

Decision of the European Ombudsman closing his inquiry into complaint 2111/2011/RA against the Research Executive Agency

Decision

Case 2111/2011/RA - **Opened on** 02/12/2011 - **Decision on** 30/04/2013 - **Institutions concerned** European Commission (No maladministration found) | European Commission (No further inquiries justified) |

A researcher complained to the European Ombudsman about a refusal of the Research Executive Agency to fund his research proposal. He alleged that the Agency's redress committee failed to carry out a proper review of the Agency's initial evaluation and that the Agency refused to make public certain information on the process.

The Ombudsman noted that the evaluation of research proposals raises complex scientific questions. His review in such cases is therefore normally limited to assessing whether there is a manifest error in the reasoning of the contested decision. The complainant in this case did not provide evidence showing that a manifest error of assessment was committed in the evaluation procedure. The Ombudsman thus found no maladministration.

With regard to the complainant's allegation that the Agency wrongly refused to make public certain information, the Ombudsman noted that the complainant had now received the information. However, he pointed out that the complainant had to turn to the Ombudsman twice in order to obtain, from the Agency, the information he was seeking. The Ombudsman thus made a further remark with a view to ensuring that such situations are avoided in future.

The Ombudsman also made another further remark, suggesting that the Agency could, in future, consider making public the names of evaluators.

The background to the complaint

1. The complaint concerns (a) the evaluation and rejection of a scientific proposal made in response to a call for proposals under the 7th EC Framework Programme for Research, Technological Development and Demonstration Activities and (b) the subsequent rejection of the complainant's appeal.



2. On 17 August 2010, the complainant submitted a proposal for a Marie Curie Intra-European fellowship for Career Development in the framework of Call for proposals "FP7-PEOPLE-2010-IEF" [1] . The Call for proposals was managed by the Research Executive Agency (hereinafter 'the Agency') [2] .
3. The Agency invited a panel of independent experts to assist in the evaluation of the proposals received in answer to that call. On 25 November 2010, the complainant was informed of his evaluation result, which was 83.50 out of 100. He also received a copy of his Evaluation Summary Report (hereinafter 'ESR') drawn up by the experts.
4. On 22 December 2010, the Agency informed the complainant that his proposal was ranked in category 'C', which corresponded to " *Proposals above thresholds but not retained for funding nor on the reserve list because of lack of budgetary resources* ". The overall statistics showed that there were 1 501 proposals in this category, while 504 proposals were recommended for funding (category 'A'), and 156 proposals were placed on the reserve list (category 'B').
5. On 24 December 2010, the complainant submitted to the Agency a request for a review of its decision.
6. On 30 March 2011, the Director of the Agency informed the complainant that the 'redress committee' had examined his case. The Director noted that the redress committee's role is to consider whether there has been a failing in the evaluation process which is likely to jeopardise the decision whether or not to fund the proposal. However, he stressed that the redress committee does not re-evaluate the proposal, nor does it call into question the scientific judgement of appropriately qualified experts.
7. The redress committee's conclusion was that there was insufficient evidence to support the complainant's request for redress. It took the view that the comments provided by the experts for each criterion, in the form of strengths and weaknesses, and the corresponding scores were consistent. Moreover, as stated in the 'Rules for submission of proposals, and the related evaluation, selection and award procedures' [3] , in the case of evaluation of proposals which have been submitted in response to previous FP7 calls, experts are required to provide a clear justification for their scores and comments only if these differ markedly from those awarded to the earlier proposal. Given that the complainant's ESR for 2010 was more favourable than the ESR for 2009, the redress committee concluded that no further follow-up was required.
8. The redress committee underlined that, while it is not its role to call into question the opinions of appropriately qualified experts, it had nonetheless examined the profiles of the experts involved in the evaluation of the complainant's proposal and concluded that the panel as a whole had the appropriate expertise to judge the proposal according to the evaluation criteria. The redress committee further confirmed that the evaluation of the complainant's proposal had been carried out in a fair and transparent manner, fully respecting the established evaluation procedures.
9. The complainant wrote to the Agency on 4 May 2011, requesting (i) the highest and lowest



points needed to be classified in each of the different categories A, B, and C for the different sub-panels, and (ii) the names of the expert evaluators who examined his proposal. With regard to point (i), the Agency informed the complainant that this information is not disclosed. With regard to point (ii), it replied that the list of experts is valid for a given year and programme, and is not divulged by actions or panels.

10. On 20 October 2011, the complainant turned to the European Ombudsman.

The subject matter of the inquiry

11. The Ombudsman opened an inquiry into the following three allegations:

(i) The redress committee failed to carry out a proper review of the evaluation of the complainant's proposal.

(ii) The Agency wrongly refused to make public the highest and lowest points needed for categories A, B, and C in the Intra-European Fellowship (IEF) 2010.

(iii) The Agency wrongly refused to make public the names of the evaluators of the complainant's IEF 2009 and IEF 2010 proposals.

The inquiry

12. On 2 December 2011, the Ombudsman opened an inquiry by asking the complainant for clarifications with respect to his complaint. In light of the clarifications provided, the Ombudsman asked the Agency for an opinion on 2 February 2012. In view of further correspondence from the complainant, the Ombudsman included the third aforementioned allegation in his inquiry, and asked the Agency, on 22 February, to include in its opinion its comments on that allegation. The Agency's opinion was transmitted to the Ombudsman on 16 July. No observations were received from the complainant.

The Ombudsman's analysis and conclusions

A. Allegation that the redress committee failed to carry out a proper review

Arguments presented to the Ombudsman

13. In his complaint to the Ombudsman, the complainant repeated the points he raised in his request for redress. In support of his allegation, he argued that (i) there was a discrepancy



between the comments made as regards the strengths and weaknesses of his proposal and the points awarded to the proposal; (ii) there was a discrepancy between the evaluation of his IEF 2009 proposal and the evaluation of his IEF 2010 proposal.

14. With regard to point (i), the complainant noted that he received 4.5/5 points for criteria 2 and 4, even though the evaluators identified " *no significant weaknesses* ". He contested the fact that points were subtracted even though the panel of experts did not provide any reasons. In his view, this is not in line with the aforementioned rules, section 3.6 of which, entitled "Proposal scoring", gives an explanation of the scores [4] . The complainant further argued that the failure to identify weaknesses makes it impossible for him to improve his proposal.

15. With regard to point (ii), namely, the apparent discrepancy between the evaluation of the complainant's IEF proposals for 2009 and 2010, the complainant pointed out that, for his 2010 proposal, the ESR identifies, as a weakness on criterion 1, that "[t] *he proposal does not make clear the interdisciplinary and inter-sectoral aspects* ", whereas the ESR for his 2009 proposal identifies, as a strength on criterion 1, that "[t] *he project includes important interdisciplinary aspects* ". In response to the Ombudsman's request for clarifications on this issue [5] , the complainant stated that he did not know the difference between 'interdisciplinary' and 'inter-sectoral' in this context. He further noted that the regulations concerning IEF proposals only mention interdisciplinarity, but not intersectoral aspects.

16. The complainant, finally, contested the redress committee's statement that, since " *the current ESR is more favourable to the applicant, the Committee concludes that no further follow-up is required* ". He argued that, relatively speaking, the evaluation he received for his 2010 proposal is no better than the one he received in 2009 since, even though he obtained a higher score, he is still ranked in category C.

17. In its opinion, the Agency explained, with regard to point (i), that, simply because no significant weaknesses are indicated in the ESR, does not mean that the mark awarded should automatically be the maximum mark. The absence of significant weaknesses does not preclude the possibility that minor weaknesses can still exist, thus preventing the proposal from receiving the maximum mark.

18. The Agency further explained that scores are given to one decimal place in order to allow fine tuning between full digits and to reflect better the often very small differences between proposals. Consequently, a score of 4.5 implies that the quality of a particular aspect of a proposal is better than 'very good' and any shortcomings are minor but that it is not, with regard to the criterion in question, the best possible of all proposals evaluated in that call by the same panel. While the complainant's ESR reveals, under criteria 2 and 4 (for which he was awarded 4.5 marks), that there were " *no significant weaknesses* ", this does not exclude minor shortcomings. Moreover, the Agency pointed out that the strengths are described with words such as " *skills are well described* ", " *host has very good infrastructure* ", " *sufficient information is provided* ", and " *arrangements are well described* ". This justifies a score below 5.0, which would only be awarded to a proposal of " *excellent* " quality. The Agency thus concluded that the comments made by the experts are consistent with the marks awarded.



19. With regard to point (ii), namely, that there is a discrepancy between the evaluation of the complainant's IEF proposals for 2009 and 2010, the Agency took the view that there is no discrepancy likely to have jeopardised the decision whether or not to fund the proposal. First, the Agency stated that it has to be borne in mind that every evaluation is carried out with reference to the current state of knowledge and progress in science. Consequently, the evaluation of the same proposal a year later may indeed result in a different assessment because the context has changed and scientific progress has been made.

20. Second, the fact that disciplines are mentioned in the proposal does not mean that the interdisciplinary aspects have been made sufficiently clear. In other words, while the proposal might include important interdisciplinary aspects, the relevance of these aspects may not have been made sufficiently clear. Experts are bound by the content of each proposal and should refrain from going beyond its content and making any positive or negative assumptions to address a perceived lack of clarity, the Agency explained.

21. Finally, when evaluating a resubmitted proposal, the rules oblige the experts to provide a justification for their scores and comments if these differ markedly from those awarded to the earlier proposal. The Agency pointed out that, due to the fact that the scores and comments for the two proposals did not differ significantly, and that the scores for the IEF 2010 proposal are higher than for the IEF 2009 proposal, the experts were not required to provide such a justification for their scores and comments.

The Ombudsman's assessment

22. The evaluation of research proposals raises complex scientific questions. The Ombudsman considers that, in examining allegations of this nature, his review should normally be limited to assessing whether there is a manifest error in the reasoning of the contested decision [6] . He will not second-guess the redress committee, or the evaluators. The Ombudsman notes that this approach is in line with the standard applied by the Court of Justice of the EU [7] .

23. In the case at hand, the Ombudsman is being asked to review the work of the redress committee. As the Ombudsman noted in his decision in case 2339/2010/(OV)RA [8] , the redress committee examines alleged shortcomings in the handling of proposals to see if those shortcomings have jeopardised the outcome of the evaluation process. If, after examining the alleged shortcomings, the redress committee finds that there were shortcomings that may have jeopardised the outcome of the evaluation process, it does not itself proceed to re-evaluate the proposal. Rather, it suggests a further evaluation of all or part of the proposal by independent experts [9] . This two-stage approach is intended to avoid a situation in which each and every applicant who is disappointed with the news that his/her proposal has not been awarded funding appeals the decision in order to obtain, automatically, a second opinion. The Ombudsman finds this approach to be entirely reasonable.

24. In his decision in case 2339/2010/(OV)RA, the Ombudsman identified three grounds that



would give rise to a full re-evaluation: (i) if an applicant puts forward evidence of procedural errors, for example, if it is clear that a step in the procedure has been overlooked; (ii) if an applicant puts forward evidence of factual errors, for example, if the experts refer to the wrong proposal; (iii) if an applicant puts forward evidence of a **manifest** error of assessment.

25. In the case at hand, the complainant put forward two main arguments: (i) there was a discrepancy between the comments made as regards the strengths and weaknesses of his proposal and the points awarded to his proposal; (ii) there was a discrepancy between the evaluations of his 2009 and his 2010 proposals. With regard to point (i), the Ombudsman finds that the Agency has now provided a reasonable and coherent explanation for the difference between the comments made and the scores. With regard to point (ii), the Ombudsman finds that, again, the Agency has provided a reasonable and coherent explanation for the change in the assessment of criterion 1 between the complainant's IEF 2009 and IEF 2010 proposal. While the complainant may disagree with the evaluators' scientific assessment of criterion 1 of his proposal, he has not provided evidence showing that a manifest error of assessment was committed in the evaluation procedure.

26. In light of the above, the Ombudsman finds no instance of maladministration corresponding to the complainant's allegation that the redress committee failed to carry out a proper review of the evaluation of his IEF 2010 proposal. Notwithstanding this conclusion, the Ombudsman finds that the redress committee could have provided more detailed explanations for its review. These explanations were only provided by the Agency in response to the Ombudsman's inquiry.

27. The Ombudsman drew similar conclusions in his decision in case 2339/2010/(OV)RA and made a further remark, according to which, in responding to requests for redress, the redress committee should endeavour to provide more detailed reasons when explaining why a request does not lead to a re-evaluation. On 1 February 2013, the Agency replied positively to that further remark. It agreed that the redress committee should endeavour to give detailed explanations for its opinion in each case and explained that this point has been emphasised again to redress committee members in view of the cases to be handled in 2013. The Ombudsman welcomes this response, as it should pre-empt complaints, such as the present complaint, in the future.

B. Allegation that the Agency wrongly refused to make public the highest and lowest points needed for categories A, B, and C in the IEF 2010

Arguments presented to the Ombudsman

28. In support of his allegation that the Agency was wrong to refuse to make public the highest and lowest points needed to be classified in each of the different categories A, B, and C for the different sub-panels in the IEF 2010, the complainant pointed out that, with respect to the IEF 2009, this information was given to him as a result of the Ombudsman's inquiry in case



2339/2010/(OV)RA. He argued that the Agency is now acting in an "*erratic and clearly not justifiable way*".

29. In its opinion, the Agency explained that it disclosed the requested information to the complainant on 13 January 2012. In response to further requests from the complainant, the Agency also disclosed statistical data on redress procedures, which constituted information that it had to compile from a number of different documents. This shows a high level of due diligence and good administrative cooperation with the complainant, it stated.

The Ombudsman's assessment

30. The Ombudsman notes that the Agency has now provided the complainant with the information he requested. Accordingly, he finds that there are no grounds for further inquiries into this issue in the context of the present inquiry.

31. Notwithstanding this conclusion, the Ombudsman notes that the complainant had to turn to the Ombudsman twice to obtain, from the Agency, the information he was seeking. The Ombudsman will therefore make a further remark with a view to ensuring that such situations are avoided in future.

C. Allegation that the Agency wrongly refused to make public the names of the evaluators

Arguments presented to the Ombudsman

32. The complainant alleged that the Agency wrongly refused to make public the names of the evaluators of his IEF 2009 and IEF 2010 proposals. He argued that it is unsatisfactory that the list of evaluators is "*hidden somewhere on the website of the European Commission and only published with a huge delay*". It is also not acceptable, he stated, that the list of evaluators is not sorted by panel and programme.

33. In its opinion, the Agency explained that the Rules for submission of proposals and the related evaluation, selection and award procedures state that "[t]he names of the experts assigned to individual proposals are not made public. However, once a year, the Commission publishes on the Internet the list of experts used for the framework programmes and in each specific programme". It went on to state that this is in line with the exception foreseen in Article 4(1)(b) of Regulation 1049/2001 [10], which obliges the institutions to take into account the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data. The aforementioned provision also aims to protect the objectivity and impartiality of selection procedures.



The Ombudsman's assessment

34. The Agency invokes the Rules for submission of proposals and the related evaluation, selection, and award procedures in order to justify its refusal to provide access to the names in question. These rules are, in its view, in line with Article 4(1)(b) of Regulation 1049/2001 and are also aimed at protecting the objectivity and impartiality of the selection procedures.

35. First, with regard to the relevant provisions in the Rules, the Ombudsman notes that the Rules provide an assurance to evaluators that their names will not be released. As such, disclosure of the names of evaluators would, as the situation now stands, undermine their legitimate expectations that the Agency will protect their privacy rights. On this basis, the Ombudsman finds that the Agency was entitled not to release the names and, by extension, that there was no maladministration by the Agency with regard to the complainant's third allegation.

36. However, if and insofar as evaluators have a legitimate expectation that their names will not be disclosed, this expectation arises because the Agency has not informed them in advance that their names could, under certain conditions, be disclosed. The Agency could easily change this for the future and adopt a more proactive approach as far as transparency is concerned. The Ombudsman will examine the possibility of such an approach, in light of the Agency's reference to (i) Article 4(1)(b) of Regulation 1049/2001 and (ii) the need to protect the objectivity and impartiality of selection procedures.

37. With regard to point (i), Article 4(1)(b) of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data. In its judgment in Case C-28/08 P *Commission v Bavarian Lager* [11], the Court of Justice (the 'Court') ruled on the interplay between the EU rules on public access to documents and those on the protection of personal data. The Court found that Article 4(1)(b) of Regulation 1049/2001 requires that any undermining of the privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation concerning the protection of personal data, and, in particular, with the provisions of Regulation 45/2001 [12].

38. The Ombudsman notes that Regulation 45/2001 does not preclude the disclosure of names, once certain provisions of the Regulation are complied with (for example, Articles 11 and 12 concerning information to the data subject). In this regard, the Ombudsman draws the Agency's attention to the European Data Protection Supervisor's (the 'EDPS') position paper of 24 March 2011 on "Public access to documents containing personal data after the Bavarian Lager ruling", which sets out the EDPS's views on the consequences deriving from the Bavarian Lager ruling for the processing of personal data by the EU institutions [13]. The Ombudsman, specifically, draws the Agency's attention to the section of that paper entitled " *The proactive approach* " [14], which provides guidance for an EU institution that wishes to carry out its work transparently, while ensuring protection of an individual's right to privacy and to the protection of his/her personal data.



39. Finally, with regard to point (ii), namely, the need to protect the objectivity and impartiality of selection procedures, the Ombudsman refers, by analogy, to Article 6 of Annex III to the Staff Regulations, which establishes that the "*proceedings*" of the selection board (in open competitions) shall be secret. According to established EU case-law, this secrecy was introduced with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressure. Observance of this secrecy therefore precludes the disclosure **of the views** adopted by individual members of selection boards [15]. As the Ombudsman has already had the opportunity to state [16], however, **the right to keep the individual views of selection board members secret is not the same as keeping their identities secret**. Indeed, the established practice has been to disclose the names of selection board members. Given the interpretation of the Court of Justice of the EU concerning the rationale behind the secrecy provision, the Ombudsman's view, in case 2586/2010/(ML)TN, was that it does not make any sense to try to keep the identity of examiners secret. The Ombudsman's view is that this analysis applies, by analogy, in the case at hand.

40. The Ombudsman will therefore make a further remark, inviting the Agency to reflect on the possibility of releasing the names of evaluators in the future.

D. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

As far as the first and third allegations are concerned, there was no maladministration by the Agency.

As far as the second allegation is concerned, there are no grounds for further inquiries.

The complainant and the Agency will be informed of this decision.

Further remarks

In order to prevent individuals from having to complain to the Ombudsman to obtain information, the Agency should ensure that its staff is aware of the information that can be disclosed to the public in the context of its Intra-European Fellowships.

In light of the Ombudsman's assessment in paragraphs 36 to 39 of the present decision,



the Agency could reflect on the possibility of releasing the names of evaluators in the future.

P. Nikiforos Diamandouros

Done in Strasbourg on 30 April 2013

[1] The Ombudsman investigated a similar complaint submitted by the complainant concerning his IEF 2009 proposal (case **2339/2010/(OV)RA**). The decision in that case is available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/11737/html.bookmark> [Link]

[2] The Research Executive Agency is a funding body created by the European Commission to foster excellence in research and innovation. It manages large parts of the Seventh Framework Programme. As an executive agency, it focuses on management tasks outsourced by the Commission and fosters efficiency when addressing the research community's needs. Autonomous since 15 June 2009, the Agency was set up in 2007 in Brussels for the lifetime of the Seventh Framework Programme.

[3] The Commission rules covering the evaluation process (Rules for submission of proposals, and the related evaluation, selection and award procedures, Version 3, 21 August 2008 COM (2008) 4617). The Ombudsman notes that these rules were replaced by Version 4, adopted by Commission Decision of 28 February 2011; OJ 2011 L 75, p.9.

[4] " 4 - *Very Good. The proposal addresses the criterion very well, although certain improvements are still possible.*

5 - Excellent. The proposal successfully addresses all relevant aspects of the criterion in question. Any shortcomings are minor. "

[5] The complainant was asked to explain why he felt there was a discrepancy, given that the weakness identified in 2010 referred to " *interdisciplinary and inter-sectoral aspects* ", whereas the strength identified in 2009 referred only to " *interdisciplinary aspects* ".

[6] See the decision of the European Ombudsman in case **1793/2009/(JMA)MHZ** , paragraph 25, available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/5372/html.bookmark> [Link]

[7] See Case T-13/99 *Pfizer Animal Health SA v Council* [1999] ECR-II-1961, paragraph 169.

[8] See footnote 1 above, paragraphs 28-29 of the Ombudsman's decision.

[9] It is important to distinguish between the review of a proposal (which is carried out by the redress committee and which is the stage of the procedure at issue in this case) and re-evaluation, which is carried out by independent experts. As provided for in the rules, specifically in Section 5.3 entitled 'Assistance, enquiries and redress', "[t] he [redress]



committee itself does not evaluate the proposal".

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

[11] Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055.

[12] Regulation (EC) No 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; OJ 2001, L 8, p.1.

[13] Available at: <http://www.edps.europa.eu> [Link]

[14] See pp 6-11 of the paper.

[15] See, for example, case 89/79 *Bonu v Council* [1980] ECR I-553, paragraph 5.

[16] See the Ombudsman's decision in case **2586/2010/(ML)TN** , paragraph 50, available at: http://www.ombudsman.europa.eu/cases/decision.faces/en/10996/html.bookmark#_ftn6 [Link]