contractual documents; 2: Correspondence concerning the implementation of the contract) were listed whereas category 3 was only referred to in general terms ("various correspondence, mainly by e-mail, between various persons in relation to the implementation of the contract"). The Commission submitted that the



issue of access could not be considered with regard to particular applicants, given that documents that were disclosed belonged to the public domain and were thus accessible to everybody.

After having expressed the view that the complainant should already be in possession of the documents belonging to the first two categories, the Commission made the following comments with regard to the whole of the documents:

The documents contained information of a commercial nature on the companies, experts and persons involved. Granting access to these documents was therefore prevented by Article 4 (2) of the Regulation according to which access shall be refused where disclosure would undermine the protection of commercial interests.

Disclosure would also undermine the protection of the privacy and integrity of individual persons. This was particularly true for documents containing the names of certain persons (in some cases even their curriculum vitae). The exception set out in Article 4 (1) (b) of the Regulation was therefore also applicable.

No partial access could be granted, given that all the information that these documents contained as regards the implementation of the contract was covered by the need to protect the commercial interests of the persons concerned. There was nothing to suggest that there was an overriding public interest in disclosure.

In its complaint to the Ombudsman, the complainant acknowledged that it was in possession of the documents belonging to the first two categories, but not of those belonging to the third category. It stressed that it was not interested in any documents concerning third parties but only in those that related to the termination of its "own" contract. The complainant also submitted that the reasoning of the Commission as regards the protection of the privacy and integrity of Mr W. was "grotesque". It stressed that the Commission had justified its termination of the contract by reference to alleged misconduct on the part of Mr W. and had thus jeopardised the latter's integrity in far worse a way than could be done by any access to documents.

The complainant further argued that the Commission's approach would render Regulation 1049/2001 nugatory, given that most documents concern the personal or commercial interests of third parties.

The complainant thus substantially alleged that the Commission had failed to comply with Regulation 1049/2001 by refusing to grant the access to the documents it had requested by letters of 5 February 2004 and 4 March 2004. It claimed that the Commission should grant access to the relevant documents.

THE INQUIRY

The Commission's opinion



In its opinion, the Commission made the following comments:

The amended responsibilities of Mr W. had been laid down in an addendum to the contract. However, Mr W. had never taken on the new responsibilities, perhaps because his employment contract with the consortium had not been amended in order to reflect the new terms of reference. The Delegation had tried to clarify this matter, but it had never received a clear answer. This situation had led to complaints from the newly recruited Co-director and from the Chinese Director. Eventually, the Commission had decided to terminate the contract.

The request for access related to exchanges, mainly by e-mail, between other persons involved in the implementation of the programme, pointing out the fact that Mr W. did not take on the new responsibilities resulting from the upgrading of his post in the amended terms of reference. Disclosing these messages would be harmful to Mr W. as an individual. It would both affect his personal integrity and his commercial interests as regards his position on the labour market. It was Mr W.'s commercial interest that the Commission felt it had a duty to protect, not that of any other party. There was no reason to assume that Mr W. was personally responsible for the fact that the new terms of reference had not been respected. His refusal to take on the new responsibilities might have been due to his contractual position with RRI or the complainant.

Once a document had been released to an applicant, it came into the public domain and access should be granted to any other applicant. It was obvious that the documents to which the complainant requested access could not be put in the public domain. The purpose of the request was to use the documents in court proceedings against Mr W. This had nothing to do with openness and the public interest in the disclosure of documents held by the institutions.

On the basis of the above considerations, the Commission maintained its decision not to disclose the documents to the complainant. It added that the documents could only be made available to a judicial authority following a court order to produce them.

The complainant's observations

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

The Commission's guesses that Mr W.'s behaviour was to be explained by his allegedly dissatisfactory employment contract with the complainant were pure speculation. Already on 11 April 2002, it (the complainant) had informed the Commission, after having contacted Mr W., that the latter was well aware of his responsibilities. Its request to be given access to the mission reports concerning the project or at least extracts thereof concerning Mr W.'s allegedly poor performance had however been rejected. On 5 February 2003, the consortium had declared, as requested by the Delegation: "Please notice that the contractual agreement between Mr [W.] and [the complainant] cannot provoke any project obstacles."

The complainant pointed out that the position that the Commission had adopted as regards access to documents led it to believe that the termination of the relevant contract on account of Mr W.'s alleged inactivity was not in conformity with the law. It therefore asked the Ombudsman to include this issue in his inquiry. In this context, the complainant submitted that it was odd that



the termination of the contract had been decided upon after the new Co-director and the Chinese Director had complained. The complainant stressed that the new Co-director was an employee of a company competing with the consortium.

Further inquiries

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

Request for additional information and for a supplementary opinion

The Ombudsman therefore asked the Commission (1) to explain why the fact that the complainant intended to use the documents to which it had requested access in court proceedings should be relevant for the Commission's handling of requests made under Regulation 1049/2001 and (2) to provide him with a list of the documents falling under category 3 together with an indication, for each document or category of documents, of the exception(s) laid down in Regulation 1049/2001 on the basis of which the Commission believed that no access could be granted to the complainant.

The Ombudsman also requested the Commission to provide an opinion on the complainant's additional allegation according to which the termination of the relevant contract on account of Mr W.'s behaviour had not been in conformity with the law.

The Commission's reply

In its reply, the Commission made the following comments:

As regards the issue of access to documents

Pursuant to Article 6 (1) of Regulation 1049/2001, an applicant did not have to give reasons when requesting access to documents. The interest of the applicant was therefore not relevant in this context. What the Commission had meant by referring to the use the complainant intended to make of the relevant documents was that this purpose could not be considered to be an overriding public interest that would prevail over the need to protect the commercial interests of the other party in the proceedings.

Category 3 of the documents to which the complainant had requested access comprised 16 documents (3). The disclosure of these documents would undermine the protection of "the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data" (Article 4 (1) b of Regulation 1049/2001). Disclosure of such data could only take place if the conditions for the treatment of personal data laid down in Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (4) were fulfilled. Article 8 (b) of this Regulation required an applicant to establish the necessity of having the personal data transferred to it and required the institution to be satisfied that the data subject's legitimate interests were not prejudiced by the transfer.

As regards the complainant's additional allegation

The service contract, which was for the provision of two EU experts (a Co-director and a financial/administrative manager), had been signed on 3 August 1999. On 8 September 2000, RRI had announced that due to family reasons the financial/administrative expert had to resign at the end of October 2000 and had proposed Mr W. as his replacement. The Commission had agreed with this.



Due to the replacement of the Co-director, the Commission had, in a letter of 10 August 2001, proposed to RRI that Mr W.'s status and responsibilities should be upgraded. RRI had accepted this. This had led to an addendum (addendum no. 2) to the service contract being signed on 3 September 2001. In this addendum, the responsibilities of the financial/administrative manager had been increased in a very detailed way, including the stipulation (in Article 1.2.2 of the terms of reference) that "he will share the signing responsibility (regarding e.g. procurement aspects, requests for transfers, management of accounts and contracts) with the Chinese Director". Among the responsibilities and functions entrusted to him were "procurement and contracting responsibility". Another important function was that of "replacing, ad interim, the EC Co-director, Team leader" (Article 4.1 of the terms of reference). The financial/administrative manager (Mr W.) had thus effectively become Deputy Co-director and his fee rate had been increased.

On 2 April 2002, the Commission had written to RRI to complain that Mr W. was not fulfilling his new responsibilities and functions. RRI was, according to Article 6 of the contract, the only contact point with regard to communications concerning the contract. On 6 June 2002, these concerns had been raised again. However, the situation had not changed.

On 30 January 2003, the Commission had again warned RRI that it would be held in breach of contract if this situation did not change. In its reply of 5 February 2003, RRI had promised to clarify the matter as soon as Mr W. had returned from his holidays. The situation had not changed, however, and Mr W. had kept putting off assuming all new responsibilities. The complaints about this had kept coming to the Delegation from all parties concerned (Chinese Co-director and EU Co-director), who were forced to take over this extra workload.

On 15 September 2003, the Delegation had terminated the contract in accordance with Article 15 of the same.

The Commission concluded by saying that it considered to have acted in accordance with the provisions of the contract that it had concluded with the consortium led by RRI.

The complainant's observations

In its observations, the complainant stressed that six of the eight documents falling under category 3 and dating from 2003 emanated from the EU Co-director, an employee of a competing company. The complainant further pointed out that if the relevant documents should indeed contain private data, the Commission was free to blank these parts of the documents. It submitted, however, that in so far as Mr W. was concerned, the latter had not acted as a private person within the relevant contract but as an employee of the complainant.

The inspection of the Commission's file

On 22 February 2005, the Ombudsman's services inspected the Commission's file. On that occasion, the Ombudsman's staff pointed out that the Commission had identified the documents in the file as being confidential and that therefore no copies were going to be made. In reply to a question to that effect put to them by the Ombudsman's staff, the representatives of the Commission present at the inspection explained that the Commission maintained its view that access to the relevant documents had to be denied on the grounds of both Article 4 (1) (b) and Article 4 (2) of Regulation 1049/2001, notwithstanding the fact that only the first of these



exceptions had been mentioned in the Commission's letter of 2 December 2004.

The complainant's observations

A copy of the report on the inspection was sent to the complainant for its observations.

In its observations, the complainant pointed out that its position remained unchanged. Given that the Ombudsman had now seen the relevant documents, the complainant asked him (1) whether these documents contained sufficient elements justifying the termination of the contract, (2) whether the allegations possibly contained in these documents could have been answered and rebutted if the Commission had granted access to these documents in good time, (3) whether the documents contained personal data on third persons and whether the Commission had sufficiently considered that Mr W. had acted as its (the complainant's) employee, (4) whether there were reasons or justifications for considering the documents as being confidential, (5) whether the Commission had taken into account that considering documents as confidential only stood in the way of granting access, according to Article 9 (1) of Regulation 1049/2001, where these documents concerned public security, defence or military matters and (6) whether there were indications suggesting that the Commission was trying to cover up maladministration or an untoward influence by competitors.

THE DECISION

1 Introductory remarks

1.1 The present complaint was brought by a German company. In 1999, the Commission concluded a service contract with RRI (Rhein-Ruhr Ingenieur-Gesellschaft mbH, a German company) as the leader of a consortium including the complainant. The contract was for the provision of two EU experts, a Co-director and a financial/administrative manager for a project in China. Mr W., an expert employed by the complainant, was appointed financial/administrative manager in September 2000. Further to an addendum (addendum no. 2) to the contract signed in September 2001, Mr W. effectively became Deputy Co-Director. On 15 September 2003, the Commission's Delegation in Beijing informed RRI that it had decided to terminate the contract on the grounds that the Deputy Co-Director had failed to fulfil his tasks as modified in addendum no. 2. The complainant subsequently asked the Commission for access to the documents on which this termination had been based. This request was rejected by the Commission.

1.2 In its complaint to the Ombudsman lodged in May 2004, the complainant alleged, in substance, that the Commission had failed to comply with Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents (5) by refusing to grant access to the relevant documents.

1.3 In its observations on the Commission's opinion on this complaint, the complainant submitted an additional allegation according to which the termination of the relevant contract on account of Mr W.'s behaviour had not been in conformity with the law. The Ombudsman decided to include this allegation in his inquiry and asked the Commission for a supplementary opinion.



1.4 The Ombudsman subsequently proceeded to an inspection of the Commission's file. In its observations on the report on this inspection, the complainant asked the Ombudsman (1) whether these documents contained sufficient elements justifying the termination of the contract, (2) whether the allegations possibly contained in these documents could have been answered and rebutted if the Commission had granted access to these documents in good time, (3) whether the documents contained personal data on third persons and whether the Commission had sufficiently considered that Mr W. had acted as its (the complainant's) employee, (4) whether there were reasons or justifications for considering the documents as being confidential, (5) whether the Commission had taken into account that considering documents as confidential only stood in the way of granting access, according to Article 9 (1) of Regulation 1049/2001, where these documents concerned public security, defence or military matters and (6) whether there were indications suggesting that the Commission was trying to cover up maladministration or an untoward influence by competitors.

1.5 It should be noted that the Ombudsman's role is to examine allegations of maladministration, not however to answer specific questions put to him by complainants. The Ombudsman would in any event not be able to reply to hypothetical questions like the second of the questions submitted by the complainant. It appears, however, that most of the other questions are linked to the allegations that are the subject of the present inquiry. The Ombudsman's examination of these allegations will therefore also answer these questions.

1.6 The Ombudsman considers it however appropriate to add a clarification as to the facts on which the fourth and fifth of the complainant's questions appear to be based. The reference to the "confidential" nature of the documents concerned in the report of the inspection of the file was intended to indicate that the Ombudsman had taken note of the Commission's position that the relevant documents should not be disclosed to the complainant. The use of this expression by the Ombudsman does not mean that the Commission had submitted further arguments in order to support its view that the documents should not be disclosed. As regards the complainant's reference to Article 9 (1) of Regulation 1049/2001, it should be noted that this provision covers "sensitive" documents (and not "confidential" documents).

2 Allegedly unlawful termination of contract

2.1 In its observations on the Commission's opinion, the complainant alleged that the Commission's decision to terminate the contract on account of the behaviour of the Mr W. had not been in conformity with the law.

2.2 The Commission explained that the service contract had provided for the provision of two EU experts, a Co-director and a financial/administrative manager, and that in 2000 Mr W. had been appointed financial/administrative manager. An addendum to the contract had been signed in September 2001. According to the Commission, this addendum had considerably increased the responsibilities of the financial/administrative manager, including the stipulation (in Article 1.2.2 of the terms of reference) that "he will share the signing responsibility (regarding e.g. procurement aspects, requests for transfers, management of accounts and contracts) with the Chinese Director". The Commission submitted that among the responsibilities and functions entrusted to Mr W. were the "procurement and contracting responsibility" and the duty of



"replacing, ad interim, the EC Co-director, Team leader" (Article 4.1 of the terms of reference).

On 2 April 2002, the Commission had written to RRI to complain that Mr W. was not fulfilling his new responsibilities and functions. On 6 June 2002, these concerns had been raised again. According to the Commission, however, the situation had not changed.

On 30 January 2003, the Commission had again warned RRI that it would be held in breach of contract if this situation did not change. In its reply of 5 February 2003, RRI had promised to clarify the matter as soon as Mr W. had returned from his holidays. According to the Commission, the situation had not changed, however, and Mr W. had kept putting off assuming all new responsibilities. The Commission submitted that complaints about this had kept coming to the Delegation from all parties concerned (Chinese Co-director and EU Co-director), who were forced to take over this extra workload.

The Commission submitted that its decision to terminate the contract in accordance with Article 15 of the latter had therefore been correct.

2.3 Before dealing with the present allegation, the Ombudsman considers it useful to stress that he has no mandate to examine the conduct of Mr W. His inquiry is therefore limited to ascertaining whether the Commission's decision to terminate the contract on account of the behaviour of Mr W. was or was not in conformity with the law.

2.4 The Ombudsman notes that the complainant does not dispute that Mr W.'s responsibilities were increased by the above-mentioned addendum to the contract and that these duties included a responsibility in the area of "procurement and contracting".

2.5 The Ombudsman has inspected the Commission's file in this case. The documents inspected on this occasion showed that Mr W. indeed appeared to assume that he had no responsibility in the area of "procurement and contracting" and that several items falling within this area thus had to be dealt with by other persons involved in the implementation of the project. It is true that the complainant has stressed that some of the relevant documents emanated from the EU Co-director, an employee of a competing company. It should be noted, however, that the relevant documents also include messages from Mr W. himself and that the contents of these messages also support the Commission's position.

2.6 In these circumstances, and taking into account the Commission's efforts to solve the problem, the Commission's position appears to be reasonable. No maladministration can therefore be found as regards the Commission's decision to terminate the contract.

3 Alleged failure to grant access to documents

3.1 In February 2004, the complainant had asked the Commission for access to the documents concerning the termination of the contract. This request had been rejected by the Commission. In its complaint to the Ombudsman, the complainant alleged that by doing so the Commission had failed to comply with Regulation 1049/2001. The complainant made it clear that its complaint only concerned the third of the three categories of documents identified by the Commission in this context. This category was described by the Commission as comprising



“various correspondence, mainly by e-mail, between various persons in relation to the implementation of the contract”.

3.2 In its opinion, the Commission took the view that disclosing these messages would be harmful to Mr W. as an individual, given that it would both affect his personal integrity and his commercial interests as regards his position on the labour market. The Commission pointed out that there was no reason to assume that Mr W. was personally responsible for the fact that the new terms of reference had not been respected. His refusal to take on the new responsibilities might have been due to his contractual position with RRI or the complainant.

3.3 In its reply to the Ombudsman's request for further information, the Commission pointed out that the relevant category of documents comprised 16 documents. The Commission argued that the disclosure of these documents would undermine the protection of "the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data" (Article 4 (1) b of Regulation 1049/2001). It further submitted that the disclosure of such data could only take place if the conditions for the treatment of personal data laid down in Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (6) were fulfilled. The Commission noted that Article 8 (b) of this Regulation required an applicant to establish the necessity of having the personal data transferred to it and required the institution to be satisfied that the data subject's legitimate interests were not prejudiced by the transfer. On the occasion of the inspection of the file, the Commission clarified that it continued to believe that its decision was also justified on the basis of Article 4 (2) of Regulation 1049/2001.

3.4 The Ombudsman is unable to agree with the position taken by the Commission as regards *Article 4 (1) b* of Regulation 1049/2001. It should first be noted that the relevant documents concern the implementation of a project financed by the EU. Mr W. was one of the persons who had been recruited for this purpose. It is therefore difficult to see how the disclosure of documents concerning the implementation of this project could undermine the protection of the "privacy" or the "integrity" of Mr W. The Ombudsman furthermore notes that - as found above (see point 2.4) - the relevant documents only confirm the Commission's argument that Mr W. had failed to fulfil all the responsibilities that had been entrusted to him by the contract. Given that the Commission has made its argument in its opinion, a publicly accessible document, it is difficult to see what further damage disclosure of the relevant documents could do to Mr W.'s right to privacy and integrity. However, even on the assumption that Mr W.'s privacy or integrity could be affected by the disclosure of the documents, the Ombudsman considers that the Commission has failed adequately to consider the possibility of granting partial access, for example by granting access to versions of the documents in which the name of Mr W. has been blanked out.

3.5 On a more general note, the position taken by the Commission in the present case could be understood as meaning that wherever the name of a person (which constitutes personal data) is mentioned in a document held by the Commission, this document can only be disclosed if the person asking for access establishes the necessity of having the personal data transferred to



him, in conformity with Article 8 (b) of Regulation 45/2001. Given that most documents contain names, this interpretation would deprive the right of public access to documents - a fundamental right recognised by Article 42 of the European Charter of Fundamental Rights - of most of its meaning. It should in particular be noted in this context that Article 6 (1) of Regulation 1049/2001 provides that no reasons need to be given by an applicant who requests access to documents in the possession of a Community institution. The Commission's view that a person requesting access to a document has to establish the necessity of being given a name, whenever the relevant document contains such a name, is difficult to reconcile with this provision.

3.6 For the avoidance of any doubt, the Ombudsman wishes to stress that he agrees that the need to protect the privacy of a person may make it necessary for a Community institution not to disclose the name of this person when being asked for access to a document containing the name of this person. The Ombudsman considers, however, that such a decision has to be based on the facts of the individual case and that it needs to be taken with due regard to the fact that exceptions to the right of access have to be construed narrowly. He further takes the view that the possibility of granting partial access needs to be considered particularly carefully in such cases.

3.7 The Commission has also invoked *Article 4 (2) first indent* of Regulation 1049/2001, according to which access can be refused if the disclosure would undermine the commercial interests of a natural or legal person. In this context, it should be noted that the Commission has stressed that it was the commercial interest of Mr W. and of no other person that it had had in mind. However, it is difficult to see what the commercial interests of Mr W. that the Commission purports to defend could be. As mentioned above, the relevant documents only support the Commission's argument that Mr W. had failed to fulfil all the responsibilities that had been entrusted to him by the contract. Given that the Commission has made its argument in its opinion, which is a publicly accessible document, it is difficult to see what further damage the disclosure of the relevant documents could do to Mr W.'s presumed commercial interests. It should further be noted that the Commission has stressed that there was no reason to assume that Mr W. was personally responsible for the fact that the new terms of reference had not been respected. In view of this, it is even more difficult to understand how the disclosure of the documents could undermine Mr W.'s commercial interests.

3.8 Having regard to the above considerations, the Ombudsman takes the view that the Commission has failed to provide a reasonable explanation for its refusal to grant access to the relevant documents. This constitutes an instance of maladministration.

4 Conclusion

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

The draft recommendation

The Commission should reconsider the complainant's request for access to documents.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a



detailed opinion by 31 July 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, 29 April 2005

P. Nikiforos DIAMANDOUROS

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

(2) Available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

(3) The Commission provided a list of these documents.

(4) OJ 2001 L 8, p. 1.

(5) OJ 2001 L 145, p. 43.

(6) OJ 2001 L 8, p. 1.