

Decision of the European Ombudsman closing the inquiry into complaint 181/2013/ AN against the European Commission

Decision

Case 181/2013/AN - **Opened on** 14/02/2013 - **Decision on** 16/02/2015 - **Institution concerned** European Commission (Friendly solution) |

The case concerned the Commission's refusal to grant the complainant, an Irish NGO, full access to the questionnaires submitted in the framework of a public consultation concerning energy projects. The Ombudsman inquired into the issue, including through an inspection of the relevant documents. She found that the Commission had not shown how the disclosure of the paragraphs redacted in those documents could have endangered the business secrets of the relevant companies. The Ombudsman proposed as a solution that the Commission could grant full access to the questionnaires by disclosing the redacted paragraphs. In reply, the Commission disclosed most of the redacted information and explained why it could not disclose the remainder. The Ombudsman was satisfied with the Commission's reply. In light of this favourable outcome and the Commission's cooperation, the Ombudsman closed the case.

The background

1. The complainant, an Irish NGO, requested access to documents and environmental information held by the Commission in relation to eight projects included in the *List of projects submitted to be considered as potential Projects of Common Interest* in energy infrastructure, on which the Commission had launched a public consultation (the 'Projects'). The request was made and handled in accordance with Regulation (EC) No 1049/2001 [1] . Having extended the deadline to reply to the initial application, the Commission partially disclosed the documents it identified as falling under the request. However, the complainant believed that the Commission had not identified all the relevant documents, and lodged a confirmatory application. When the Commission stated it could not reply to the confirmatory application within the extension of deadline it had requested, the complainant considered that the application had been effectively rejected and complained to the Ombudsman.

2. The Ombudsman opened an inquiry into the complainant's allegations that the Commission (i) failed to deal with its request for access to documents in a timely manner and (ii) wrongly refused to grant it access to the documents and environmental information requested, including



by failing to identify all the relevant documents. The Ombudsman's inquiry also covered the complainant's claim that the Commission should give it access or provide adequate reasons for not doing so in a timely manner.

3. In the course of the Ombudsman's inquiry, which included an inspection of the Commission's file related to the complainant's requests, the Commission identified further documents containing data which " *came closest to the definition of environmental information* ". Those documents were the questionnaires submitted to the Commission by the Projects' promoters. The Commission invited the complainant to submit a fresh request for access to the above documents, which the complainant did. The Commission granted the complainant partial access to those documents. The parts of the questionnaires containing commercially sensitive information and personal data were redacted.

4. In its subsequent submission to the Ombudsman, the complainant limited the scope of its complaint to the above questionnaires. Consequently, the Ombudsman's inquiry continued with regard to those documents only [2] .

Alleged failure to grant access to the requested documents and related claim

The Ombudsman's proposed solution

5. The complainant believed that the questionnaires contained environmental information and, therefore, the Aarhus Regulation [3] on access to environmental information applied to them. According to that Regulation, the possible exceptions to public disclosure under Regulation 1049/2001 must be interpreted in a restrictive way taking into account the public interest served by disclosure and whether the information is related to emissions into the environment. In its decision granting partial access, the Commission failed to take these restrictions into consideration. In any event, the complainant considered that it should have been granted full access to the questionnaires.

6. The Commission considered that the questionnaires did not contain environmental information, which is why they were not identified as falling under the complainant's initial request for access to documents. The Commission said it had no intention whatsoever to deliberately withhold environmental information from citizens and to prevent them from participating in public consultations. As soon as further information of that kind would become available, the public could request access to it in accordance with the relevant rules. The Commission mentioned a number of measures aimed at providing the public with the widest possible access to information about the Projects in question.

7. Having inspected the documents, the Ombudsman accepted that the data in the redacted paragraphs might reasonably be considered commercially sensitive. However, the Commission had failed to show how business secrets of the undertakings concerned were endangered by



the disclosure of each piece of the redacted information. In fact, some items may have already been in the public domain. Moreover, the Ombudsman was not convinced by the Commission's view that the redacted material does not constitute " *environmental information* " in the sense of the Aarhus Regulation. Finally, the Ombudsman reminded the Commission that it needs to assess whether the public interest requires the information to be disclosed in spite of the predictable commercial damage this might cause. It was not clear from the file that the Commission had done so.

8. In light of the above, the Ombudsman concluded that the Commission had not provided sufficient grounds for its decision to redact parts of the questionnaires. The Ombudsman therefore proposed as a solution to the Commission that it **"grant full access to the questionnaires by disclosing the redacted paragraphs."** The complainant agreed to this proposal prior to it being submitted to the Commission.

Arguments submitted after the Ombudsman's proposed solution

9. The Commission noted that the Ombudsman's proposed solution did not concern the Commission's redaction of names, e-mail addresses and telephone numbers in seven of the ten requested questionnaires. The Commission thus assumed that the Ombudsman had no objection to the non-disclosure of that data. To the extent that the complainant had not established the need to obtain that information, and given that its release might prejudice the privacy and integrity of the individuals concerned, the Commission maintained the non-disclosure on the basis of Article 4(1)(b) of Regulation 1049/2001 as interpreted by the Court of Justice [4] .

10. Following the Ombudsman's solution proposal, the Commission again consulted the authors of the other three questionnaires to discuss the possibility of granting further access to the commercially sensitive information redacted therein. Based on this dialogue and on its own assessment of the relevant information, the Commission was able to grant wider public access to the three questionnaires.

11. The redactions that the Commission maintained in those questionnaires were justified by the exception laid down in Article 4(2), first indent of Regulation 1049/2001, regarding the protection of commercial interests, including the intellectual property of the legal entities concerned. The redactions were the following:

(a) the level (amount) of access to funding and the estimated project costs, the cost per unit power and the energy storage cost, including a related brief explanation

12. The Commission considered that these costs are individual to each project promoter and reflect its business model, genuine use of resources and possible competitive advantage. Disclosure of this information would reveal details about its way of operating to its competitors, which could use this information to the project promoter's disadvantage. This amounts to a real



and non-hypothetical risk that the commercial interests of the project promoter concerned would be negatively affected.

(b) information about possible subsequent phases of the projects, follow-up actions and the type of resources to be invested

13. For the same reasons set out above, the Commission considered that the disclosure of this information would entail a real and non-hypothetical risk to the promoter's commercial interests and its intellectual property, given that it would reveal the future commercial and research strategy of the promoter, the works to be considered and the resources to be envisaged.

(c) a summary of the ownership of shares of one of the undertakings concerned

14. The Commission, based on the objection of the project promoter, considered that there is a real and non-hypothetical risk that public knowledge of this information would undermine the commercial interest of the holding on the market and in particular its market value.

15. The Commission added that it had also considered the Ombudsman's solution proposal in light of two other specific provisions, namely Article 339 TFEU [5] and Annex III, point 2(2) of Regulation 347/2013 on guidelines for trans-European energy infrastructure [6]. The Commission argued that the application of Regulation 1049/2001 cannot have the effect of rendering these provisions ineffective, and thus the exceptions of Article 4 of that Regulation have to be read in light of the confidentiality requirements defined in the TFEU and in Regulation 347/2013. The redacted information was submitted to the Commission on the basis of privileged access rules, and the originators have legitimate expectations that the institution will not divulge that information to the public and that it will protect commercially sensitive data contained in their submissions.

16. Not only would the disclosure of the redacted information be contrary to the confidentiality requirements in Regulation 347/2013, but it would also impact negatively on the stakeholders' confidence in the Commission's services, rendering them less likely in the future to submit commercially sensitive information to the Commission. Since such information is necessary for the institution in order to decide on the related project proposals, this would end up undermining the Commission's decision-making process protected under Article 4(3) of Regulation 1049/2001.

17. As regards the public interest test, the Commission acknowledged it had not specifically informed the complainant whether it had carried it out. It considered that, in accordance with Article 6 of the Aarhus Regulation, there is no presumption that an overriding public interest exists in this case, as the withheld information does not relate to emissions into the environment. The "*limited redactions*" are justified in order to protect the commercial interests of the undertakings concerned and the Commission's own decision-making process and they prevail over the public interest in transparency in this case.

18. The complainant disagreed with the Commission's decision not to disclose the personal



data redacted in the relevant questionnaires. It argued that under the Aarhus Convention “personal data” cannot refer to information concerning legal persons, and regretted that the Ombudsman did not raise this issue with the Commission on her own motion at an earlier stage.

19. As regards the non-disclosure of commercially sensitive information, the complainant said that both the Aarhus Convention and the Aarhus Regulation define “ *environmental information* ” to include ‘ *cost-benefit and other economic analyses and assumptions* ’ as well as ‘ *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect [elements of the environment]* ’. Consequently, the Commission was not entitled to hide cost-related data or information about possible subsequent phases of the projects. The complainant also argued that the Aarhus Compliance Committee has considered that “ *in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure* ”.

20. In addition, the EU is bound to give effect to the international agreements to which it is a party, such as the Aarhus Convention, and this includes interpreting and applying secondary legislation so far as is possible in a way that is compliant with the latter. Thus, the Commission cannot invoke Regulation 347/2013 in order to avoid fulfilling its disclosure obligations under the Aarhus Convention. In any event, the said Regulation dates from 2013, and the environmental information to which the complainant seeks access was provided to the Commission in 2012.

21. Finally, the complainant considered that in her role as an “ *adequate and effective remedy* ” in the sense of Article 9(4) of the Aarhus Convention, the Ombudsman was not entitled to propose a solution to the Commission in the present case, but should have adopted a stronger attitude towards that institution as regards the identified failures.

The Ombudsman's assessment after the proposal for a solution

22. The Ombudsman confirms that the non-disclosure of information on the basis of Article 4(1), letter b (protection of personal data) did not form part of her proposal for a solution because she agreed with the Commission’s position on this matter. Contrary to the complainant’s assertion, the data redacted from the questionnaires and covered by the above-mentioned exception was not data of the legal person submitting the information, but personal information (names, telephone numbers and e-mails) concerning individuals employed by the relevant legal persons. This fully falls under the definition of personal data under Regulation 45/2001 [7] .

23. Pursuant to the established case-law of the Court of Justice, which the Commission also quoted [8] , where a request based on Regulation 1049/2001 seeks to obtain access to documents containing personal data, the provisions of Regulation 45/2001 become applicable in their entirety. If the relevant persons have not given their consent to their personal data being released, Article 8(b) of Regulation 45/2001 becomes applicable, and thus the person seeking



access must provide an express and legitimate justification or convincing arguments in order to demonstrate the necessity for those personal data to be transferred. This has not been the case with the complainant. The Commission was thus entitled to withhold the said information.

24. As regards the information covered by the exception in Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests), the Ombudsman considers that, contrary to the Commission's position, at least part of the information described in sub-headings (a) and (b) above constitutes environmental information in the sense of Articles 2(3) of the Aarhus Convention and 2(1)(d) of the Aarhus Regulation. The information described in sub-heading (c), however, does not.

25. Following the Ombudsman's solution proposal, the Commission provided the complainant with much wider access to the questionnaires, by disclosing large parts which it had previously refused to disclose in order to protect the commercial interests of the promoters.

26. This attitude, which enables the complainant and the public at large to gain broader knowledge of the projects in question, is in itself positive and welcome.

27. For the commercially sensitive information still withheld, the Commission has provided individualised explanations of why it considers that public access is not possible. These explanations are significantly more detailed than those provided in reply to the complainant's request, which had led the Ombudsman to conclude in her proposed solution that the Commission had not sufficiently explained its decision to redact parts of the questionnaires.

28. In their current drafting and level of detail, **the Commission's explanations do satisfy its procedural obligation to provide an adequate statement of reasons for refusing the disclosure of the relevant information** : the Commission described to a reasonable extent the content of the redacted paragraphs, made a concrete assessment in terms of the risk that disclosure would entail for the protected interest, identified the sources of risk and explained how that risk may materialise. This information objectively enables the complainant to ascertain why disclosure was denied in the contested case, and allows the Ombudsman to verify the lawfulness of the Commission's position.

29. Moreover, having inspected the questionnaires and being aware of the redacted information, the Ombudsman considers that **the Commission's substantive position is reasonable and accurate and duly balances the risks entailed by disclosure and the overriding public interest in disclosure, both under Regulation 1049/2001 and, where applicable, the Aarhus system** .

30. First, the Commission has redacted only very limited items of a particularly sensitive nature, disclosure of which might clearly affect the protected interests of the companies involved to a significant extent, and certainly far beyond the "*relatively small amount of harm*" the complainant referred to. The Commission has thus, in the Ombudsman's view, applied the exception in Article 4(2), first indent, of Regulation 1049/2001 strictly, as it was obliged to do.



31. Second, with particular regard to the paragraphs containing environmental information, the Ombudsman notes that the classification of information as constituting environmental information does not grant the public unrestricted and unconditional access to the information in question. On the contrary, Article 4(4), letter d) of the Aarhus Convention allows the Parties to reject requests for environmental information if disclosure would adversely affect “[t] he *confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest*”. The protection of commercial interests is provided for in Regulation 1049/2001 which, according to Article 3 of the Aarhus Regulation, is applicable to requests for access to environmental information. Therefore, even in the absence of Article 339 TFEU and Regulation 347/2013, the Commission was entitled, under the Aarhus system, to seek to protect the commercial interests of the promoters.

32. Third, concerning the balancing exercise under Article 4(2) of Regulation 1049/2001, the Ombudsman fully recognizes the importance for the Irish citizens opposed to the Projects to be aware of the latter's costs and possible future developments. However, the Ombudsman considers that, other than highlighting the need for and benefits of transparency and criticizing the Commission's support for the Projects, the complainant has not set out clearly any overriding public interest which would justify sacrificing the legitimate commercial interests of the promoters involved –which, as stated, are protected both under Regulation 1049/2001 and the Aarhus system.

33. Fourth, the Ombudsman confirms the Commission's statement that the redacted information does not refer to “ *emissions into the environment* ”, and therefore the overriding public interest pre-defined in Articles 4(4)(d) of the Aarhus Convention [9] and 6(1) of the Aarhus Regulation [10] does not apply.

34. Having taken the view that the Commission was entitled to withhold the relevant information in order to protect the promoters' commercial interests, the Ombudsman does not consider it necessary to address the exception related to the protection of the Commission's decision-making process or the Commission's arguments concerning Article 339 TFEU and Regulation 347/2013.

35. The Ombudsman regrets to note that the complainant now takes the view that no proposal to resolve matters should have been made in this case. She wishes to stress that the complainant was consulted before this proposal was made and explicitly stated that it agreed with this proposal. However, in light of the above considerations, the Ombudsman considers that **the Commission has accepted her proposed solution and has provided the complainant with the widest possible access to the requested documents in the legal and factual circumstances prevailing.**

Alleged failure to deal with the complainant's request on time



Arguments presented to the Ombudsman

36. The complainant considered that the Commission's delay in handling its legitimate requests for access to documents and environmental information was unjustifiable both under Regulation 1049/2001 and the Aarhus system. In particular, the Commission had failed to identify the questionnaires from the beginning as falling under its initial request. In the complainant's view, the Commission thus deliberately withheld environmental information and prevented citizens from effectively participating in the public consultation process.

37. The Commission rejected this stance and took the view that the questionnaires did not automatically fall under the initial request, as they did not contain environmental information. Once the complainant lodged a specific request for access to the questionnaires, the Commission dealt with it in accordance with the applicable rules.

The Ombudsman's assessment

38. This allegation raises two different aspects.

39. The first one relates to the Commission's position that the information contained in the questionnaires was not environmental information, but merely an undefined category "*coming closest to the definition*" of it. The second one concerns the Commission's handling of the complainant's specific request for access to the relevant questionnaires that was submitted after the Commission identified them to the complainant.

40. As regards the first aspect, the Ombudsman considers that at least part of the data contained in the questionnaires did constitute environmental information in the sense of the Aarhus Convention and Regulation. As the complainant rightly pointed out, Article 2(1)(d) of the Aarhus Regulation defines environmental information as "*measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect*" the state of the elements of the environment or the releases into the latter (sub-indent (iii)), as well as "*cost-benefit and other economic analyses and assumptions used within the framework of the [said] measures*" (sub-indent (v)). It thus appears that at least the costs and the descriptions of possible subsequent project phases contained in the questionnaires fell under that definition.

41. Consequently, the Commission should have identified the questionnaires as forming part of the complainant's initial request for access to documents, dated 20 August 2012. The Commission identified and mentioned those questionnaires for the first time on 28 February 2013, in reply to the complainant's confirmatory application. This constituted maladministration.

42. The Ombudsman understands that the above delay was due to the Commission's erroneous interpretation of the term "*environmental information*", which is a wide concept that the Union courts and the Aarhus Compliance Committee have not yet defined with precision. Although the Commission wrongly considered that the questionnaires did not contain



environmental information and thus did not fall under the complainant's application, it nevertheless proactively identified them to the complainant as "coming closest" to the latter's request.

43. This leads to the assessment of the second aspect, namely, the Commission's handling of the complainant's second request for access to documents, which specifically concerned the questionnaires. In this regard, the Ombudsman notes that the Commission promptly registered the request and dealt with it within the applicable deadlines set in Regulation 1049/2001. When requesting an extension to handle the initial application, the Commission provided reasons for it and subsequently respected the extended deadline to reply. Moreover, the Commission showed full availability to meet the complainant in this context and offered to do so on two occasions, in order to discuss the matter and clarify any concerns. The complainant declined the offer to meet the Commission on both occasions.

44. Finally, the Commission has been particularly cooperative during the Ombudsman's inquiry in this case. On the one hand, the Commission engaged with the Ombudsman despite the fact that, as regards the questionnaires, the Commission's assessment of the access request was still ongoing at the time the Ombudsman inspected the Commission's files and the Commission sent its opinion. On the other hand, as mentioned in the previous section, the Commission was receptive to the Ombudsman's arguments and overturned its initial decision to redact larger parts of the questionnaires.

45. Given that the complainant has now obtained the widest possible access to the questionnaires, and in light of the above arguments, the Ombudsman considers that it is not appropriate to issue a critical remark with regard to the finding of maladministration in paragraph 41.

Conclusion

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

The Commission has accepted the Ombudsman's proposed solution and has provided the complainant with the widest possible access to the requested documents in the legal and factual circumstances prevailing .

In light of this favourable substantive outcome and the Commission's cooperative attitude, the Ombudsman does not consider it appropriate to issue a critical remark over the procedural oversight identified in this case.

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

Emily O'Reilly



European Ombudsman

[1] Regulation (EC) No 1049/2001 establishing the rules concerning public access to documents held by the European Parliament, the Council of the European Union or the European Commission, OJ 2001 L 145, p. 43.

[2] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's friendly solution proposal/draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/58977/html.bookmark> [Link].

[3] Regulation (EC) No 1367/2006 on the application to Community institutions and bodies of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Regulation'). OJ L 264, p. 13, 25.09.2006.

[4] Judgment of 29.6.2010 in Case C-28/08 P, *Bavarian Lager*.

[5] This Article requires members of the staff of the EU institutions to refrain from disclosing *"information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components"*.

[6] This provision states that " [a] *ll recipients shall preserve the confidentiality of commercially sensitive information*" .

[7] 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 L8, page 1, 12.1.2001.

[8] *Bavarian Lager*, quoted in footnote 4, paragraphs 63 and ss.

[9] Article 4(4)(d) of the Aarhus Convention " *Within this framework [protection of commercial information], information on emissions which is relevant for the protection of the environment shall be disclosed ;"*

[10] Article 6(1) of the Aarhus Regulation: " *As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment "*.