

Decision of the European Ombudsman closing the inquiry into complaint 2266/2013/JN against the European Commission

Decision

Case 2266/2013/JN - Opened on 10/12/2013 - Decision on 02/03/2015 - Institutions concerned European Commission (No maladministration found) | European Commission (Settled by the institution) |

The case concerned the manner in which the European Commission handled the complainant's request for access to a number of documents relating to EU-funded water sector reform projects in Egypt. In particular, the question arose as to whether the Commission had acted diligently in consulting third parties - the Egyptian government and the United Nations - with a view to taking a decision regarding disclosure. The Ombudsman inquired into the matter and found that the Commission had taken adequate steps to address the procedural shortcomings that had occurred in this case. The Ombudsman also found that the Commission provided a satisfactory justification for its refusal to grant access. However, the Ombudsman made a further remark suggesting that the Commission keep a written record of its meetings held in the context of public consultations in order to increase transparency.

The background to the complaint

1. On 23 March 2013, the complainant submitted to the Commission (EuropeAid) a request for access to documents under Regulation 1049/2001 [1] . He requested access to the following documents, which related to EU-funded water sector reform projects in Egypt:

- a) studies that were undertaken under the Water Sector Reform Programme ('WSRP'), and the evaluation reports on the WSRP or the EU's aid to Egypt's water sector in general,
- b) information on the funding conditions and the amount of the relative funds (as well as their 'destination' (intended use)) / the amount of funds (and their 'destination') that were disbursed in connection with the Water Sector Budget Support Programme ('WSBSP'),
- c) the programme, minutes, studies or evaluations of the Donor Assistance Group ('DAG') or Donor Partners Group ('DPG'),



d) specific information on the Stakeholder and Civil Society Consultations regarding EuropeAid's or the DPG's work in respect of Egypt's water sector.

2. On 26 March 2013, the Commission acknowledged receipt of the request and informed the complainant that it would be handled within 15 working days.

3. On 23 April 2013, the complainant reminded the Commission that it should have replied by 12 April 2013.

4. On 8 May 2013, the Commission extended the time limit for replying to the complainant's initial application by 15 days. It stated that the statutory 15-day time limit expired on 19 April 2013. It also explained that an extended time limit was needed because (i) the complainant's application concerned a large number of documents, and (ii) voluminous files had to be examined in order to retrieve the documents requested. The new time limit was to expire on 15 May 2013. The Commission apologised for the delay and for any inconvenience.

5. On 14 May 2013, the Commission contacted the Egyptian government in order to obtain its view regarding the disclosure of documents relating to the WSRP.

6. On 15 May 2013, the Commission disclosed part of the documents. These were: (i) the final evaluation report on phase II of the WSRP, (ii) the signed financing agreement concerning phase II of the WSRP, including the matrix detailing the funding conditions and the relative amounts, and (iii) a presentation on the programme given by the EU Delegation during a round table working session of the DPG on 20 December 2011. The Commission explained that the remaining documents concerning the Stakeholders and Civil Society Consultations as well as documentation concerning phase I were still being cleared in cooperation with the Egyptian authorities. The Commission apologised for the delay and stated that it trusted that the complainant was aware of the sensitivity of the files and the working environment in Egypt prevailing at the time.

7. On 15 May 2013, the Egyptian government responded to the Commission that " *all detailed reports in both [p]rogrammes* " had been submitted to the Commission for its sole use and that the Commission was " *responsible for the confidentiality of the information included in these reports* ".

8. On 26 June 2013, the complainant sent a reminder to the Commission.

9. In its reply of 1 July 2013, the Commission noted that the complainant would " *receive the rest of the documents before August* " 2013. It apologised for the delay and explained that it was experiencing a particularly heavy workload, and that events in Egypt did not simplify matters.

10. On 6 August 2013, the complainant asked the Commission about the status of his request.

11. On 8 August 2013, the Commission provided the complainant with an additional document concerning phase I (the 'Project fiche') [2] .



12. On 30 August 2013, the complainant again wrote to the Commission on the matter and requested disclosure of the remaining documents.

13. On 3 December 2013, the complainant submitted a complaint to the European Ombudsman and, on 10 December 2013, the Ombudsman opened a simplified inquiry by asking the Commission to provide the requested documents or explain why it could not do so.

14. On 20 December 2013, the Commission replied to the complainant and apologised for the delay in doing so. It explained that the complainant's request of 30 August 2013 for information about the amount of funds (and their 'destination') disbursed in connection with the Water Sector Budget Support Programme had now been registered [3] and would be addressed in due time. It advised the complainant to use its functional mailbox in order to ensure that his requests be received correctly.

15. As regards the DPG documents (those listed in point c) in paragraph 1 above), the Commission stated that the only document "*in the Commission's ownership*" had been provided to the complainant (the presentation). The Commission contended that the DPG documents were not in its "*ownership*" as the DPG was composed of "*23 bilateral partners and 17 multilateral organisations, plus the private sector and sometimes the Egyptian government*". Thus, those documents were third-party documents and, in accordance with Article 4(1) of Regulation 1049/2001, the Commission needed to consult the third party author before deciding whether to give access. It added that since the third party was the UNDP Cairo [4] in its role of permanent Chair of the DPG and since the number of documents could be large, it could take some time to obtain a response. The complainant would however be informed of the result of the consultation as soon as possible.

16. As regards the information on consultations with civil society and stakeholders (the documents listed in point d) in paragraph 1 above), the Commission admitted that it had not addressed this point. It apologised for this shortcoming. However, as regards consultations carried out by the DPG, the same explanation as that given with respect to the documents listed in point c) applied. As regards the Commission's activities, it did not have any written record of its consultations with stakeholders or with civil society in respect of the water sector. Consultations were extensively carried out on a daily basis through informal channels or during meetings and conferences with partners, trade union representatives "*and many more at different levels*".

17. On 27 January 2014, the Commission consulted the Egyptian government again regarding the possible disclosure of documents relating to the two phases of the WSRP. On 30 January 2014, the Commission consulted the United Nations Resident Coordinator in Cairo regarding the possible disclosure of documents relating to the work of the DPG in the water sector.

18. On 30 January 2014, the complainant submitted observations on the Commission's reply. He listed 18 documents constituting studies and evaluations which should have been available according to Annex 4 to the Final Report of Validation and Restructuring of the Water Sector



Reform Programme Phase II. He explained that he wished to obtain these documents. On 15 April 2014, the complainant confirmed by e-mail that he wished to obtain access to all relevant documents, not only the 18 documents listed in his observations.

19. On 4 February 2014, the United Nations Resident Coordinator in Cairo replied to the Commission stating that no documents relating to the work of the DPG (discussions, minutes, studies and evaluations) were compiled. In any event, even if such information were available, her Office could not consent to the sharing of such information since this would require consultations with and approval by each DPG member.

20. On 6 February 2014, the Egyptian government refused access to documents relating to both phases of the WSRP.

21. On 28 February 2014, the Commission sent a further reply to the complainant. The Commission specified the amount of funds disbursed in connection with both phases of the WSRP and their intended use. As regards the requested documents, since they originated from third parties, these had been consulted. It also explained that both authors of the documents, that is to say, the Egyptian government and the UNDP Cairo had informed the Commission of their refusal to disclose the documents concerned. As regards the reply of the UNDP Cairo, the Commission explained that the Government of Egypt participates in the DPG group. In view of these refusals, the Commission considered that access to the documents of the Egyptian government and the UNDP Cairo had to be denied under Article 4(1)(a) of Regulation 1049/2001 (protection of international relations) [5] . The complainant was informed of his right to submit a confirmatory application.

The inquiry

22. On 4 April 2014, the Ombudsman opened a formal inquiry into the complaint and identified the following allegation and claim:

The Commission unduly delayed its decision on whether or not to grant access to the requested documents. The Commission should grant access to the requested documents or duly explain why it cannot do so on the basis of Regulation 1049/2001.

23. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the decision on the complainant's request for access to documents was unduly delayed and claim that access should be granted



Arguments presented to the Ombudsman

24. The complainant submitted that the Commission had failed **actively** to seek the consent of the third parties concerned to the disclosure. In addition, the Commission failed to take a position on the disclosure of the third-party documents either once the third parties concerned expressed their disagreement or once reasonable time for the third parties to take a position had elapsed.

25. In its opinion, the Commission presented its apologies for the "*initial delay in the handling of the complainant's reiterated request in August 2013*". It noted that it had already apologised in December 2013. It also submitted that it did not delay its decision unduly and that it had actively sought the third parties' consent. It had contacted the Egyptian government twice.

26. As regards the **studies and evaluation reports**, the request for access was made on 23 March 2013. Certain documents were disclosed to the complainant on 15 May 2013 (Final evaluation report on phase II and the related financing agreement). However, since other documents were third-party documents and could possibly fall under the exception in Article 4(1)(a) of Regulation 1049/2001, the Commission, acting in accordance with Article 4(4) of Regulation 1049/2001 [6], contacted the Egyptian authorities on 14 May 2013. Taking into account Egypt's reply of 15 May 2013, the Commission assessed the remaining documents and disclosed a further document (Project fiche of phase I) in August 2013. The Commission considered that it thus fully responded to the complainant's request.

27. On 30 August 2013, the complainant repeated his initial request without specifying any additional documents he wished to have access to. The Commission regretted that this repeated request had been overlooked. On 20 December 2013, the Commission apologised and confirmed that it considered that this part of the request had been fully satisfied.

28. As regards, more specifically, the 18 documents referred to in Annex IV to the Final Evaluation Report on phase II, which had been consulted before drawing up the report, the Commission explained that it consulted the Egyptian government once more in January 2014. However, the latter took a firm line by rejecting the disclosure of any documents concerning the WSRP as well as technical studies undertaken for the purposes of the programme.

29. Thus, acting in accordance with Article 4(1)(a) of Regulation 1049/2001, the Commission refused disclosure of further documents including the 18 documents mentioned by the complainant. The complainant was informed accordingly on 28 February 2014. The Commission considered that disclosing these documents against the will of the Egyptian authorities would have harmed the EU's relations with Egypt. The Commission pointed out that according to existing case-law, when resorting to the said exception, it has a wide margin of discretion [7]. The exception can be invoked if it is clear that disclosure would harm the EU's international relations with third countries [8].

30. As regards the **information concerning the conditions set and the amount of funds**,



the Commission provided the relevant information on 15 May 2013 by disclosing the signed financing agreement relating to phase II of the WSRP, which includes a matrix indicating the funding conditions and the amount of the relative funds. As regards the amount of funds, the Commission regretted that this part of the request dated 30 August 2013 had initially been overlooked and had not been addressed in time. However, the Commission acceded to this request by disclosing the data at its disposal in its reply of 28 February 2014.

31. As regards the information regarding the **programme, minutes, studies and evaluation of the DPG**, the Commission had already explained in its reply of 15 May 2013 that these documents were not in its "*ownership*". The Commission regretted that this request, which was reiterated in August 2013, had not been addressed in time. However, on 20 December 2013, the Commission informed the complainant of the composition of the DPG and that the UNDP Cairo needed to be consulted. On 30 January 2014, the Commission approached the UNDP Cairo but on 4 February 2014, the latter stated that it did not consent to disclosure.

32. In view of that position, the Commission decided, on 28 February 2014, that the requested documents could not be disclosed in accordance with Article 4(1)(a) of Regulation 1049/2001. The Commission considered that disclosing the documents against the will of the UN authorities would have harmed the EU's relations with the UN.

33. As regards the information concerning **consultations with civil society and stakeholders**, the Commission confirmed its earlier reply that it does not have any written record (such as minutes of meetings) of consultations with stakeholders or with civil society concerning the water sector in Egypt. Such consultations had been carried out at an informal level and no official minutes were kept.

34. The complainant informed the Ombudsman's services that all his observations had already been included in his initial complaint. Therefore, he would not submit additional observations. He simply pointed out that on 28 February 2014, the Commission invited him to submit a confirmatory application. The complainant did not do so because the Ombudsman's inquiry was already ongoing at that time.

The Ombudsman's assessment

35. The allegation and claim included in the Ombudsman's inquiry cover both the substantive and the procedural aspects of the Commission's handling of the complainant's request for access to documents.

36. With respect to the *procedural aspect*, the Commission admitted that delays had occurred when handling the complainant's request for access to documents and apologised for these delays. Therefore, the Ombudsman sees no advantage in examining in detail the Commission's compliance with the deadlines set out in Regulation 1049/2001.

37. As regards the related question whether the Commission acted diligently when seeking the



third parties' consent to the disclosure, the Ombudsman notes that the Commission contacted the Egyptian government rather speedily after it received the initial request. Later on, as a result of the Ombudsman's simplified inquiry, it contacted the Egyptian government once more and it also consulted the UNDP Cairo. It took a decision shortly after having received the relevant replies. Therefore, the Commission has taken adequate steps to remedy the above delays and no further inquiries are justified.

38. The Ombudsman considers it useful, however, to draw the Commission's attention to the fact that all the categories of documents to which the complainant wished to be given access had already been specified in the complainant's initial request of 23 March 2013. Therefore, the Commission should have taken an adequate course of action with respect to all of them at that time. The complainant's message of 30 August 2013 cannot be regarded as a new request for access with a resulting new starting date for the Commission's actions to be assessed. In fact, the latter message reiterated the complainant's initial request only to the extent that he was not satisfied with the Commission's reply.

39. As regards the *substantive* aspect of the case, that is to say, the *justification* for the Commission's refusal to disclose certain documents, the Ombudsman is not entirely sure how to understand the Commission's statement that certain documents were not in its "*ownership*". In fact, the notion which is relevant for the purposes of access to documents under Regulation 1049/2001 is that of 'possession' in that the Regulation applies to all documents "*held*" by the EU institutions (Article 2(3) of the Regulation). The consultation envisaged by Article 4(4) of Regulation 1049/2001 concerns "*third-party documents*", that is to say, documents originating from a third party which are in the possession of the EU institutions.

40. Nonetheless, the Ombudsman finds the explanations provided by the Commission in its opinion reasonable and acceptable.

41. As regards the **studies and evaluation reports** (including the 18 specific documents referred to by the complainant), the Commission explained that these were third-party documents and that the Egyptian authorities had refused to agree to their disclosure on two occasions. Similarly, the **programme, minutes, studies and evaluation of the DPG** also constituted third-party documents and the UNDP Cairo refused to agree to their disclosure. It follows from the Commission's submissions that the Commission took the view that disclosing these documents against the will of Egypt and of the United Nations would undermine the EU's international relations with Egypt and the United Nations. The Commission thus invoked the exception set out in the third indent of Article 4(1)(a) of Regulation 1049/2001, according to which, access is to be refused if the disclosure of a document would undermine the protection of the public interest as regards international relations. In view of the circumstances of this case, the Ombudsman considers that the Commission's view that this exception applied was reasonable. She further notes that the complainant has not put forward any specific arguments challenging the Commission's position on this issue. It transpires from the Commission's replies that it could not, for the same reasons, disclose more information than it did as regards the **conditions and relative funds**. The Ombudsman takes the view that the Commission thus did not exceed the limits of the broad discretion which it enjoys in this area [9].



42. As regards the documents relating to the **Commission's public consultations** , the Commission explained that such documents did not exist because it did not draw up any minutes of meetings. The Ombudsman has no reason to doubt this explanation. Given that access can be requested only in respect of existing documents, the Commission's decision to reject the request in relation to these documents was correct. However, the Ombudsman is of the view that it would clearly be in the interest of transparency if the Commission kept an adequate written record of its meetings held in the context of public consultations. Therefore, the Ombudsman will make a corresponding further remark below. As regards the **DPG's public consultations** , the same considerations as those made in paragraph 41 above apply.

Conclusions

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

The Commission has taken adequate steps to address the procedural shortcomings that occurred in its handling of the complainant's request for access to documents.

There is no maladministration as regards the substance of the Commission's decision.

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

Further remark

The Commission should keep an adequate written record of its meetings held in the context of public consultations. This would increase transparency.

Emily O'Reilly

Strasbourg, 02/03/2015

[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] It appears from the complainant's initial request of 25 March 2013 that he already had in his possession an 'action fiche' containing information on phase II. He stated at the time that he could not " *locate similar information for phase I* ".



[3] The request was registered on 19 December 2013.

[4] UNDP stands for the United Nations Development Programme.

<http://un.org.eg/UNInner2.aspx?pageid=20> [Link]

[5] The relevant part of Article 4 reads as follows: " 1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) the public interest as regards: ...

- international relations ... "

[6] Article 4(4) reads as follows:

" 4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. "

[7] Case T-529/09 *Sophie in'T Veld v Council* , judgment of 4 May 2012, not published in the ECR.

[8] Case T-211/00 *Kuijper v Council* [2002] ECR II-485.

[9] Case T-529/09, *Sophie in'T Veld v Council* , cited in footnote 7 above, paragraph 25:

" Since such a decision calls for a wide margin of discretion, the General Court's review of its legality must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (Case C-266/05 P Sison v Council [2007] ECR I-1233, paragraph 34). "