

Decision of the European Ombudsman closing the inquiry into complaint 2275/2013/ANA against the European Commission

Decision

Case 2275/2013/ANA - Opened on 06/01/2014 - Decision on 11/11/2014 - Institutions concerned European Commission (No maladministration found) | European Commission (No further inquiries justified) |

The case concerned access to documents relating to the EU's natural gas policy and, specifically, documents regarding the control of investments by third countries in the network infrastructure of the EU Member States. A British academic complained to the Ombudsman about the Commission's refusal to grant access to most of the documents sought. He complained also that the Commission relied on more than one exception in refusing access to some individual documents and that it did not specify which exception applied to which section of the particular document.

The Ombudsman inquired into the issue and concluded that, while it could have been more transparent, no further inquiries were justified into the complainant's allegation that the Commission failed to specify the precise exception it applied in cases where it relied on more than one exception for refusing access. She also concluded that there was no maladministration by the Commission as regards the remainder of the complaint.

In her decision, the Ombudsman also made a further remark that the Commission, where it rejects a request for access to documents by relying on more than one of the exceptions set out in Regulation 1049/2001, should provide the applicant with sufficient information to allow him or her to understand which exception is invoked as regards specific sections of the document concerned.

The background to the complaint

1. The complainant, a British academic, made a request on 24 February 2012 to the European Commission for public access to the document entitled "Discussion Note: Control of non-EU investment in EU networks" for the transmission of natural gas (the 'Discussion Note') and to any connected ancillary documents. Following the Commission's refusal to grant access, the complainant submitted a confirmatory application.



2. Not having received a reply to his confirmatory application within the deadline provided for in Regulation 1049/2001 [1] , on 11 July 2012, the complainant lodged a complaint with the Ombudsman (complaint 1454/2012/ANA) in which he alleged that the Commission had failed to provide satisfactory reasons for its implicit refusal to grant access. The Ombudsman opened an inquiry into the complaint and, on 20 September 2012, carried out an inspection of the Commission's file, which contained two documents: 1) the Discussion Note and 2) a note from the Commission's Legal Service on 'third country investments in Community undertakings' (the 'Legal Service Note').

3. On 14 May 2013, the Commission decided on the complainant's confirmatory application. In its decision, the Commission identified 22 documents falling within the scope of the complainant's request. The Commission (a) granted full access to documents no. 5, 7, 10, 12, 14 and 19. The Commission (b) denied access to documents no. 2, 3 (the Legal Service Note), 11, 18, 21 and (c) granted partial access to documents no. 1 (the Discussion Note), 4, 6, 8, 9, 13, 15, 16, 17, 20 and 22. As regards (b) and (c), the Commission based its refusal on the exceptions laid down in Regulation 1049/2001 and, in particular, Article 4(2), second indent ('protection of legal advice'), Article 4(1)(b) ('privacy and the integrity of the individual') and Article 4(1)(a), third indent ('protection of the public interest as regards international relations').

4. The complainant expressed his satisfaction with the content of the Commission's decision of 14 May 2013 and for the documents that were disclosed to him. At the same time, however, he asked the Ombudsman to ensure that the Commission's refusal to grant full access to all the requested documents was fully justified under the applicable law.

5. Considering that the Ombudsman's services had inspected the Discussion Note and the Legal Service Note, in the decision closing the inquiry into complaint 1454/2012/ANA, the Ombudsman carried out an assessment of only those two documents, and not of the additional documents which the Commission identified, after the inspection, as being covered by the complainant's request for access. After having carefully examined the two documents, the Ombudsman reached the conclusion that there was no maladministration on the Commission's part as regards those two documents [2] .

6. Regarding access to documents no. 2, 4, 6, 8, 9, 11, 13, 15, 16, 17, 18, 20, 21 and 22, the Ombudsman considered it appropriate to examine the complainant's allegation within the context of a new inquiry (complaint 2275/2013/ANA).

7. On 2 December 2013, the complainant informed the Ombudsman that he agreed with this approach.

The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the following allegation and claim.

**Allegation:**

In its decision of 14 May 2013 on the complainant's confirmatory application, the Commission failed to provide satisfactory reasons for its refusal to grant full access to documents no. 2, 4, 6, 8, 9, 11, 13, 15, 16, 17, 18, 20, 21 and 22.

Claim :

The Commission should grant full access to documents no. 2, 4, 6, 8, 9, 11, 13, 15, 16, 17, 18, 20, 21 and 22 or provide satisfactory reasons for refusing to do so.

The inquiry

9. On 27 January 2014, the Ombudsman's services carried out an inspection of the documents covered by this inquiry as well as documents concerning the Commission's handling of the complainant's application for access to documents. The report on this inspection was forwarded to the complainant.

10. The Ombudsman received the Commission's opinion on the complaint on 2 April 2014 and forwarded it to the complainant. The complainant did not submit any observations.

Allegation that the Commission failed to provide satisfactory reasons for its refusal to grant access to the requested documents and the related claim

Arguments presented to the Ombudsman

11. The complainant observed that the Commission had responded to his request. However, he put forward certain concerns regarding the Commission's reply and asked the Ombudsman to take them into account in her analysis.

12. Specifically, as regards (i) the exception concerning the protection of legal advice, the complainant argued that he would be happy to accept the Commission's decision not to disclose certain documents or parts of those documents, provided that the Ombudsman is satisfied that the requirements set out in Regulation 1049/2001 are met.

13. The complainant noted that the same applies as regards (ii) the exception concerning the protection of privacy and the integrity of the individual. He agreed with the Commission that he had no interest in obtaining personal data, provided that the Ombudsman is satisfied that the deletions made by the Commission meet the requirements set out in Regulation 1049/2001.

14. In relation to (iii) the exception concerning the protection of the public interest as regards



international relations, the complainant stated that he respects the decision to delete information that could genuinely undermine the protection of the EU's international relations. However, he expressed concern about the manner in which the Commission had proceeded in this case. In several documents, large sections of text had been deleted, instead of deleting key sentences which make explicit reference to particular individuals, companies, EU Member States or third countries. In particular, the complainant urged the Ombudsman to check whether the Commission's reliance on this exception to refuse access to documents no. 2, 11, 18 and 21 in their entirety was justified.

15. Moreover, the complainant argued that, in its decision of 14 May 2013, the Commission gave a rather general explanation as to how it applied the exceptions to specific deletions. The complainant observed that, in some cases (documents no. 8, 9, 15, 16 and 22), both the exception concerning the protection of legal advice and the exception concerning the protection of the public interest as regards international relations were found to apply, without, however, making it clear which exception was meant to apply to specific deletions. The complainant took the view that, in the interest of transparency, the Commission should provide clear indications as to why individual sections were deleted or give reasons why this is not possible.

16. In its opinion, the Commission observed that the level of detail required in the statement of reasons should be assessed on a case-by-case basis. In the Commission's view, the justifications put forward in this case clearly showed that it had made an individual and detailed assessment of every document covered by the complainant's request.

17. The Commission said that the exceptions it had applied in redacting each document were clearly explained in its decision of 14 May 2013 and in the annex to that decision. The information provided was sufficient for the complainant to understand why full disclosure of all documents was not possible. The Commission argued that it was not required under Regulation 1049/2001 and the case-law of the Court of Justice of the European Union ('CJEU') to specify paragraph by paragraph, for all the documents that were not disclosed or were only partially disclosed, which reasons for refusal applied. In its view, such an approach would have resulted in an unnecessarily voluminous decision on the confirmatory application without bringing added value to the clarity of the reasoning already put forward. Describing the content of every section that was redacted would have also risked harming the relevant interests protected and thereby depriving the exceptions of their purpose.

18. Regarding the exceptions concerning (i) the protection of legal advice and (iii) the protection of the public interest as regards international relations, which it applied to documents no. 2, 4, 8, 9, 11, 13, 15, 16, 17, 18, 20, 21 and 22, the Commission considered that its explanations were sufficient both for the complainant to understand the decision on the confirmatory application and for appeal bodies, such as the Ombudsman and the Courts, to exercise a review of its assessment.

19. Regarding the exception concerning (ii) the protection of privacy and the integrity of the individual which the Commission invoked to refuse the disclosure of the names of officials mentioned in document no. 6, the Commission argued that, in each specific case, it makes a



careful assessment of the possible risks in disclosing names. The Commission considered it necessary not to disclose the names of its staff members who had participated in the meeting reported in document no. 6, firstly, because the complainant did not put forward any argument suggesting the necessity of having those names disclosed [3] and, secondly, because of the sensitive nature of the issues discussed at that meeting which concerned energy networks and the rights of third country companies. The Commission stated that the view was taken that disclosure of the names would carry clear risks to the privacy and the integrity of the individuals concerned.

The Ombudsman's assessment

20. The Ombudsman takes the view that transparency is an essential aspect of good democratic governance. Transparency makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. As such, openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability. Transparency also facilitates citizen participation in public activities by ensuring access to information and the means to take part in the process of governance to which they are subject [4] .

21. The quest for transparency on the part of the European Union institutions finds specific expression in the fundamental right of access to documents, enshrined in Article 42 of the Charter of Fundamental Rights of the European Union. This fundamental right is embodied in the Union legal order by Regulation 1049/2001 [5] . The right of public access to documents, however, is not absolute; it is subject to certain limitations, which are based on grounds of public or private interest [6] . These limitations are laid down in Article 4 of Regulation 1049/2001 [7] . In view of the objectives pursued by Regulation 1049/2001, in particular the aim of ensuring the widest possible access to documents held by the institutions, these exceptions have to be interpreted strictly [8] .

Exception concerning the protection of legal advice

22. The Ombudsman notes that invoking this exception is justified only if the Commission has previously assessed whether access to the document concerned would specifically and actually undermine the protected interest [9] and, if the reply is in the affirmative, whether there is an overriding public interest in disclosure. The risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical [10] .

23. The Commission invoked this exception to grant partial access only to documents no. 8, 9, 15, 16 and 22. The deleted sections of these documents refer to and reproduce the detailed and comprehensive legal advice that the Commission's Legal Service provided, in the Legal Service Note, about restrictions on third country investments in EU energy undertakings in light of the EU's and Member States' international commitments under several bilateral or multilateral agreements.



24. A careful examination of the documents in question leads to the following conclusions. First, the deleted parts of the documents address wider issues in relation to third country investments in EU energy undertakings. The Commission's position therefore that the legal opinion concerned was given not in the context of a legislative process that led to the adoption of the directive relating to the internal market in natural gas [11] is both sufficiently detailed and supported by the documents themselves. Second, as the Commission convincingly argued, the legal advice remains politically sensitive, in particular in relation to the EU's and Member States' international relations both in multilateral and bilateral fora. In view of these considerations, the Ombudsman takes the view that the Commission's resort to the exception relating to the protection of legal advice is justified.

25. As regards the existence of an overriding public interest in disclosure, the Ombudsman notes that, in its decision of 13 May 2013, the Commission stated that it welcomes and understands the public interest in a transparent debate on its policies; it argued, however, that legal opinions concerning considerations that remain relevant should not be made public in order to allow the Legal Service to express its opinions freely and to allow the Commission to prepare its decisions having at its disposal all the elements it requires. In light of all the circumstances of the present case, the Ombudsman finds that the Commission's position that disclosure of the deleted parts of the documents in question would specifically undermine the Commission's interest in obtaining frank, objective and comprehensive advice [12] is reasonable.

Exception concerning the protection of the public interest as regards international relations

26. According to the case-law of the CJEU, the interests protected under this exception are of a particularly essential and sensitive nature. The CJEU has emphasised the complex and delicate nature of an institution's decision on whether to grant access, which calls for the exercise of particular care and, therefore, requires a margin of appreciation. An institution must be recognised as enjoying a wide discretion in determining whether disclosure could undermine the protected public interest [13]. Furthermore, this exception is not qualified by the need to apply a public interest test.

27. Conscious that the EU institutions enjoy a margin of discretion when they invoke the exception in question, the Ombudsman exercises her review in order to verify whether the procedural rules have been complied with and whether the Commission gave plausible and sufficiently concrete explanations for its decision [14].

28. In the case at hand, the non-disclosed sections of documents no. 4, 8, 9, 13, 15, 16, 17, 20 and 22 directly concern the EU's and Member States' international relations. Particularly, they examine the legal options, the political feasibility of the proposed options as well as the advantages and disadvantages of those options. Having carefully examined these documents, the Ombudsman considers that the Commission's argument, that disclosure of the parts of



these documents that have not been disclosed might seriously harm the interests protected by the exception in question, is convincing. Furthermore, the Ombudsman considers that the extent of the deletions made by the Commission in these documents is justified.

29. The examination of documents no. 2, 11, 18 and 21, to which the Commission refused access, establishes that these documents contain an analysis of the strategic advantages and disadvantages of the options examined from the EU's legal and political perspective. In light of this, the Commission's argument that the disclosure of these documents would reveal the options available to the EU with the result that the position of the EU and the Member States and their margin of manoeuvre in relations with third countries would be undermined is reasonable. The Ombudsman, therefore, considers that the Commission's refusal to grant access to these documents is justified.

30. Regarding the question of partial access to documents no. 2, 11, 18 and 21, the Commission argued that it examined that possibility but considered that, for the reasons outlined above, they were covered by the exception in their entirety. Having carefully examined the documents in question, the Ombudsman confirms that the grounds invoked by the Commission cover the documents in their entirety and considers that the Commission's refusal to grant access to these documents is justified.

Exception concerning the protection of privacy and the integrity of the individual

31. To justify its decision to delete the names of the officials in document no. 6, the Commission put forward two arguments: (a) the complainant did not prove the necessity of their disclosure, and (b) the risks to the privacy and integrity of the individuals concerned because of the sensitive nature of the discussions.

32. As regards (a), the Ombudsman notes that, as the CJEU has ruled [15], any undermining of the privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data [16]. Regulation 45/2001, in particular, its Article 8, requires the applicant to establish the necessity of having the personal data transferred [17]. In this case, the complainant submitted that he had no interest in obtaining the personal data contained in document no. 6 and, consequently, has not put forward any argument to demonstrate the necessity of having the personal data transferred to him. The Ombudsman, therefore, finds the Commission's argument that the complainant did not prove the necessity of having the data disclosed convincing. Taking this finding into account, the Ombudsman considers that it is not necessary to examine the Commission's argument (b).

The Commission's responsibilities when more than one exception applies



33. The complainant further argued that, where both the exception concerning the protection of legal advice and the exception concerning the protection of international relations apply (documents no. 8, 9, 15, 16 and 22), the Commission should specify the precise exception it applied in each document on a paragraph-by-paragraph basis. In response, the Commission argued, firstly, that it is not required by law to do so and, secondly, that providing greater detail regarding the exception used in each paragraph of the redacted text might result in a voluminous decision and entail the risk of disclosing the content of every section and thus depriving exceptions of their purpose.

34. The Commission's first argument is not convincing. It should be stressed that the Ombudsman, in accordance with the Treaties and her Statute, has the duty to ensure that EU institutions do not merely comply with the standard that is set by the law in any given case but that they embrace and apply the principles of good administration. In this regard, the concept of good administration is broader than the concept of legality [18] . While, in view of the foregoing analysis, the Ombudsman considers that the Commission's reasons for refusing to give access to certain documents or parts of documents are in conformity with the law, her analysis must also address whether the Commission's approach is in line with good administration.

35. The principles of good administration require that decisions of EU institutions contain individual reasoning, where possible, and avoid giving overly brief or vague grounds [19] . In this case, this principle means that, when refusing access to a document or part of a document on the ground of more than one of the exceptions provided for in Regulation 1049/2001, the Commission could, in principle, specify which exception it is relying on in order to refuse access to specific sections of the documents concerned.

36. The Commission's argument that a paragraph-by-paragraph analysis of the exceptions on which it relies may result in its confirmatory decision becoming rather voluminous is not convincing. First, the complainant referred to only documents where deletions were based on more than one exception. Second, and on a general level, the Commission's argument that there would be a risk of disclosing the content of the documents is based on the erroneous assumption that providing the information requested by the complainant would make it necessary to discuss each and every paragraph in which deletions are made. However, the Commission could easily comply with the complainant's request without entering into a further discussion on the substance. It could do so by simply identifying the passages in which deletions were made in a suitable manner (for instance, by referring to 'the third line on page 3' of a given letter). An even simpler solution in the case of redacted documents would be for the Commission to add a stamp bearing a short reference to the exception invoked in the text of the document in which the deletions are made, that is to say, the version of the document that is made available. The amount of work that this requires should be very limited. In any event, a complainant should not have to turn to the Ombudsman or the Court to find out exactly which exception has been invoked to justify a given deletion.

37. The Ombudsman considers that, in failing to specify, in cases where both the exception concerning the protection of legal advice and the exception concerning the protection of international relations apply, the precise exception it relied on in each document on a



paragraph-by-paragraph basis, the Commission fell short of the requirements of good administration. However, having inspected the documents in question, the Ombudsman has been able to establish that all the deletions that the Commission has made are covered by the exception concerning the protection of international relations and that the exception relating to the protection of legal advice is invoked, as an additional ground, in the few cases in which the paragraph concerned contained legal advice also. Given that the Commission's arguments for the non-disclosure of these parts of the documents were convincing, the Ombudsman considers that it would serve no useful purpose to further pursue this inquiry with a view to making the Commission provide this information to the complainant. However, in order to provide guidance to the Commission on how to deal with similar requests in the future, the Ombudsman considers it appropriate to make the further remark set out below.

Conclusions

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

No further inquiries are justified into the complainant's allegation that the Commission failed to specify the precise exception it applied in cases where it relied on more than one exception for refusing access.

There has been no maladministration by the Commission as regards the remainder of the complaint.

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

Further remark

Where the Commission rejects a request for access to documents by relying on more than one of the exceptions set out in Regulation 1049/2001, it should provide sufficient information to allow the applicant to understand which exception is invoked as regards specific sections of each document concerned.

Emily O'Reilly Done in Strasbourg on 11 November 2014

[1] 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.

[2] Decision of the European Ombudsman closing her inquiry into complaint 1454/2012/ANA against the European Commission, available at:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/52892/html.bookmark> [Link]

[3] In accordance with Article 8(b) of 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.

[4] Decision of the European Ombudsman closing the inquiry into complaint 1649/2012/RA against the Council of the European Union, available at:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/51650/html.bookmark> [Link]

[5] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 69; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 51.

[6] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62; *Technische Glaswerke*, paragraph 53.

[7] Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 57.

[8] *Sweden v API and Commission*, paragraph 73; *Sison v Council*, paragraph 63.

[9] *Sweden v API and Commission*, paragraph 72.

[10] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69.

[11] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ 2009 L 211, p. 94

[12] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 42.

[13] *Sison v Council*, paragraphs 34-36.

[14] See, for instance, Decision of the European Ombudsman closing the inquiry into complaint 1633/2008/DK against the European Commission, available at:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/10577/html.bookmark>

[15] Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, paragraph 59.

[16] Cited above, footnote 3.

[17] " Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or



(b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced ."

[18] Decision of the European Ombudsman closing the inquiry into complaint 1560/2010/(ML)FOR against the European Anti-Fraud Office (OLAF), paragraph 82.

[19] Article 18 of the European Code of Good Administrative Behaviour, available at: <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1> [Link]