

Draft recommendation of the European Ombudsman in the inquiry into complaint 844/2014/PL against the European Personnel Selection Office (EPSO)

Recommendation

Case 844/2014/DR - **Opened on** 19/06/2014 - **Recommendation on** 29/05/2015 -
Decision on 30/08/2016 - **Institution concerned** European Personnel Selection Office (Draft recommendation partly accepted by the Institution) |

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

The background to the complaint

1. The complainant was a candidate in EPSO's open competition 2012-AD/230-231/12. Due to a number of problems concerning the computer-based admission tests (hereinafter 'CBT'), he had to re-sit these tests several times.
2. The complainant first took part in the CBT in May 2012. On the day of his tests, the Prometric [1] testing centre encountered technical problems that prevented all candidates from finishing the test. Before the system failed, the complainant had completed the verbal reasoning test and part of the numerical reasoning test.
3. The complainant sat the CBT for the second time the following day. He was informed by the Prometric staff in place that he could continue the test from the point at which he had been interrupted. He was thus instructed to skip the verbal reasoning test and the first four questions of the numerical reasoning test.
4. Two weeks later the complainant was contacted by Prometric and informed that, due to a technical problem, the first part of his EPSO test had been lost. He was consequently invited to retake the verbal reasoning test. The numerical reasoning questions were not mentioned even though the complainant had specifically asked about them.
5. The complainant sat the CBT for the third time in early June 2012. He was instructed to answer the questions of the verbal reasoning test and to skip the rest of the test. At the end of June 2012, EPSO informed the complainant that he had failed to reach the required threshold and that he would not be invited to the next stage of the competition.
6. In July 2012, the complainant sent EPSO a request for review arguing that EPSO had



failed to take into account the answers to the first four questions of the numerical reasoning test. Furthermore, EPSO had failed to give him enough time to prepare for the verbal reasoning test before his last examination. Consequently, he asked for all these questions to be considered as correctly answered or, alternatively, to be allowed to retake these parts of the test. Finally, he requested a full explanation of the circumstances of the loss of his data, and information as regards EPSO's handling of other similar cases. EPSO acknowledged receipt of his request for review.

7. Given EPSO's failure to reply by January 2013, the complainant sent a reminder. Three days later, he received an email from EPSO apologising for the delay and explaining that, due to an administrative oversight, no reply had been sent to him although his request had been examined and investigated at the time. As regards the substance, it explained that, as the complainant was the first to re-sit the test, EPSO had at that stage not yet been aware that the data from the previous day was irretrievable. EPSO confirmed that the first four questions of the numerical reasoning test appeared to be unanswered, but stated that even if his responses had been correct he still would have been one point short of making the threshold. Finally, as regards the verbal reasoning test, EPSO pointed out that no candidate was given extra time to prepare for the test.

8. On 30 January 2013, the complainant submitted a request for access to all documents related to his case. After having extended the deadline for replying, EPSO gave access to the documents requested on 13 March 2013. In the letter accompanying the documents EPSO apologised for the unfortunate events, which were "entirely out of EPSO's control".

9. On 15 March 2013, the complainant complained to EPSO's Director concerning the handling of his request for review and his access to documents request. EPSO's Director replied assuring the complainant that he would personally look closely into the matter and get back to him with a detailed explanation.

10. The complainant did not receive further communications from EPSO, and on 8 May 2014, he submitted this complaint.

The inquiry

11. The Ombudsman opened an inquiry into the complaint and identified the following allegations and claims:

1) EPSO did not put in place adequate mechanisms to handle problems arising during examinations. The complainant claimed that EPSO should closely monitor the Computer-Based Tests and ensure that test data is automatically saved.

2) EPSO failed properly to handle the complainant's request for review. The complainant claimed that EPSO should provide the detailed explanation that its Director promised in March 2013, regarding its handling of his request for review.

3) EPSO failed properly to handle the complainant's request for access to documents. The complainant claimed that EPSO should grant full access to the documents covered by the



request for access.

12. In the course of the inquiry, the Ombudsman received the opinion of EPSO on the complaint and, subsequently, the comments of the complainant in response to EPSO's opinion. Her services also carried out an inspection of EPSO's file concerning this case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

The alleged failure of EPSO to put in place adequate mechanisms to handle problems arising during examinations and related claim

Arguments presented to the Ombudsman

13. The complainant argued that EPSO delegated all responsibility to Prometric since it did not have itself enough staff to provide assistance to candidates during the tests. He pointed out that EPSO's contact number for candidates is only operative three hours per day Monday to Friday, making it an ineffective support system in the event that there are serious problems during an examination.

14. In its opinion, EPSO explained the systems and procedures that were put in place to automatically record each candidate's answers during the CBT. It explained, however, that the server crash had disrupted the proper functioning of the system and that this was an instance of *force majeure*, i.e. an incident entirely out of EPSO's control. EPSO concluded that the circumstances of this case were an "*unfortunate concordance of events*".

15. In his observations, the complainant pointed out that the repeated mistakes prove that EPSO had relinquished to an external contractor the organisation and management of the competition. He reiterated that candidates did not have effective access to EPSO in the event of problems.

The Ombudsman's assessment leading to a draft recommendation

16. It is good administrative practice for the administration to take all the measures that are necessary to ensure the proper organisation of a competition. EPSO has a duty to ensure that the tests are conducted as smoothly and properly as possible in accordance with the principles of sound administration and equal treatment. This consideration is also endorsed by the case-law, according to which the administration is obliged to ensure that a competition is properly organised. [2]

17. The Ombudsman understands that despite EPSO's best efforts the occurrence of a *force majeure* incident may take place. In this case, the Ombudsman acknowledges that the server crash that occurred can be considered to constitute such an incident. However, the series of events that followed the crash and resulted in the complainant having to re-sit the tests twice cannot be considered as incidents entirely outside of EPSO's control.

18. In particular, it appears from the information provided to the Ombudsman that even though EPSO was informed by Prometric of the problem with the server at the time, the



information provided by EPSO does not allow the Ombudsman to verify the follow up it has or may have given to the issue. Moreover, the correspondence between EPSO and Prometric inspected by the Ombudsman in the course of her inquiry leads the Ombudsman to believe that EPSO was unaware of the complainant's difficulties until January 2013, when the request for review was answered.

19. Furthermore, the complainant wrote on several occasions to EPSO's Candidate Contact Service through the contact form provided on EPSO's website. It was Prometric's staff that replied, however, and at least on one occasion, with incorrect/incomplete information.

20. In light of the above, the Ombudsman has doubts about the degree of coordination between EPSO and Prometric following the server crash, in general, and the problems the complainant encountered, in particular. Moreover, EPSO's description of the events as 'unfortunate' incidents calls into question to what degree EPSO assumes responsibility for the mistakes that were made in the handling of the events that gave rise to this complaint.

21. Although the Ombudsman welcomes EPSO's statement and its willingness to learn from this case, EPSO has not provided any explanations as to the concrete measures it has or will put in place in order to avoid similar problems arising in the future. Furthermore, EPSO has not addressed in its opinion the issue raised several times by the complainant of the hours of availability of the Candidate Contact Service.

22. In light of the above, the Ombudsman finds that EPSO has not sufficiently proven that it duly coordinated with its contractor and took the necessary measures to ensure sound administration of the complainant's participation in the competition in question. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

The alleged failure of EPSO properly to handle the complainant's request for review and related claim

Arguments presented to the Ombudsman

23. The complainant pointed out that it took EPSO six months to reply to his request for review and that it did so only after he had sent a reminder. He also called into question EPSO's reply that it had already dealt with his request for review in due time but had failed to send him the reply at the time because of an administrative oversight.

24. In its opinion, EPSO apologised once again to the complainant for replying beyond what could be considered a reasonable deadline and stated that there had been a misunderstanding regarding the explanations promised to the complainant by its Director in March 2013. The explanations in question were to be given in reply to the complainant's e-mail of 15 March 2013, and regarded the complainant's request for access to documents only. This was also explained to the complainant over the telephone. EPSO apologised if the complainant had misunderstood what was to be further explained.

25. In his observations, the complainant pointed out that, in his email to EPSO of 15 March



2013, he had complained about the mishandling of his request for review and not only about EPSO's delay in replying to his access to documents request. EPSO's Director had assured him that he would look into the situation very closely and get back to him with a detailed reply. The complainant contested that EPSO had provided the promised explanation over the telephone.

The Ombudsman's assessment leading to a draft recommendation

26. The Ombudsman is aware of the fact that EPSO is facing difficulties in handling requests for review within a reasonable amount of time. Taking into consideration the number of complaints the Ombudsman has received regarding this matter in the recent past, those difficulties appear to result from systemic problems in the application of the request for review procedure. The Ombudsman has therefore taken the view that the underlying problem cannot be addressed effectively in the course of a complaint-based inquiry and thus has decided to open an own initiative inquiry into EPSO's application of the review procedure.

27. This said, in this case the complainant encountered specific problems that should be addressed by EPSO in the context of this inquiry. First, EPSO informed the complainant in January 2013, six months after receiving the request for review, that his request had been "*examined and fully investigated*" at the time, but that due to an administrative oversight the reply had not been sent earlier to him. However, it appears from the internal correspondence inspected by the Ombudsman's services that the request in question was not dealt with until the complainant sent a reminder to EPSO on 8 January 2013.

28. Second, as regards the explanation promised by EPSO's Director, it is clear from the complainant's email of 15 March 2013 that he was not questioning the handling of his request for access to documents only, but also the handling of his request for review. EPSO, however, appears to have misunderstood the email and have considered that it regarded his access to documents request only. According to EPSO, it replied to this issue over the telephone. The complainant has disputed this statement.

29. The Ombudsman is not in a position to assess what EPSO may have discussed with the complainant over the telephone. In any event, it is clear that EPSO's Director did not provide the complainant with a written reply. It is also clear that, if a telephone conversation did take place, EPSO's services did not discuss with the complainant at least part of the issues he had put forward.

30. Although EPSO has repeatedly apologised for these matters, the Ombudsman considers that EPSO failed to provide the complainant with the detailed explanation it had promised. The Ombudsman will therefore make a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman. The alleged failure of EPSO properly to handle the complainant's request for access to documents

Arguments presented to the Ombudsman



31. The complainant argued that EPSO failed to respect the relevant provisions of Regulation 1049/2001 [3] ('the Regulation'). In his opinion, EPSO had failed to justify the need for an extension of the 15 working days deadline provided for by the Regulation. The complainant also questioned the limited number of documents that, according to EPSO, fell within his request, as well as EPSO's redaction of the documents disclosed.

32. In its opinion, EPSO stated that the complainant had received copies of all the relevant documents that were in its own and Prometric's possession. Furthermore, it considered that it complied with the time limits provided for by the Regulation. As regards the redacted data, EPSO argued that it was either not relevant to the substance of the complainant's request or fell under the exception provided for in Article 4(1)(b) of the Regulation. [4] EPSO recognised that the justification for the deadline extension given to the complainant was imprecise and did not refer explicitly to the voluminous nature of the documentation to be examined. EPSO agreed to pay closer attention to this aspect in the future. Finally, EPSO pointed out that the complainant had failed to make a confirmatory application and that his allegations as regards his request for access to documents should thus be considered inadmissible.

33. Following the Ombudsman's inspection of the file, the complainant was informed that part of the information that EPSO had redacted concerned technical data on the failure of the server. The complainant argued that this information did not fall under the exception of the Regulation claimed by EPSO. The complainant reiterated that there were no exceptional circumstances in his access to documents request that would justify the extension of the deadline.

The Ombudsman's assessment leading to a draft recommendation

34. It is necessary at the outset to address the question raised by EPSO of the admissibility of this allegation. According to Regulation 1049/2001, an applicant whose request for access to documents has been rejected explicitly or implicitly, has the possibility to make a confirmatory application for access. This confirmatory application should have been addressed to the Secretary-General of the Commission. Although this information was provided to the complainant, the complainant did not write to the Secretary General but to the Director of EPSO two days after EPSO's initial reply complaining against the handling of his access to documents request as well as of his request for review.

35. Articles 15 of the European Code of Good Administrative Behaviour (the 'Code') [5] is very clear as to the obligation of the EU institutions and bodies to transfer to the competent service correspondence or complaints when they have no competence to deal with it. However, EPSO did not transfer the complainant's email of 15 March 2013, but promised instead to look into the matter. EPSO acknowledged that it recognised the complainant's email as a complaint regarding the access to documents procedure; it is therefore unclear why it did not transfer it to the Secretary-General of the Commission. In any event, given the reply of EPSO's Director, it is understandable that the complainant



considered that the issues raised would be duly investigated and handled by EPSO and did not consider it necessary to send his confirmatory application to the Commission. In light of the circumstances, the Ombudsman considers that this allegation is admissible.

36. As regards the substance, during the inspection of the relevant documents the Ombudsman found that most of the data redacted by EPSO did indeed concern personal data. However, two of the redacted paragraphs described the events surrounding the server crash and contained technical details regarding that incident. The Ombudsman considers that at least the description of the events falls within the scope of the complainant's request and was not protected by the exception claimed by EPSO. Therefore, EPSO wrongly redacted part of the text of one of the documents provided.

37. Concerning EPSO's extension of the 15-day deadline, the Ombudsman notes that EPSO did not provide any reasons at the time as to why it needed an extension. However, she welcomes EPSO's acknowledgement of this failure and its intention to better explain in the future the reasons why an extension is justified.

38. That being said, the Ombudsman shares the complainant's scepticism as to the reasons put forward by EPSO in its opinion to justify the need for an extension in this case, namely that it was necessary due to the large number of documents to be checked. EPSO has stated that the complainant received all the documents that EPSO and Prometric possessed in relation to the complainant's case. The complainant has received copies of eleven emails. The Ombudsman notes that Article 7(3) of the Regulation [6] constitutes an exception, and should thus be interpreted strictly. In this case, neither the number of documents that fell within the scope of the request nor their nature appears to justify such an exception.

39. In light of the above, the Ombudsman makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

The draft recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendation to EPSO:

- 1. EPSO should explain the mechanisms that it has or will put in place to ensure better coordination with Prometric and in order to avoid similar problems arising in the future.**
- 2. EPSO should provide the complainant with the detailed explanation it promised to supply to him and, in particular, clarify how the complainant's request for review was investigated after it arrived in July 2012.**
- 3. EPSO should provide the complainant with further access to the documents covered by the latter's request for access, to the extent that the documents or parts thereof are not covered by one of the exceptions set out in Regulation 1049/2001.**



EPSO and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, EPSO shall send a detailed opinion by 31 July 2015. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly

European Ombudsman

Strasbourg, 29/05/2015

[1] Prometric is the company entrusted with the practical organisation and management of open competitions organised by EPSO.

[2] Case T-159/98 Torre and Others v Commission [2001] ECR-SC I-A-83 and II-395, paragraph 46.

[3] 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.

[4] Article 4(1) of Regulation 1049/2001 provides that "*The institutions shall refuse access to a document where disclosure would undermine the protection of: (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*"

[5] Available on the Ombudsman's website at www.ombudsman.europa.eu

[6] Article 7(3) of Regulation 1049/2001 provides that "*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, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*"