European Ombudsman

Draft recommendation of the European Ombudsman in the inquiry into complaint 1174/2011/MMN against EASA

Recommendation
Case 1174/2011/OV - **Opened on** 30/06/2011 - **Recommendation on** 17/01/2014 - **Decision on** 17/06/2014 - **Institution concerned** European Union Aviation Safety Agency (Draft recommendation accepted by the institution) |

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

The background to the complaint

1. The case at hand concerns the refusal by the European Aviation Safety Agency's ('EASA') to grant access to certain documents regarding four aircraft maintenance service providers established in Asia.

2. Pursuant to Article 20(2)(b)(iii) of Regulation 216/2008 on common rules in the field of civil aviation and establishing EASA [2] ('Regulation 216/2008'), one of EASA's responsibilities is to approve organisations, such as the four organisations concerned by the present case, involved in the maintenance of aeronautical products located outside the territory of the Member States. If EASA concludes that an organisation complies with the applicable requirements, it issues an approval certificate. All approved organisations are subject to surveillance by EASA in order to ensure that they continue to comply with the applicable requirements. Every 24 months, the auditors prepare an 'approval recommendation report' which contains the findings of the surveillance activities and the relevant recommendations concerning EASA's approval.

3. On 4 October 2010, EASA rejected an application for access to documents made by an association of aircraft engineers (the 'complainant').

4. On 15 October 2010, the complainant made a confirmatory application for access to: (i) EASA's surveillance plans relating to the relevant four aircraft maintenance service providers; and (ii) EASA's approval recommendation reports relating to these four providers.

5. On 25 October 2010, EASA rejected the confirmatory application on the basis of Regulation 1049/2001 regarding public access to documents [3] ('Regulation 1049/2001'). In particular,

EASA based its decision on the protection of the purpose of inspections, investigations and audits (the third indent of Article 4(2)) and on the protection of commercial interests (the first indent of Article 4(2)).

6. As a preliminary matter, EASA explained that the surveillance plans are essential for its continued surveillance of approved aircraft maintenance service providers. These documents contain information which the agency uses to plan the audits, their frequency and their schedule. Although each maintenance service provider must be audited at least every two years, the frequency of the audits may vary from one maintenance service provider to another, depending on a number of factors (including EASA's audit findings, the complexity of the organisation and the scope of the approval). EASA added that the surveillance plans are communicated only to the relevant aircraft maintenance service provider upon request.

7. As regards the approval recommendation reports, EASA explained that they contain the results of the relevant audits and the auditors' recommendation concerning the relevant approval.

8. As far as the exception concerning the protection of the purpose of inspections, investigations and audits is concerned, EASA indicated that both the surveillance plans and the approval recommendation reports were covered by it. According to the agency, their disclosure would undermine the climate of mutual trust between EASA and the organisations inspected. It emphasised that disclosure of those documents could create a disincentive for organisations to be transparent towards EASA, ultimately undermining EASA's surveillance tasks.

9. As regards the exception concerning the protection of commercial interests, EASA argued that the approval recommendation reports were also covered by this exception. In particular, EASA indicated that these documents contained information concerning the performance of maintenance activities and the identity of customers.

10. Finally, EASA concluded that there was no overriding public interest in the disclosure of the documents in question. On the contrary, disclosure would be against the public interest, since it could make it more difficult for EASA to obtain the necessary information from the audited organisations. In turn, this would jeopardise EASA's ability to fulfil its duties regarding aviation safety.

11. On 24 February 2011, the complainant again wrote to EASA in relation to the request for access to documents. On 11 April 2011, the complainant sent an additional letter regarding this issue.

12. On 14 April 2011, EASA replied that the complainant's request was covered by EASA's decision of 25 October 2010. In view of this, EASA indicated that it considered the matter closed.

13. On 25 May 2011, the complainant lodged the present complaint with the European Ombudsman.

The subject matter of the inquiry

14. On 30 June 2011, the Ombudsman opened an inquiry into the following allegation and claim:

Allegation:

EASA wrongly refused to grant access to: (i) EASA's surveillance plans; (ii) EASA's approval recommendation reports relating to aircraft maintenance services providers; and (iii) certain additional documents requested in a letter dated 11 April 2011 (including, in particular, the minutes of meetings, decisions and agreed practices concerning standardisation issues).

Claim:

EASA should grant the complainant access to the requested documents.

The inquiry

15. On 28 September 2011, EASA provided its opinion which was forwarded to the complainant for observations.

16. On 31 October 2011, the complainant submitted its observations on EASA's opinion.

17. On 24 January 2012, the Ombudsman's services carried out an inspection of the file at EASA's premises.

18. On 10 February 2012, the Ombudsman sent the report on the inspection of the file to the parties and invited the complainant to submit observations. Neither of the parties submitted any observations.

19. On 29 November 2012, the Ombudsman made a proposal for a friendly solution.

20. On 31 January 2013, EASA sent its reply to the friendly solution proposal, which was forwarded to the complainant for observations.

21. On 13 February 2013, the complainant submitted its observations.

The Ombudsman's analysis and conclusions

A. Alleged refusal to grant access to documents and related claim

Arguments presented to the Ombudsman

22. In its opinion, EASA noted that the complainant's letter of 11 April 2011 requesting access to item (iii) concerning additional documents (including, in particular, the minutes of meetings, decisions and agreed practices concerning standardisation issues) was addressed to the Commission and not to EASA.

23. The agency then described the nature of: (i) its surveillance plans; and (ii) its approval recommendation reports by providing the same explanations it had given in its decision rejecting the confirmatory application.

24. In EASA's view, its refusal to grant access to the requested documents was justified by the protection of the purpose of inspections, investigations and audits (the third indent of Article 4(2) of Regulation 1049/2001) and by the protection of commercial interests (the first indent of Article 4(2)).

25. First, as regards the protection of the purpose of inspections, investigations and audits, EASA indicated that both: (i) the surveillance plans; and (ii) the approval recommendation reports were covered by this exception.

26. As a starting point, EASA argued that its surveillance activities fall within the scope of the concepts of 'investigations' and 'audits' for the purposes of Regulation 1049/2001. In particular, it indicated that the purpose of surveillance activities is to verify that the organisation continues to comply with the applicable legal requirements. If the surveillance reveals that the organisation has failed to comply with the applicable legal requirements, EASA may amend, limit, suspend or revoke the approval certificate.

27. EASA emphasised that, in order to carry out its tasks, it needs to receive all the necessary information from the organisations. For this purpose, there needs to be a climate of mutual trust between EASA and the organisations under surveillance. The organisations' employees must be able to express themselves freely. EASA stressed that the safety assurance system is based on the willingness of the organisations and their employees openly to report and to document safety issues in order " *to learn from them and to prevent their reoccurrence* ".

28. Furthermore, EASA referred to Article 6(4) of the decision of its Management Board on Certification Procedures for Organisations which establishes that the surveillance plan will be communicated to the organisation in question. According to EASA, since the decision does not provide for disclosure to third parties, this creates a presumption that public disclosure of the surveillance plan would harm the purpose of the audit.

29. Thus, EASA concluded that, if the organisation cannot be sure that the information disclosed to EASA will not be made public, the flow of information it provides EASA would seriously be disrupted. Such an eventuality would undermine the purpose of the inspections and audits.

30. Second, EASA argued that the protection of commercial interests also justifies its refusal to grant access to (ii) EASA's approval recommendation reports because they contain commercially sensitive information. In particular, EASA indicated that these documents contain technical information concerning the performance of maintenance services by the organisations, the identities of their customers and their aircraft undergoing maintenance.

31. After concluding that the documents in question were covered by two exceptions listed in Article 4(2), EASA considered whether there was an overriding public interest in disclosure. It concluded that there was none because disclosure would have undermined its task of promoting aviation safety, which constitutes a public interest.

32. Finally, EASA indicated that partial access to the documents was not possible because they were covered by the exceptions in their entirety.

33. In its observations, the complainant argued that EASA's refusal to grant access in reality amounted to giving precedence to commercial interests, that is, the organisations' interests, over the public interest in the disclosure of information concerning safety-related issues. Moreover, the complainant suggested that EASA may also have an interest in refusing disclosure because it may reveal failures in its surveillance mechanisms.

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

34. Regulation 1049/2001 establishes the principle of public access to all documents held by the institutions, unless the institution to which a request for access is submitted can show that one of the exceptions set out in Articles 4(1) to (3) of the Regulation applies.

35. Moreover, in accordance with settled case-law, since they derogate from the principle of the widest possible public access to documents, the exceptions to the right of access must be interpreted and applied strictly [4] .

36. The present case concerns the interpretation and application of the exceptions concerning the protection of the purpose of inspections, investigations and audits, that is, the third indent of Article 4(2), and the protection of commercial interests, namely, the first indent of Article 4(2).

37. Pursuant to the case-law, in order to justify a refusal of access to a document, it is not sufficient for that document to be covered by an activity mentioned in Article 4(2) of Regulation 1049/2001. The institution concerned must also demonstrate that access to that document would specifically and actually undermine the interest protected by an exception laid down in

that Article [5] . Therefore, the institution concerned must, in principle, carry out a concrete, individual examination of the documents requested.

38. In the context of this legal framework, the Ombudsman examined the exceptions invoked by EASA concerning, first, the protection of commercial interests, and, second, the purpose of inspections, investigations and audits.

39. For the purposes of the present analysis, the Ombudsman noted that the surveillance plans consisted of tables in which EASA indicated the dates of its planned surveillance activities for each organisation. They were drafted in 2010-2011 and concerned surveillance activities which were planned for the period 2010-2012.

The protection of commercial interests

40. According to EASA, the protection of commercial interests justified its refusal to grant access to (ii) EASA's approval recommendation reports.

41. Although the concept of commercial interests had not been defined in the case-law, it was clear that it was not possible to regard all information concerning a company and its business relations as covered by the exception provided for in the first indent of Article 4(2) of Regulation 1049/2001. Otherwise, the general principle of giving the public the widest possible access to documents held by the institutions would be frustrated [6] .

42. Moreover, the case-law had also established that the negative effects likely to follow the disclosure of commercially sensitive information become less significant the older the information in question is [7] . However, there is no strict rule whereby all information after a particular period of time should be regarded as no longer affecting the commercial interests of the company in question [8] .

43. In the present case, EASA indicated that the documents in question contained technical information concerning the performance of maintenance services by the organisations concerned, the identities of their customers and their aircraft undergoing maintenance.

44. The Ombudsman considered that if the documents did contain technical information that constituted trade secrets or that concerned secret know-how, this could justify a refusal to grant full access to the documents. However, upon examination of the documents in question, it did not immediately appear that this was the case. Moreover, if there was certain information that could be regarded as commercially sensitive, this should not have prevented EASA from granting partial access to the remainder of the documents. Indeed, Article 4(6) of Regulation 1049/2001 required that partial access be granted in such circumstances.

45. As regards the information concerning the customers' identity and their aircraft undergoing maintenance, the Ombudsman considered that this type of information could, in principle, be regarded as commercially sensitive. It was true that some of the requested documents contained the names of some customers and of certain aircraft manufacturers. However, this

should not prevent EASA from deleting such references and granting partial access to the remainder of the documents, as required by Article 4(6) of Regulation 1049/2001.

46. In view of the foregoing, the Ombudsman took the preliminary view that EASA was not entitled to invoke the exception concerning the protection of commercial interests in refusing to give at least partial access to its approval recommendation reports.

The protection of the purpose of inspections, investigations and audits

47. According to EASA, the protection of the purpose of inspections, investigations and audits justified its refusal to grant access to: (i) its surveillance plans; and (ii) its approval recommendation reports.

48. The Ombudsman considered that, as EASA correctly argued, its surveillance activities should be regarded as falling within the scope of the concepts of 'investigations' and 'audits' for the purposes of Regulation 1049/2001. Indeed, although these concepts had not been defined by the Regulation or by the case-law of the EU Courts, it was clear that the activity of verifying whether an organisation complies with the applicable legal requirements to obtain or maintain an approval certificate should be regarded as an investigation or audit activity.

49. However, this did not mean that any document relating to EASA's surveillance activities was thus covered by the said exception. On the contrary, it was necessary to carry out an individual examination in order to establish whether disclosure of the specific documents requested would undermine the purpose of EASA's surveillance activities, namely, to establish whether the organisation in question complied with the applicable legal requirements to hold an approval certificate.

50. It should be noted that the aim of the exception provided for in the third indent of Article 4(2) was not to protect the investigations or audits as such but rather their 'purpose'. For this reason, documents relating to the various acts of investigation may remain covered by the exception so long as that goal had not been attained, even if the particular investigation or audit which gave rise to the document in question had been completed [9] .

51. In the case at hand, the Ombudsman doubted whether the mere fact that the relevant organisations had to be audited every two years suffices to conclude that the investigations or audits in question can be regarded as 'ongoing'. Moreover, if EASA's position were to be accepted, this would imply that the investigations or audits should be regarded as 'ongoing' for an indefinite period, namely, for as long as the organisations in question hold an approval certificate.

52. As regards, in particular, the surveillance plans, the applicable rules provided that the relevant organisations must be audited at least every two years. Furthermore, according to EASA, surveillance visits normally took place at least once a year, although the frequency of these visits may vary depending on certain factors, such as the follow-up of audits / findings, changes to the approval, incident responses or if the organisation involved was large and

complex [10] .

53. Moreover, it was important to note that the said plans were disclosed in advance to the organisations concerned. Therefore, they did not concern 'unannounced inspections' which, by definition, must be kept secret before they take place if their purpose is not to be undermined. It should also be noted that the only information included in the surveillance plans was the planned date of the inspections and meetings, which the organisations concerned were made aware of in advance.

54. Taking into account the fact that the minimum frequency of the inspections was established in the applicable rules and that the organisations concerned were given notice of the surveillance plans in advance, the Ombudsman was not convinced that the disclosure to third parties of the dates of the surveillance inspections and meetings would undermine their purpose.

55. As regards the approval recommendation reports, the Ombudsman considered that EASA had a legitimate interest in receiving from the inspected organisations all the information it needed to fulfil its tasks. Therefore, the inspected organisations' cooperation was certainly useful or even necessary. However, the 'mutual trust' to which EASA referred could not derive from the assumption that the information obtained from the organisations, which may reveal safety issues, would remain secret for an indefinite period of time. Furthermore, the Ombudsman noted that, as acknowledged by the agency itself, the inspected organisations had the legal obligation to be transparent towards EASA.

56. In view of the foregoing, the Ombudsman considered that accepting EASA's position would amount to accepting that EASA could generally prevent access, for an indefinite period, to all surveillance plans and all approval recommendation reports. In the Ombudsman's view, this would be contrary to the spirit of Regulation 1049/2001.

57. Therefore, the Ombudsman took the preliminary view that EASA was not entitled to refuse access to the requested documents in order to protect the purpose of inspections, investigations and audits (the third indent of Article 4(2) of Regulation 1049/2001). Accordingly, the Ombudsman made the following friendly solution proposal:

" *Taking into account the Ombudsman's findings, EASA could consider granting full access to (i) the surveillance plans. Moreover, EASA could consider granting full or at least partial access to (ii) the approval recommendation reports, without prejudice to the possibility of refusing disclosure of any commercially sensitive information.* "

The arguments presented to the Ombudsman after the friendly solution proposal

58. In its reply to the friendly solution proposal, EASA expressed its commitment to giving the fullest effect possible to the right of access to documents established by Regulation 1049/2001.

However, after having carefully analysed the Ombudsman's friendly solution proposal, EASA concluded that it could not accept it. It confirmed its refusal to grant access to the documents on the basis of the exceptions established in the first and the third indents of Article 4(2) of Regulation 1049/2001, namely the protection of commercial interests and the protection of the purpose of inspections, investigations and audits.

59. In EASA's opinion, the protection of commercial interests justified its refusal to grant access to (ii) the approval recommendation reports. In this respect, EASA noted that, in order to assess compliance with the applicable technical requirements, it receives safety information through the inspections carried out which often should be regarded as commercially sensitive information. In particular, the approval recommendation reports contain EASA's assumptions and views concerning the technical compliance of the maintenance service providers. Moreover, partial access could not be granted because the information in the reports is closely intertwined. Furthermore, the reports reflect the situation at the time of the inspection and thus the information contained therein may be out-of-date at the time of the request. In addition, granting partial access may give a partial and thus misleading impression of the situation. Furthermore, EASA referred to the case-law of the Court of Justice of the European Union (the 'Court'), which, according to EASA, supported its position in this respect [11] .

60. As regards the protection of the purpose of inspections, investigations and audits, EASA reiterated that this exception justified its refusal to grant access to: (i) the surveillance plans; and (ii) the approval recommendation reports.

61. As far as (ii) the approval recommendation reports are concerned, EASA contended that their disclosure would jeopardise the willingness of the maintenance service providers to cooperate with EASA in the future. In that regard, EASA referred to recent case-law of the Court [12] . Furthermore, EASA considered that, according to the case-law, it could rely on a general presumption that the documents contained in the file for the administrative procedure of renewal of an approval are covered by the exception concerning the protection of the purpose of inspections, investigations and audits [13] .

62. EASA indicated that the same considerations set out above applied to (i) the surveillance plans. Thus, their disclosure would also undermine the purpose of inspections, investigations and audits.

63. Finally, EASA pointed out that there was no overriding public interest in disclosure. Although the complainant invoked the public interest of air safety, disclosure would precisely undermine such public interest because maintenance service providers would be less willing to cooperate with EASA.

64. In its observations, the complainant expressed its dissatisfaction with EASA's reply.

The Ombudsman's assessment after the friendly solution proposal

65. In its reply, EASA rejected the Ombudsman's friendly solution proposal and maintained its refusal to grant access to: (i) its surveillance plans; and (ii) its approval recommendation reports. It reiterated its view that this refusal was justified by the exceptions established in the first and the third indents of Article 4(2) of Regulation 1049/2001, namely the protection of commercial interests and the protection of the purpose of inspections, investigations and audits.

66. Since the general considerations expressed at the time of the friendly solution proposal are still valid (points 34-39), the Ombudsman will focus her analysis on the specific arguments put forward by EASA after such proposal. In that regard, it is worth briefly noting that Regulation 1049/2001 establishes the principle of public access to all documents held by the institutions, unless the institution concerned can show that one of the established exceptions should apply. Moreover, this principle is of paramount importance in increasing the accountability of the EU institutions, and thus strengthening the trust of EU citizens in their functioning.

The protection of commercial interests

67. In its reply, EASA indicated that it was obliged to refuse access to (ii) the approval recommendation reports in order to ensure the protection of the commercial interests of the maintenance service providers. In this respect, EASA put forward arguments relating to the documents as such, as well as arguments based on the case-law.

68. As regards the documents in question, leaving aside technical information that may constitute trade secrets or may concern secret know-how, as well as the identity of customers and their aircraft undergoing maintenance [14] , EASA contends that the approval recommendation reports contain EASA's views concerning the technical compliance of the maintenance service providers. Thus, EASA appears to consider that the disclosure of such views may harm the commercial interests of maintenance service providers.

69. In the Ombudsman's opinion, this cannot constitute a valid justification to refuse disclosure. Although disclosing EASA's doubts or even negative views on specific issues regarding compliance may harm the commercial interests (that is the reputation) of maintenance service providers, the Ombudsman is not convinced that there is a *legitimate* commercial interest that would be protected by keeping such information secret.

70. It should be noted that the General Court has had to deal with a case in which the applicant had asked the Commission for access to documents concerning a cartel case and in which the Commission took the view that granting such access would harm the commercial interests of the companies that had taken part in the cartel. The General Court held: " *that the interests of the undertakings that had participated in the cartel [...] in non-disclosure of the documents requested cannot be regarded as commercial interests in the true sense of those words* [15] . " In fact, " *the interest which those companies might have in non-disclosure of the documents requested seems to reside not in a concern to maintain their competitive position on the [...] market on which they are active but, instead, in a desire to avoid actions for damages being brought against them before the national courts* [16] . " In the General Court's view, " *the*

interest of a company which has taken part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection [17] ". The Ombudsman considers that a similar logic could be applied in the present case. It is not immediately obvious why the companies concerned should have a legitimate commercial interest in the non-disclosure of documents containing information on potential problems as regards aviation security in relation to these companies.

71. In any event, the Ombudsman notes that EASA has merely stated that disclosing the relevant documents would undermine the protection of the commercial interests of the companies concerned, without providing any specific arguments to support its position. In particular, EASA has not shown how the disclosure of these documents could specifically and actually undermine the said protection. It should be noted in this context that, as EASA itself has recognised, some of the information contained in these documents may already have been out-of-date at the time the request for access was made (see point 42 above).

72. The Ombudsman further notes that, having carefully examined the documents, there is no factual basis for EASA's argument that the information in the reports is so closely intertwined that it is not possible to grant partial access either. On the contrary, the information which might affect the commercial interests of maintenance service providers, if any, could easily be separated from the remaining information.

73. As regards the case-law referred to by EASA, the Ombudsman notes that the judgment in *Technische Glaswerke Ilmenau* [18] , delivered in the context of an ongoing State aid investigation, concerned the exception based on the protection of the purpose of inspections, investigations and audits, and not that based on the protection of commercial interests. The possible implications of this judgment for the purposes of the present inquiry will therefore be analysed below in relation to the first-mentioned exception.

74. In view of the foregoing, the Ombudsman concludes that EASA has not established that it was entitled to invoke the exception concerning the protection of commercial interests in refusing to give at least partial access to its (ii) approval recommendation reports.

The protection of the purpose of inspections, investigations and audits

75. EASA claimed in its reply that it was obliged to refuse access to: (i) the surveillance plans; and (ii) the approval recommendation reports in order to protect the purpose of inspections, investigations and audits.

76. As regards the (ii) approval recommendation reports, EASA reasoned that a disclosure of the documents requested would jeopardise the willingness of the maintenance service providers to cooperate with EASA in the future. Moreover, EASA referred to the case-law of the Court, which in EASA's view supported its refusal.

77. The Ombudsman considers that EASA's arguments are unconvincing. As indicated in the friendly solution proposal, the maintenance service providers cannot legitimately assume that

the information obtained from them, which may reveal safety issues, will remain secret for an indefinite period of time. Furthermore, as acknowledged by EASA, the inspected organisations have the legal obligation to be transparent towards EASA. They are thus not at liberty to withhold relevant information from EASA, something that would be likely to lead to the withdrawal of the approval certificate and possibly to the imposition of penalties.

78. In relation to the case-law cited by EASA, the Ombudsman recalls that the judgment in *Technische Glaswerke Ilmenau* concerned a request for access to documents in an ongoing State aid investigation, which had been made by an interested third party (that is the beneficiary of the aid, which is considered as a third party in State aid proceedings between the Commission and the State in question) [19] . In this judgment, the Court held that Regulation No 659/1999 [20] , which establishes the rules on procedure for the Commission's review of State aid, does not establish any right of access to documents in the file for interested third parties [21] . For that reason, the Court acknowledged the existence of a rebuttable presumption that disclosure of documents in the administrative file in principle would undermine the protection of the purpose of the relevant investigations [22] .

79. The Ombudsman notes that, contrary to the situation in *Technische Glaswerke Ilmenau* , in the present case the sector specific legislation does not contain any special and restrictive rules concerning access to the file and access to documents. On the contrary, Article 58(1) of Regulation 216/2008 provides as follows:

" *Regulation (EC) No 1049/2001 shall apply to documents held by the Agency.* "

80. Therefore, in the Ombudsman's view, the judgment in *Technische Glaswerke Ilmenau* does not support EASA's position

81. As regards the judgment in *Agrofert* , also cited by EASA, the Ombudsman notes that this case concerned a request by a third party for access to documents relating to merger control proceedings which had been terminated. In this context, the Court noted that the merger control regulation [23] and the implementing regulation contained specific rules on access to the file, which limit access to the 'parties directly involved' and, under certain conditions, to 'other involved parties' [24] . Thus, the Court considered that there was a rebuttable presumption that disclosure of the documents concerned would undermine the protection of the purpose of investigations [25] .

82. However, for the reasons explained above, that reasoning cannot be applied to the present case.

83. For the sake of completeness, the Ombudsman notes that the General Court recently concluded in its judgment in *ClientEarth* that the abovementioned presumption should also apply in the context of infringement proceedings brought by the Commission against a Member State. According to the General Court, the rationale for this is that disclosure may undermine the climate of trust between the Commission and the Member State with the goal of achieving a mutually acceptable solution to any alleged contraventions of EU law. According to the General

Court, the need to protect the (i) climate of mutual trust between the Commission and the Member State concerned and (ii) the proper conduct of infringement proceedings applied even during the court proceedings and up to the delivery of the Court's judgment. This is because an amicable settlement between the parties could be reached before the Court has delivered its judgment [26] .

84. By analogy with *ClientEarth* , the Ombudsman considers that EASA could conceivably, in certain circumstances, consider refusing access to the approval recommendation reports until it has taken a final decision on whether the approval certificate should be maintained, withdrawn or amended. In particular, such refusal may be envisaged where, following the adoption of the approval recommendation report and before the approval certificate has been granted, discussions are taking place between EASA and the provider with a view to resolving any outstanding issues. However, EASA has not argued that this was the case as regards the documents requested.

85. In view of the foregoing, the Ombudsman concludes that in the present case EASA has not established that it was entitled to refuse access to (ii) the approval recommendation reports in order to protect the purpose of inspections, investigations and audits.

86. Since EASA merely referred to the same considerations as regards (i) the surveillance plans, the Ombudsman considers that the same conclusion applies as regards these documents.

87. Therefore, the Ombudsman will make a draft recommendation in the present case.

B. The draft recommendation

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

EASA should grant full access to (i) the surveillance plans, and full or at least partial access to (ii) the approval recommendation reports.

EASA and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, EASA shall send a detailed opinion by 31 March 2014. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly

Done in Strasbourg on 17 January 2014

[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] Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ 2008 L 79 p. 1.

[3] 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.

[4] See Case T-344/08 *EnBW Energie Baden-Württemberg* v *Commission* , judgment of 22 May 2012, not yet published in the ECR, paragraph 41.

[5] *Idem* , paragraph 40.

[6] *Idem* , paragraph 134.

[7] *Idem* , paragraph 139.

[8] *Idem* , paragraph 142.

[9] *Idem* , paragraph 116.

[10] See EASA's User Guide for Applicants for Foreign Part 145 approvals, which is available on-line at: www.easa.europa.eu [Link]

[11] Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 59.

[12] Case C-477/10 P *Commission* v *Agrofert* , judgment of 28 June 2012, not yet published in the ECR, paragraphs 66 and 84.

[13] *Commission* v *Technische Glaswerke Ilmenau* , cited above, paragraphs 54 *et seq* .

[14] Which in the Ombudsman's opinion could be regarded as commercially sensitive (points 43-45 above).

[15] See Case T-344/08 *EnBW Energie Baden-Württemberg* , cited above, paragraph 147.

[16] Case T-344/08 *EnBW Energie Baden-Württemberg* , cited above, paragraph 147.

[17] Case T-344/08 *EnBW Energie Baden-Württemberg* , cited above, paragraph 148.

[18] *Commission* v *Technische Glaswerke Ilmenau* , cited above.

[19] *Commission* v *Technische Glaswerke Ilmenau* , cited above, paragraphs 50 *et seq* .

[20] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 83, p. 1.

[21] *Commission* v *Technische Glaswerke Ilmenau* , cited above, paragraph 56.

[22] *Commission* v *Technische Glaswerke Ilmenau* , cited above, paragraph 61.

[23] Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1.

[24] *Commission* v *Agrofert* , cited above, paragraphs 49 *et seq* , in particular paragraphs 62-63.

[25] *Commission* v *Agrofert* , cited above, paragraph 64.

[26] Case T- 111/11, *ClientEarth* v *Commission* , judgment of 13 September 2013, not yet published in the ECR, paragraphs 58 *et seq* .