European Ombudsman

Draft recommendation of the European Ombudsman in relation to complaint 3196/2007/(BEH)VL against the European Commission

Recommendation
Case 3196/2007/(BEH)VL - **Opened on** 17/01/2008 - **Recommendation on** 06/10/2010 - **Decision on** 20/12/2011

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

The background to the complaint

1. The complainant is a British citizen specialising in data protection issues. On 27 April 2007, he sent an e-mail to the Secretariat-General of the European Commission, in which he put forward certain questions on ongoing infringement procedures concerning Directive 95/46/EC on the protection of personal data. [2] The infringement procedures were mentioned in a Communication published by the Commission. [3]

2. The subject of the e-mail was entitled " *Application for information under Regulation 1049/2001* ". The questions put forward by the complainant were the following:

"Could I have background information in documents which describe for each proceeding:

(a) the country which is subject to proceedings or intended proceedings (b) the nature of the [...] infringements (c) when proceedings were commenced (d) which article(s) is/are alleged to have been infringed.

I would also like to know what the 'number' is."

3. On 11 May 2007, the Commission's Directorate-General Justice, Freedom and Security ('DG JLS'), as it was called at the time, informed the complainant that it could not comply with his request, since the documents he had asked for were covered by an exception contained in Regulation No 1049/2001. [4] The exception invoked was " *Article 4(2), third indent, of Regulation 1049/2001: 'The institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings and legal advice'* ". DG JLS informed the complainant that he could ask for a review of this decision by making a confirmatory

application to the Commission's Secretary-General.

4. The complainant lodged a confirmatory application on 30 May 2007.

5. The Commission's Secretariat-General acknowledged receipt of the application on 7 June 2007. It indicated that the complainant would receive a substantive reply within 15 working days.

6. The Secretariat-General answered the confirmatory application by letter of 19 July 2007. It explained that, as correctly pointed out by the complainant in his confirmatory application, the exception applied was misquoted in the reply of DG JLS; the correct exception in Article 4(2), third indent, of Regulation 1049/2001 should have been the protection of the purpose of inspections, investigations and audits. The Secretariat-General explained that, given the wording of the complainant's application, DG JLS first considered that it was a request for access to a full set of infringement procedure documents made under Regulation 1049/2001. However, having re-examined the complainant's request, the Secretariat-General came to the conclusion that what the complainant had actually asked for was " *precise and well-characterised information* " rather than access to documents. It thus provided him with a summary table prepared by DG JLS on the ongoing infringement cases and apologised for the possible misinterpretation of his initial request. The table enclosed contained information on infringement cases against Germany (two proceedings), Austria and the United Kingdom with the dates of the relevant procedural steps undertaken by the Commission. With regard to the infringement proceedings against Austria and Germany, the summary table also included information on the articles of Directive 95/46/EC allegedly breached, together with a brief explanation. As regards the United Kingdom, the table merely referred to an " *alleged failure of the 1998 UK Data Protection Act to implement various provisions of the Directive 95/46/EC [...] including through the interpretation of its courts and its data protection authority* ". Apart from one of the procedures against Germany, where a reasoned opinion had been addressed to the Member State concerned, all the other procedures were at the letter of formal notice stage.

7. On 20 August 2007, the complainant pointed out in an e-mail sent to DG JLS and the Secretariat-General that the table provided did not list the articles allegedly breached by the United Kingdom, whereas it did so as concerned Austria and Germany. The complainant further queried whether the fact that two letters of formal notice were sent to the United Kingdom meant that the first letter was withdrawn. He also asked for an explanation of the acronym " *CDO* ", mentioned in relation to that Member State.

8. By an e-mail dated 13 September 2007, DG JLS communicated to the complainant the articles of Directive 95/46/EC allegedly breached by the United Kingdom (Articles 2, 3, 8, 10, 11, 12, 13, 22, 23, 25 and 28). It further informed him that the acronym " *CDO* " was used for cases commenced at the Commission's initiative and that even though a second letter of formal notice was sent to the United Kingdom that did not mean that the first letter had been withdrawn.

9. On 17 September 2007, the complainant sent a further e-mail to DG JLS, in which he pointed out that the table contained no explanations as regards the United Kingdom's alleged

infractions, whereas short explanations had been given for Austria and Germany. Therefore, he asked to receive a one-sentence description of the issues related to each of the allegedly infringed articles.

10. On 17 October 2007, the Commission answered that, in light of its policy not to disclose details relating to infringement proceedings so as not to prejudice negotiations with Member States, it could not provide him with the requested information.

11. The following day, the complainant sent an e-mail to the Secretariat-General and stressed that all he was requesting was for the Commission to provide him with the same level of information that it had already given him in relation to the Austrian and German cases.

12. By an e-mail of 10 January 2008, DG JLS confirmed its decision with reference to its policy not to disclose any details relating to infringement procedures. It stated that the infringement procedure to which the request related was still at a stage where the details sought could not be disclosed.

The subject matter of the inquiry

13. In his complaint to the Ombudsman, the complainant put forward the following allegation and claim:

The complainant alleges that, by not providing the same level of information relating to the nature of the infringement with regard to an infringement procedure against the United Kingdom as for other Member States, the Commission failed to comply with principles of good administration such as those flowing from Regulation 1049/2001/EC.

The complainant claims that the Commission should provide him with information about the nature of the problems forming the subject matter of the said infringement procedure in the same way as it has done with regard to infringement proceedings concerning other Member States.

The inquiry

14. The complainant lodged his complaint with the European Ombudsman on 12 December 2007. On 17 January 2008, the Ombudsman asked the Commission for its opinion on the complaint.

15. The Commission submitted its opinion on 9 July 2008. The complainant's observations on the opinion were received on 31 August 2008.

16. Given that additional clarifications were necessary, the Ombudsman conducted further inquiries into the complaint on 9 October 2008. The Commission provided its answer to these

inquiries on 23 January 2009. The complainant submitted his observations on 9 February 2009. Further observations were received from the complainant on 14 April 2009.

17. On 13 July 2009, the Ombudsman made a proposal for a friendly solution.

18. On 29 December 2009, the Commission sent its reply to the Ombudsman's friendly solution proposal.

19. On 7 February 2010, the complainant submitted his observations on the Commission's reply. On 23 April 2010 and 25 June 2010, the complainant submitted additional observations.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission did not provide the complainant with the same level of information concerning the infringement procedure against the United Kingdom as for other Member States and related claim

Arguments presented to the Ombudsman

20. In its opinion on the complaint, the **Commission** explained that, since the complainant's request was entitled "Application for information under Regulation 1049/2001", it had initially been handled as a request for access to documents pursuant to that Regulation. Once the Commission's Secretariat-General analysed the confirmatory application, it concluded that what the complainant actually sought was precise and well-characterised information with regard to infringement proceedings. It thus instructed DG JLS to provide him with a summary table containing general information on the ongoing infringement procedures.

21. The Commission considered that it did not fail to comply with Regulation 1049/2001 because that Regulation concerns access to documents whereas the complainant wanted to obtain factual information. The Commission further argued that the complainant's request for information, to which the Commission's Code of Good Administrative Behaviour [5] applies, was handled in accordance with the rules contained therein. While acknowledging that it did not include in the summary table the explanations on the nature of infringements allegedly committed by the United Kingdom, the Commission underlined that it would have been inappropriate to disclose such information in view of the tangible progress made on some points, which resulted from ongoing discussions with that Member State's authorities. In this context, the Commission pointed out that the progress of these negotiations was demonstrated by changes made to the United Kingdom's Information Commissioner's Guidance to data controllers on the definition of personal data.

22. The **complainant** put forward various arguments as to why the Commission should have

provided him with the requested information. However, it appeared that he understood the Commission's approach to his request as meaning that, since the information he requested - or, to be more precise, the actual words that would literally satisfy his request - could not be found in a document, the Commission deemed his request to be outside of the scope of Regulation 1049/2001 and that it consequently did not have to release the requested information at all. Based on that premise, the complainant insisted that, since the relevant information could be found in Commission documents, a summary derived from these documents should also be covered by Regulation 1049/2001. He referred to the wording of Article 3(a) of Regulation 1049/2001, which states that the term " *document shall mean* **any** *content* " and took the view that a summary based on the content of a document or of a number of documents should be covered by the Regulation. He further argued that, in line with Article 1(c), which refers to promoting good administrative practice on access to documents, a duty to release summary information could be deduced from Regulation 1049/2001.

23. The complainant considered the Commission's position to be inconsistent, since comparable information was given to him with regard to infringement procedures against Austria and Germany. By way of comparison, he referred to the judgment of the House of Lords in *CSA v SIC* , [6] which dealt with the release of statistical data. One of the issues in that case concerned the question whether statistical data which had been modified so as to protect the personal data of individuals could be released. The complainant argued that the House of Lords held that if the relevant data can be transformed into a releasable form, then it ought to be made available to an applicant. By analogy, he took the view that the Commission should be able to release summary information amounting to 6-10 words on each of the alleged infringements.

24. The complainant argued that the Commission had incorrectly applied the exception in Article 4(2), third indent of Regulation 1049/2001. In this context, he highlighted the fact that it was difficult to imagine how a brief explanation of 6-10 words on the substance of the alleged infringements could either undermine the legal positions of both parties involved or impose an onerous burden on the Commission. Given that the procedure had started in April 2004, the complainant also expressed doubts as to whether a court case would be brought at all.

25. In its reply to the Ombudsman's request for additional information, the **Commission** maintained its position that the complainant's request should have been dealt with as a request for information. It pointed out that its decision to handle it as such rather than as an access to documents request did not prejudice the complainant's rights in any way because it was intended to provide him with the information sought, in spite of the fact that the documents themselves were covered by the exception in Article 4(2), third indent of Regulation 1049/2001.

26. As concerns the reasoning of its refusal to release part of the information sought by the complainant, the Commission explained that, given that the co-operation with the United Kingdom's authorities had been subject to a substantially different degree of co-operation than with other Member States and had proved particularly constructive, it believed that a higher degree of confidentiality was justified.

27. The Commission also referred to the judgment of the House of Lords in *CSA v SIC* .

According to the Commission, the United Kingdom's authorities had informed it of their intention to intervene in that case, which subsequently led to a clarification of earlier case-law that was apparently inconsistent with EU law. The Commission stated that two further issues were resolved due to that ruling.

28. In his observations on the Commission's comments, the **complainant** reiterated his position concerning the release of statistical data and the provision of a summary. With regard to the Commission's argument concerning the outcome of the House of Lords' judgment in the *CSA v SIC* case, the complainant submitted that the Commission could have made available information on those aspects that had been resolved through this judgment. In his supplementary observations, the complainant further pointed to a then recent press release IP/09/570 of the Commission's Directorate-General for Information Society and Media ('DG INFSO') on a separate infringement procedure against the United Kingdom that also concerned alleged infringements of Directive 95/46/EC. In this press release, the Commission mentioned the relevant articles of the directive (Articles 2(h), 24 and 28) and explained the underlying issues in significantly greater detail. [7]

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

29. The Ombudsman took note that the complainant and the Commission disagreed on whether the Commission acted correctly in re-classifying the complainant's request for access to documents as a request for information. Requests for information are covered by Section 4 of the Commission's Code of Good Administrative Behaviour, whereas requests for access to documents are subject to the rules laid down in Regulation 1049/2001. Given the different legal frameworks applicable, it thus appeared necessary to first examine this procedural aspect prior to examining the substance of the case.

a) On the procedural aspects

30. The Ombudsman recalled that Regulation 1049/2001 lays down a two-step procedure for handling requests for access to documents. The first step is the initial application, whereby an applicant first approaches an institution with an eye to obtaining access to a document. In the event that the institution refuses to grant (full or partial) access, it informs the complainant of this fact and of his right to make a confirmatory application, which is the second step.

31. It was clear that the Commission initially handled the complainant's request as a request for access to documents pursuant to Regulation 1049/2001. It appeared that it was only when dealing with the complainant's confirmatory application that the Commission changed its view as to how to classify the complainant's request.

32. The Ombudsman acknowledged that there may be good reasons for deciding that a request that was initially understood as a request for access to documents should be

considered as constituting a request for information. In such a case, the applicant should obviously be clearly informed of this change of position and of the reasons underlying it. The Ombudsman noted that the Secretariat-General provided such information to the complainant in its letter of 19 July 2007.

33. As regards the case at hand, the Ombudsman noted that the complainant's request of 27 April 2007 explicitly referred to Regulation 1049/2001. It was therefore perfectly reasonable for the Commission to interpret this request as a request for access to some or all of the documents concerning the relevant infringement proceedings. The Commission took the view that no access could be granted to these documents, given that one of the exceptions set out in Regulation 1049/2001 applied. Whilst it was true that, in its reply of 11 May 2007, DG JLS quoted an exception which was not relevant, this mistake was corrected in the letter which the Secretariat-General addressed to the complainant on 19 July 2007.

34. It appeared that the complainant did not dispute the Commission's view that the documents concerning the relevant infringement proceedings could not be disclosed to him. Instead, the complainant argued that the Commission should have, on the basis of the said documents, prepared a summary setting out the information referred to in his request of 27 April 2007 and in subsequent correspondence. In the complainant's view, the provision of such a summary fell under the concept of access to documents covered by Regulation 1049/2001. The Ombudsman was not able to concur with that reasoning, since Regulation 1049/2001 deals with requests for access to existing documents. It does not concern the question whether certain documents ought to be drawn up and provided to applicants.

35. Instead of continuing to deal with the complainant's request as a request for access to documents, which it considered could not be complied with, the Secretariat-General decided to try and provide the complainant with the information he was effectively looking for. In view of the above, the Ombudsman considered that the approach adopted by the Secretariat-General was reasonable.

b) On the substantive aspects

36. As regards the handling of the request for information, the Ombudsman took the view that it was good administrative practice to provide the requested information unless there was a valid reason for not doing so. This basic rule of good administration is also laid down in Article 22 of the European Code of Good Administrative Behaviour (the 'Code'). [8] The Ombudsman noted that the Commission provided the complainant with what the latter appeared to consider a sufficient amount of information concerning the relevant infringement proceedings against Germany and Austria. It also made available some information on the infringement proceedings against the United Kingdom. Therefore, the inquiry only concerned the question whether the Commission, in addition to this information, also ought to have provided the complainant with a short description concerning the issues that were related to the articles of Directive 95/46/EC that had allegedly been infringed by the United Kingdom. The Commission argued that it could not disclose the requested information in the interest of ongoing negotiations with the United

Kingdom authorities. It supported this position by referring to tangible progress on some points which, in its opinion, had proved particularly constructive. It explained that it did not wish to jeopardise these negotiations by disclosing the relevant information.

37. The Ombudsman noted that the information which the Commission refused to disclose did not seem to be confidential as such. As a matter of fact, information of the type sought by the complainant was made available as regards the infringement proceedings against Germany and Austria. The Commission's decision thus appeared to be based exclusively on the fact that, according to the Commission, the United Kingdom showed itself to be particularly constructive in its negotiations with it. The Commission argued that disclosing the information concerned would jeopardise these negotiations.

38. However, the Ombudsman took the view that the reason put forward by the Commission could, in any event, not explain why no information could be provided as regards the issues that had, in the meantime, been resolved. It was difficult to see what further negotiations could be pending in relation to these issues.

39. As regards the reason put forward by the Commission as such, the Ombudsman pointed out that the complainant essentially asked for a brief description (6-10 words) of the alleged individual infringements. The Ombudsman found it difficult to see how disclosing this summary information could have had the negative consequences feared by the Commission. As mentioned above, such information was made available regarding two other Member States. As a matter of fact, the Ombudsman considered that, if the attitude of the United Kingdom in its negotiations with the Commission had, as stated by the Commission itself, proven to be particularly constructive, one would expect that making such information available would be less likely to give rise to problems than in the case of a less co-operative Member State.

40. Moreover, the Ombudsman found it difficult to reconcile the position taken by the Commission in the present case with the approach that it appeared to have adopted in the case that gave rise to its press release IP/09/570. In that case, the Commission appeared to have felt able to provide a substantially greater level of information on an infringement procedure, even though this procedure concerned the same Member State and alleged infringements of the same directive.

41. In light of the above considerations, the Ombudsman made the preliminary finding that, in the absence of a convincing explanation as to why disclosing the requested information was not possible, the Commission’s refusal to provide the complainant with the information sought on the infringement proceeding against the United Kingdom amounted to an instance of maladministration. He therefore made a corresponding proposal for a friendly solution, in accordance with Article 3(5) of his Statute.

The arguments presented to the Ombudsman after his friendly solution proposal

42. The **Commission** pointed out that it had decided to limit itself to what it considered to be the critical findings. It argued that, in arriving at his findings, the Ombudsman appeared to have relied, at least in part, on the complainant's observations on its previous comments, and on the new matters raised therein. The Commission noted that these observations were forwarded to it at the same time as the proposal for a friendly solution. Nevertheless, it appreciated being given the opportunity to comment, even though the Ombudsman had already arrived at his preliminary findings. Moreover, it welcomed the fact that the Ombudsman found that the Commission had acted reasonably in handling the complainant's request as a request for information rather than a request for documents.

43. The Commission stated that it interpreted the Ombudsman's statement that it was good administrative practice to provide requested information, unless there was a valid reason for not doing so, as a decision to treat the complaint as alleging a failure to provide information which was not confidential, rather than alleging a failure to provide the same level of information about a number of different Member States. It pointed out that Article 22(3) of the Code sets out the procedure to be followed where the requested information was confidential. The Code does not specify who decides whether the relevant information is confidential or not. The Commission further submitted that Article 22 of the Code was not the only applicable provision in this case. Article 10 of the Code obliges an official to follow his or her institution's normal administrative practices, unless there are legitimate grounds to depart from them. This also concerned practices in relation to confidentiality. The Commission also invoked its own Code of Good Administrative Behaviour, which provides that the Commission needs to be consistent in its administrative behaviour, follow its normal practice, and justify any departure from this principle.

44. As regards the Ombudsman's statement that the Commission had not provided a convincing explanation as to why it was not possible to disclose the requested information, the Commission stated that it had already explained to the complainant that the information he requested was confidential, and that, in accordance with its internal rules on handling infringement cases, it could not be disclosed. The Commission considered this to be a valid explanation, particularly in view of Article 22(3) of the Code, and consistent with the Commission's normal administrative practices. It underlined once more that it was part of its discretionary power to determine, having regard to the specific circumstances of the case, which information in its possession was confidential, and which was not and could consequently be made available. A negation of this discretion would render the existing practices of the EU institutions in relation to confidential information devoid of any practical use. The Commission therefore concluded that it could not accept the idea that complying with normal administrative practice could ever constitute maladministration.

45. The Commission therefore maintained its view that it had indicated a valid reason for refusing to disclose the information requested by the complainant. It thus rejected the Ombudsman's friendly solution proposal.

46. The **complainant** stated that he was not convinced that the limited information he requested was such that a claim of confidentiality would succeed. By way of example, he put forward that the Commission might argue that the relevant filing system provisions in the

national transposition measures breached Article 2 of the directive, whereas the United Kingdom might counter-argue that a recital allowed it to define its own position with respect to personal data in manual files. In such circumstances, he could imagine that confidentiality would be an issue in so far as the detailed arguments supporting the parties' negotiating points were concerned. However, he did not consider that this would apply to the summary information he had requested.

47. According to the complainant, the Commission's position appeared to be that (i) it was committed to releasing information, unless it was confidential; (ii) it had discretion to identify what was confidential; and (iii) its use of this discretion could not be challenged. However, the position taken by the Commission with regard to his request left it in a " *hermetically sealed environment* " that could not be penetrated by European citizens. The complainant argued that, by implication, the Commission is not open to the healthy, and often constructive, criticism and debate, which is needed if European citizens are to perceive it as a transparent and accountable institution. In this context, the complainant wondered whether the Ombudsman could ask the Commission for a copy of the requested information in order to assess whether it was confidential or not.

48. The complainant further referred to the decision closing the Ombudsman's own-initiative inquiry OI/2/2009/MHZ, where the Ombudsman stated that a " *lack of clarity in [informing citizens how to obtain access to infringement procedure documents and learning which entity the refusal could be attributed to, i.e. Commission or Member State] could lead citizens to believe that European integration is a process which excludes and disempowers them.* " [9] In the context of data protection, the complainant disagreed with " *excluding and disempowering* " all of Europe's data subjects, who are concerned about the purported level of protection by the United Kingdom's legislation on data protection, which has been kept secret for half a decade. Directive 95/46/EC did not concern significant economic or diplomatic initiatives, where confidentiality would obviously be an issue. His request concerned a directive requiring the protection of the privacy of European citizens.

49. The complainant further argued that when the Commission considered his request under Regulation 1049/2001, no reference was made to Article 9(1) of that Regulation. The complainant queried, therefore, whether it was reasonable to assume that, in view of the absence of any mention of the confidentiality exemption in all of the Commission's previous communications relating to Regulation 1049/2001, this implied that the information he requested might not have been contained in documents classified as confidential. If this were the case, it would, in his view, undermine the Commission's assertion that the information requested was confidential.

50. The complainant also pointed out that the Commission appeared to be inconsistent in the way in which it applies the rules identified in its comments on the proposal for a friendly solution, in view of the fact that it had published details on infringement proceedings concerning the United Kingdom in other cases. In support of this statement, he referred to the Commission's press release IP/09/1626. [10] The complainant noted that this press release explained the nature of alleged infringements of Directives 2002/58/EC and 95/46/EC, and that it provided

more details than he himself was asking for.

51. The complainant also referred to a further press release by the Commission, IP/10/811, concerning the United Kingdom and an infringement proceeding on Directive 95/46/EC. [11] In that press release, Mrs Reding, Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship, publicly urged the United Kingdom to strengthen national data protection. In view of this, the complainant could not understand why the Commission felt unable to provide him with the information requested.

52. The complainant pointed out that he had made a request, similar to the one submitted to the Commission, to the United Kingdom Ministry of Justice, which the latter had rejected. He enclosed a copy of the reply to that request in his observations. The complainant underlined that, in contrast to the Commission, the Ministry had not referred to grounds of confidentiality, even though the United Kingdom Freedom of Information Act provided for a relevant exemption. He further pointed out that he had made a complaint to the national Information Commissioner concerning the Ministry's refusal to release the content of formal letters exchanged with the Commission. According to the complainant, the Information Commissioner had found that making these letters publicly available would not have constituted an actionable breach of confidence by that Member State. Therefore, he argued that providing him with summary information on the alleged infringements was all the more unlikely to trigger confidentiality constraints under the United Kingdom's Freedom of Information Act.

The Ombudsman's assessment after his friendly solution proposal

Preliminary observations

53. The Ombudsman notes that the Commission suggests that some of his findings in the proposal for a friendly solution were based on the complainant's observations on its reply to a request for further information, and on what it considers to be new matters raised in these observations. Even though the Commission does not say so expressly, it would thus appear to be suggesting that the Ombudsman did not properly respect its right to be heard.

54. In this context, it should first be noted that a proposal for a friendly solution does not constitute the Ombudsman's definitive assessment of a given case. Instead, such a proposal is based on a preliminary assessment, which necessarily takes into account any observations the complainant may have made on the institution's opinion. It is only after analysing the institution's reply to a friendly solution proposal that the Ombudsman decides whether this preliminary assessment has to be maintained, and only then will he decide whether to make a definitive finding of maladministration.

55. The Ombudsman nevertheless considers it obvious that no proposal for a friendly solution should be based on arguments or evidence in relation to which the institution has not yet had a

proper chance to express its views. It appears that the Commission implicitly criticised the Ombudsman's approach regarding two points, namely, (i) the Ombudsman's view that information relating to issues resolved in the course of a lawsuit dealt with by the House of Lords could have been disclosed, and (ii) the Ombudsman's reference to press release IP/09/570.

56. As regards the first of these issues, it should be recalled that it was the Commission itself that pointed out that *CSA v. SIC* , dealt with by the House of Lords, had resolved certain issues concerning the application of Directive 95/46/EC in the United Kingdom. The Commission should not, therefore, have been surprised at the complainant's comment that the Commission should, therefore, be able to provide more detailed information on the issues that were resolved. Besides, the Ombudsman notes that the Commission did not address the said argument in its reply to his proposal for a friendly solution. In these circumstances, it is difficult to see why the Commission's attention should specifically have been drawn to this argument before the friendly solution proposal was made.

57. As regards the second issue, the Commission's interpretation of the Ombudsman's reasoning appears to be based on a misunderstanding. In the proposal for a friendly solution, the Ombudsman noted that the Commission's refusal to provide the requested information concerning the United Kingdom was not convincing, given that it had provided such information with regard to other Member States. The Commission did not argue that it was not heard concerning this argument. It was in this context, and only as an illustration of the said argument, that the Ombudsman referred to the Commission's press release IP/09/570. This press release, which also concerned infringement proceedings against the United Kingdom in relation to Directive 95/46/EC, listed the articles of the directive which the Commission considered were infringed, and explained the underlying issues in some detail. It is true that these infringement proceedings were opened as the result of a proposal made by DG INFSO, and not by DG JLS. However, the Ombudsman considers that DG JLS could hardly have been unaware of the case dealt with by DG INFSO. In any event, and as mentioned above, this other case merely provides a further illustration of what the Ombudsman considers to be examples of the Commission's inconsistent behaviour in the present case. It appears useful to add that the Commission also failed to address this argument in its reply to the friendly solution proposal.

58. In view of the above, the Ombudsman considers that the approach he has taken in his friendly solution proposal is in full conformity with the general principles of fair procedure and the specific rules governing his work.

59. In its reply to the friendly solution proposal, the Commission stated that it understood the approach taken by the Ombudsman to mean that he considered the present case to concern an alleged failure to provide information which was not confidential, rather than a failure to provide the same level of information about a number of different Member States. This interpretation is not correct. In order to avoid possible misunderstandings, it appears useful to reiterate that the present case concerns the fact that the Commission provided diverging levels of information with regard to the relevant infringement procedures. However, since the Commission refused to disclose information concerning the United Kingdom, whereas the complainant was satisfied

with the information he received concerning Austria and Germany, it is only logical that the Ombudsman's reasoning focused on the Commission's reasons for justifying its refusal to provide the requested information concerning the United Kingdom.

As to the substance

60. In the proposal for a friendly solution, the Ombudsman made the preliminary finding that, in the absence of a convincing explanation as to why it was not possible to disclose the requested information, the Commission's refusal to provide the complainant with the information he sought on the infringement proceeding against the United Kingdom amounted to an instance of maladministration. The Ombudsman therefore has to examine whether the Commission has, in its reply, put forward a convincing explanation for this refusal.

61. The Commission basically argued that the information requested by the complainant was confidential and could not be disclosed. It submitted that it was part of its discretionary power to determine, having regard to the specific circumstances of the case, which information in its possession was confidential and which was not. The Commission further argued that complying with normal administrative practice could never constitute maladministration.

62. The Ombudsman agrees that a decision on whether or not certain information ought to be considered confidential needs to be taken with regard to the specific circumstances of the case. He is not convinced, however, that the Commission has discretion in this area in the sense that it has complete freedom to decide whether or not to consider certain information confidential. Such discretionary power would hardly be compatible with Article 1 of the Treaty on European Union, according to which "decisions are taken as openly as possible" in the EU. If an institution takes the view that certain information is confidential, it can be expected to put forward a satisfactory explanation for this view, if necessary seeking inspiration from Regulation 1049/2001 in this regard. However, and in order to avoid any possible misunderstanding, it appears useful to stress that the Commission does enjoy discretion in the sense of a margin of appraisal as regards determining the confidential nature of information.

63. The Ombudsman considers, however, that there is no need to discuss this point of principle any further. As already explained in the proposal for a friendly solution, the Commission's refusal to disclose the relevant information in the present case is difficult to reconcile with its decision to make such information available in relation to infringement cases concerning other Member States and, as press release IP/09/570 demonstrates, in other infringement proceedings concerning the United Kingdom. The provision of this information in other cases would be incomprehensible if such information were indeed, as the Commission claims, intrinsically confidential. Given the fact that the Commission adopted a manifestly different approach in other cases, the Ombudsman is also at a loss to understand the Commission's reference to 'normal administrative practice'.

64. The Ombudsman considers it useful to point out that (i) the type of information which the Commission refused to disclose in the present case was made available as regards the

infringement cases against Austria and Germany; (ii) the reasons invoked by the Commission could not, in any event, explain its refusal to release information on issues that had been settled in the meantime, and were no longer the subject of negotiations; (iii) the complainant asked for summary information only [12] ; and (iv) the type of information which the Commission refused to disclose in the present case was made available in relation to another infringement proceeding against the United Kingdom concerning alleged infringements of the same directive. In its reply to the Ombudsman's proposal for a friendly solution, the Commission did not address any of these points.

65. In view of the above, the Ombudsman concludes that the Commission failed to provide a convincing explanation as to why the information requested by the complainant should not be disclosed.

66. In his final observations, the complainant suggested that the Ombudsman could ask the Commission for a copy of the relevant information so as to enable him to evaluate whether or not it should be classified as confidential. The Ombudsman recalls that he has the possibility to ask the institution concerned for any information that he needs for assessing a complaint. He considers, however, that he already has all the necessary information in order to deal with the present case.

67. In light of the above, the Ombudsman finds that, in the absence of a convincing explanation as to why disclosing the requested information is not possible, the Commission’s refusal to provide the complainant with the requested information on the infringement proceeding against the United Kingdom constitutes an instance of maladministration. He therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The draft recommendation

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

The Commission should provide the complainant with the summary information requested on the infringement proceeding against the United Kingdom, or put forward a convincing explanation as to why this is not possible.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 January 2011. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 19 October 2010

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

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31.

[3] Communication from the Commission to the European Parliament and the Council on the follow-up of the Work Programme for better implementation of the Data Protection Directive, COM(2007) 87 final, of 7 March 2007.

[4] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ L 145, p. 43.

[5] Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public. The Code is annexed to the Commission's Rules of Procedure (OJ 2000 L 308, p. 26).

[6] *Common Services Agency v Scottish Information Commissioner* [2008] HL 47.

[7] " *Telecoms: Commission launches case against UK over piracy and personal data protection* ", press release IP/09/570.

[8] The European Code of Good Administrative Behaviour was approved by the European Parliament's resolution, of 6 September 2001, on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour. The Code can be accessed at http://www.ombudsman.europa.eu/resources/code.faces [Link]

[9] The complainant referred to paragraph 7 of the decision on the own-initiative inquiry, which can be accessed here: http://www.ombudsman.europa.eu/cases/decision.faces/en/4390/html.bookmark [Link]

[10] The press release can be accessed under the following link:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1626&format=HTML&aged=0&language=EN&guiL
[Link]

[11] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/811 [Link]

[12] By way of illustration, the summary information provided to the complainant on infringement case 2003/4820 against Germany stated: " *The complainant considers that Germany has not properly transposed the data protection directive 95/46 EC, notably its article 28 which stipulates that data protection authorities shall act with complete independence.* "