

Decision of the European Ombudsman closing the inquiry into complaint 943/2014/MHZ against the European Commission

Decision

Case 943/2014/MHZ - **Opened on** 23/06/2014 - **Decision on** 09/03/2015 - **Institution concerned** European Commission (No further inquiries justified) |

The case concerned the alleged mishandling by the European Commission of a request for access to documents submitted by the complainant in accordance with Regulation 1049/2001. The request related to two Commission EU pilot cases against Poland. The Ombudsman found that the Commission's shortcomings and oversights constituted maladministration. However, the Commission's eventual decision was correct and the complainant got access to the documents in question. In addition, the Commission promised to make changes to its procedures in order to minimise the risk of similar mistakes occurring in the future. For these reasons the Ombudsman decided that there is no need for her to take further action.

The background to the complaint

1. The complainant is a Polish eco-farmer and the owner of forests through which run many streams. In 2012, he submitted to the European Commission an infringement complaint against Poland. He claimed that the Polish authorities do not respect the relevant legal provisions governing the 'Infrastructure and Environment' operational programme for Poland under Regulation 1083/2006 [1] , which is financed by the EU Cohesion Fund. In 2013, as a result of the complainant's infringement complaints, the Commission opened two separate EU Pilot files against Poland: the first was dealt with by the Directorate-General for Agriculture and Rural Development ('DG AGRI') and the second by the Directorate-General for Regional and Urban Policy ('DG REGIO').

2. In late March 2014, in accordance with Regulation 1049/2001, the complainant submitted to the Commission a request for access to its documents and to its correspondence with the Polish authorities concerning the said EU Pilot cases. The request was drafted in Polish, the complainant's mother tongue, and the only language he masters well. His request was registered by the Commission and was to be partly handled by DG AGRI and partly by DG REGIO.



3. On 15 April 2014, DG AGRI informed the complainant that the prescribed deadline for replying to the request for access to documents could not be complied with. The Commission explained in Polish that the deadline was extended due to the need to consult different services of the Commission in order to gather all requested documents, in accordance with Article 7(3) of Regulation 1049/2001. On 16 April 2014, DG REGIO contacted the complainant to inform him of a new extended deadline. The Commission's letter was incomplete and did not provide any reasons to justify the extension.

4. On 25 April 2014, DG AGRI sent the complainant its decision in English and refused to grant access to the requested documents. The Commission annexed a list of documents covered by the request and held by DG AGRI, which was composed of two items only. The Commission denied access to both documents on the basis of exception laid down in the third indent of Article 4(2) of Regulation 1049/2001. It considered that their disclosure would undermine the protection of the ongoing first EU Pilot investigation " *as the complainant's reply to the Commission's pre-closure letter is still examined by the Commission's services. Indeed, disclosure of the concerned documents at this point of time would affect the climate of mutual trust between the authorities of the Member State and the Commission, which is required to enable them to resolve the case without having to refer it to the Court of Justice.* " DG AGRI explained that partial access was not possible because these documents were entirely covered by the exception. The public interest in disclosure was not found to outweigh the harm disclosure would cause to the climate of mutual trust between the Polish authorities and the Commission in the context of information exchange and problem solving. DG AGRI also informed the complainant that he was entitled to submit a confirmatory application to the Secretary-General " *within 15 working days upon receipt of this letter* " and it provided her address. In the last sentence of that letter, it was stated that " *the Polish version of this letter will be sent to [the complainant] as soon as the translation is ready* ".

5. On 7 May 2014, the complainant received the verbatim translation into Polish of the above document. It bore exactly the same reference to the 15-day time limit for submitting a confirmatory application and included the sentence indicating that the translation in Polish would follow. As a result, the complainant was utterly confused about the applicable deadline for submitting a confirmatory application.

6. On 14 May 2014, DG REGIO wrote to the complainant in Polish. It explained that the Commission needed to consult the Polish authorities before disclosing the requested documents in relation to the second EU Pilot and that it was still awaiting their reply. It added that "[i]f there is no reply within a reasonable time, DG Regio will disclose these documents which, in accordance with Regulation 1049/2001, the Commission would be able to disclose." The complainant did not understand why the Commission extended the deadline for replying to his request for access to documents twice. Nor was it clear to him when he could submit a confirmatory application in the event that the Commission did not disclose the requested documents, since the Commission used the term " *reasonable time* ".

7. Utterly confused, on 22 May 2014, the complainant turned to the European Ombudsman. On 3 June 2014, he received another holding letter, drafted in Polish, from the Secretariat-General



of the Commission. It related to a confirmatory application submitted by the complainant in respect of documents relating to the first EU Pilot but it referred to the date of that application incorrectly (13 April instead of 13 May). The Commission extended the deadline once again. DG REGIO granted access to the requested documents relating to the second EU Pilot case on 6 June 2014, while the Commission's Secretariat-General upheld DG AGRI's refusal to grant access to the documents relating to the first EU Pilot on 26 June 2014.

The inquiry

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

1) The Commission mishandled the complainant's initial applications for access to documents. As a result, it misled him and left him in uncertainty as to the state of affairs of his application.

2) The Commission should (i) apologise for having mishandled the complainant's initial application; (ii) take internal measures to prevent the reoccurrence of such mishandling of applications; and (iii) grant access to the requested documents.

9. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, invited the complainant to submit observations on the Commission's opinion. However, the complainant did not avail himself of this opportunity. Moreover, the Ombudsman's services carried out an inspection of the Commission's file concerning this case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission mishandled the complainant's initial applications for access to documents, thus misleading him and leaving him in uncertainty as to the state of affairs of his application and related claims

Arguments presented to the Ombudsman

10. On the basis of the documents submitted by the complainant, the Ombudsman identified the following arguments in support of the allegation.

1) The Commission acted negligently:

As regards the request for access to the first EU Pilot file, (i) DG AGRI did not check the content of the Polish translation dated 7 May 2014, in which the final sentence made no sense; (ii) in its letter of 25 April drafted in English, DG AGRI set a 15-day deadline for submitting the



confirmatory application. The time limit began to run from the date of that letter even though it was clear that the complainant does not understand English (the letter was sent for translation); (iii) in its letter of 3 June, the Secretariat-General stated that it was replying to the complainant's confirmatory application of 13 April, while it was not until 15 April that the complainant received a reply to his initial application.

As regards the request for access to the second EU Pilot file, (i) the most important sentence in DG REGIO's letter of 16 April, that is the sentence explaining the reason for its delay, was incomplete; (ii) in its further letter dated 14 May, DG REGIO used the term "*reasonable time*" to indicate when it would reply to the complainant's initial application. This term has no meaning for citizens in the given circumstances.

2) The Commission failed to justify the extended deadlines in a convincing manner: in its letter of 15 April, DG AGRI stated that it needed an additional 15 days because the documents concerned were held by different departments, whereas according to the "list" attached to its further letter of 25 April, only two documents were concerned and they were held by that same DG. In any event, Regulation 1049/2001 (Article 7(3)) allows for only one 15-day extension and solely "*in the event of an application relating to a very long document or to a very large number of documents* ." It did not appear that this exception applied to this case, at least as regards the documents held by the DG AGRI.

11. In its opinion, the Commission apologised for (i) not having deleted the final sentence "*The Polish version of this letter will be sent to you as soon as the translation is ready*" in the translated Polish letter; (ii) the incorrect date given in the letter of 3 June 2014; (iii) the incomplete explanation of the reasons for the extension of the deadline in its letter of 16 April 2014. The Commission also took note of the remark that the term "*reasonable time*" has no added value for citizens in access to documents cases and stated that it will avoid using such imprecise terms in the future. It undertook to revise the standard template of letters before sending the English or French versions for translation, in order to avoid similar situations in future. The Commission added that it will also include a sentence in the initial replies clarifying that the time limit for submitting the confirmatory application begins to run from the date when the applicant receives the letter in the language of his application. However, the Commission firmly noted that "*it cannot accept the claim that it mishandled the complainant's requests. Its services had neither the intention nor the purpose to mislead the complainant and always acted in good faith so as to deliver a timely and coherent reply* ."

12. Finally, the Commission explained that, when referring in its holding reply of 15 April 2014 to the consultation with other services, it meant the consultation between DG REGIO and DG AGRI. Both of these services were concerned by the complainant's requests for access and these requests were interrelated. The consultation between them was thus needed in order to ensure a consistent approach to similar requests. The Commission submitted that the deadline stipulated in Article 7(3) of Regulation 1049/2001 may exceptionally be extended not only in the event of a large number of documents, which is mentioned as an example in Article 7(3) of Regulation 1049/2001, but also when an application concerns ongoing infringement proceedings which are dealt with by different services and a consultation is necessary, as



happened in this case.

13. The Commission also pointed out that, in the meantime, the investigation of the first EU Pilot was completed and, thus, the reasons for withholding the documents invoked in its previous correspondence with the complainant ceased to exist. Consequently, on 12 August 2014, the Commission granted the complainant access to the requested file.

The Ombudsman's assessment

14. The Ombudsman welcomes the fact that the complainant was eventually granted access to the requested documents. Upon inspection of the relevant documents, she does not find errors in the Commission's substantive assessment of the complainant's request: the reasons given for the initial refusal were in line with the relevant case-law [2] .

15. The Ombudsman equally appreciates that the Commission undertook to revise the standard template letters and translation drafts, clarify the applicable deadlines and make sure that all correspondence is drafted in a reader-friendly manner and that there are no oversights in the text of the letters, in order to avoid similar problems in future. In this respect, she will make a further remark below.

16. As regards the claim that the Commission should apologise, the Ombudsman notes that the Commission apologised for some of the shortcomings in dealing with the complainant's requests, which she had identified in her letter opening the inquiry. At the same time, however, the Commission submitted it could not accept the complainant's reproach that it had mishandled his requests. In this context, the Commission contended that it had always acted in good faith and that it had never intended to mislead the complainant.

17. The Commission's approach appears to be based on the assumption that maladministration implies that the institution concerned has acted deliberately. However, this is not the case. It is sufficient that an institution has failed to act in a manner that is compliant with principles of good administration. In this case, it is clear that the Commission has failed to handle the complainant's requests as properly and diligently as it should have. If the Commission accepts certain shortcomings in its handling of these requests and apologises for them but at the same time refuses to accept that it committed maladministration, its approach can only be called contradictory. Given the position the Commission has taken, the apology it has offered is not convincing. In these circumstances, the Ombudsman would normally make a finding of maladministration and a corresponding critical remark. However, in light of the Commission's positive actions described in points 14 and 15 above and also bearing in mind the fact that the complainant did not submit any observations on the Commission's opinion, the Ombudsman considers that there is no need to do so in this case.

18. Finally, as regards the Commission's explanations regarding the reasons for the extension of the 15-day deadline stipulated in Regulation 1049/2001 (point 12 above), the Ombudsman welcomes the Commission's intention to adopt a coherent approach to similar requests for



access. However, the Commission's interpretation of the relevant provision of Regulation 1049/2001 is, in the given context, not acceptable. Article 7(3) of the Regulation provides that an extension of the deadline is possible in "*exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents*." Neither of these specific examples applied in this case; and neither is it clear that any other example of an "exceptional" case applied. Given the fact that Article 7(3) of Regulation 1049/2001 constitutes an exception, it is clear that it needs to be interpreted strictly. The Commission's view that the provision could be invoked in order to give its services more time to pursue their inter-service consultations is thus clearly incorrect given that such inter-service consultation is a routine feature in the working of the Commission. It should be noted, however, that the Ombudsman is currently conducting an own-initiative inquiry into the general issue of compliance with the time limits under Regulation 1049/2001 by the Commission, Council and Parliament (OI/6/2013/KM). The above-mentioned statement suggests that there is a systemic issue relating to the Commission's interpretation of Regulation 1049/2001 as regards the circumstances in which it is possible to extend the time limits. It is therefore appropriate to pursue this issue in the context of that own-initiative inquiry rather than the present one.

Conclusion

On the basis of her inquiry, the Ombudsman has decided to close this complaint with the following conclusion:

The manner in which the Commission handled the complainant's requests for access to documents did not meet the requirements of good administration. However, in view of the Commission's subsequent positive actions in this case, described in points 14 and 15 of this decision, the Ombudsman takes the view that the problem encountered by the complainant has now been remedied and there is no need for further action.

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

Further remark

The Ombudsman encourages the Commission to meet its undertakings, in particular, to revise the standard template letters and translation drafts, clarify the applicable deadlines and make sure that all correspondence is drafted in a reader-friendly manner and that there are no oversights in the text of the letters, in order to avoid similar problems in future. The Ombudsman would appreciate if she were to be informed of the implementation of these changes in due course.

Emily O'Reilly



Strasbourg, 09/03/2015

[1] Council Regulation (EC) 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund (OJ 2006 L 210 p. 25).

[2] Case T-191/99 *Petrie and others v European Commission* [2001] ECR II-3677, paragraph 68; Joined cases C-514/11P and C-605/11 P *Liga para a Protecção da Natureza*, judgment of 14 November 2013, not yet published in the ECR, paragraphs 55, 96-98; and Case T-111/11 *ClientEarth v European Commission*, judgment of 13 September 2013, not yet published in the ECR, paragraph 75.