

Decision of the European Ombudsman closing the inquiry into complaint 1153/2014/DK against the European Personnel Selection Office

Decision

Case 1153/2014/DK - Opened on 02/09/2014 - Decision on 22/06/2015 - Institution concerned European Personnel Selection Office (Settled by the institution) |

The case concerned the complainant's request for access to the source texts of the translation tests in an EPSO open competition.

The Ombudsman inquired into the issue and asked EPSO to explain why it departed from its earlier policy of providing candidates with the source texts in open competitions. In reply, EPSO stated that it had reviewed its policy again and decided to publish on its website the source texts used in future open competitions. In accordance with its revised policy, EPSO sent to the complainant a copy of the source text in question.

The Ombudsman therefore closed the case with a finding that EPSO had settled the matter.

The background to the complaint

1. In 2013, the complainant participated in Open Competition EPSO/AD/270/13 organised for the recruitment of Portuguese language lawyer-linguists (AD7). He passed the admission test and was therefore invited to do the translation tests [1] .

2. In May 2014, EPSO informed the complainant that his application was not admitted to the next stage of the competition (assessment centre) as he did not obtain the passmark in test B (he obtained 27 out of 80 points).

3. The complainant then asked EPSO to have access to (i) the source text, (ii) his translation and (iii) the evaluation criteria used by the Selection Board. He argued that he needed to have access to these documents in order to be able to submit an appropriately reasoned request for review.

4. In reply, EPSO provided the complainant with an uncorrected version of his translated text for translation tests A and B. However, it refused to provide him with the source texts, arguing that



they are taken from a database, developed by EPSO, and are likely to be used in future competitions. It also refused access to the evaluation grid and his corrected translation text on the basis that these are covered by the confidentiality of the Selection Board's work.

5. On 26 June 2014, the complainant complained to the European Ombudsman against EPSO's refusal to provide him with the requested documents.

The inquiry

6. The Ombudsman decided to open an inquiry into the following allegation and claim:

Allegation:

EPSO has failed to provide the complainant with a copy of the source texts he translated in test B in the Open Competition he sat.

Claim:

EPSO should provide the complainant with a copy of the source text of test B.

7. The Ombudsman also asked EPSO to explain why it had departed from its traditional policy of providing candidates with the source texts of translations in open competitions.

8. The Ombudsman informed the complainant that his allegations as regards EPSO's refusal to disclose (i) the evaluation criteria used for the translation tests and his corrected translation concerned the same issue as in complaint 1136/2014/DK. In her inquiry into that complaint, the Ombudsman asked EPSO to comment on the possible relevance of the judgment of the Civil Service Tribunal in case *De Mendoza Asensi v Commission* [2].

9. In the course of the inquiry, the Ombudsman received the opinion of EPSO on the complaint and, subsequently, the observations of the complainant in response to EPSO's opinion.

Allegation of failure to provide the source text of the complainant's translation test

Arguments presented to the Ombudsman

10. In its opinion, EPSO stated that in light of its ongoing commitment to maintaining and improving high standards of selection and transparency, it had reviewed its policy concerning the disclosure of source texts within the context of competitions for translators. As a result, EPSO decided that all source texts in future open competitions for translators would be published on its website, thereby guaranteeing direct access to candidates. EPSO also stated



that, by e-mail of 26 November 2014, it sent to the complainant a copy of the source text of his translation test B.

11. In his observations, the complainant maintained his complaint arguing that he needed the requested document to formulate a grounded request for review. However, the review of his tests was completed without EPSO allowing him to present the grounds for his request for review. EPSO thereby violated his right to be heard.

12. The complainant also argued that EPSO sent him a copy of the source text, by e-mail of 26 November 2014 for the sole purpose of being able to claim in its opinion to the Ombudsman that it had already complied with the Ombudsman's request.

13. Finally, the complainant observed that the reserve list of successful candidates in the competition has now been published. Therefore any request for review would be devoid of any useful purpose.

The Ombudsman's assessment

Preliminary remark

14. In addition to the allegation that EPSO failed to provide the complainant with a copy of the source texts used for the translation competition, the complainant also alleged that the EPSO failed to provide him with his translations evaluated by the selection board and the evaluation criteria used by the Selection Board. The Ombudsman did not open an inquiry into this other allegation for the following reasons.

15. The Ombudsman has criticised EPSO in the past for not providing candidates with more detailed information as regards their performance in tests. Specifically, the Ombudsman criticised the failure to grant access to evaluation criteria and corrected exams. The position taken by the Ombudsman was not, however, supported by developments at the EU Civil Service Tribunal, specifically in its judgment of 12 February 2014 (*De Mendoza Asensi v Commission*), where the Civil Service Tribunal stated that Selection Boards are **not required** to give candidates (i) the corrected version of their tests, (ii) reasons why their replies were erroneous, or (iii) the evaluation grids used for the written and oral tests, since these documents form part of the Selection Board's **comparative assessments** and are **covered by the secrecy of the Selection Board proceedings** . [3]

16. In the context of her inquiry into another complaint [4] , the Ombudsman asked EPSO to reflect on the consequence of the *De Mendoza Asensi v Commission* ruling as regards its practices. In its reply, EPSO stated that the judgment of the Civil Service Tribunal recognised the requirement that a decision adversely affecting a person (such as a decision excluding them from a competition) should state the reasons on which the decision is based. Providing such reasons is intended to provide the affected party with the information necessary to determine



whether the decision is justified or not, and to enable a judicial review [5] . EPSO went on to state that, as regards the decisions taken by a selection board in a competition, the obligation to state reasons for the purposes of allowing a person to exercise their right of review, must, however, be reconciled with the confidentiality of selection board proceedings, as required by Article 6 of Annex III to the Staff Regulations [6] . This confidentiality was imposed by the legislature to guarantee the independence of selection boards and the objectivity of their work, by protecting them from all external interference and pressures, whether from the EU administration, the candidates, or third parties. Consequently, the confidential nature of selection board proceedings precludes divulging the attitudes adopted by individual selection board members and revealing any factors relating to the individual or comparative assessment of candidates [7] . Therefore, the simple communication of the marks obtained in the various tests in open competitions constitutes an adequate justification of the selection board's decisions [8] . Such a statement of reasons is not, EPSO stated, prejudicial to the candidates' rights (such as the right to request a review of the decision excluding them from the competition) as it allows them to know the value set on their performance, and to ascertain if they have obtained the number of marks required by the notice of competition in order to succeed. In addition, it also enables the EU Courts to properly carry out a judicial review [9] .

17. EPSO went on to state that it therefore had no obligation to disclose to the candidates the corrected test papers , the correction methods , the evaluation sheets , the marking criteria , or the reasons why certain elements of the candidates' performance were deemed insufficient . On the contrary, all these elements form an integral part of the comparative assessment performed by the selection board with regard to the candidates' merits, and they are therefore covered by the secrecy of the board's proceedings under Article 6 of Annex III of the Staff Regulations.

18. While stating the above, EPSO reassured the Ombudsman that the transparency of its selection procedures would, in any case, be enhanced by the introduction of competency and skills-based tests, and by the provision of a competency passport to candidates, which summarises the results of the skills tested. It also stated that candidates who do not receive a competency passport because they are eliminated from the competition at an earlier stage can now request EPSO to provide them with comments. Finally, EPSO has stated that it is developing a new procedure that will allow candidates, who do not receive a competency passport, to obtain the selection board's reasoned decision, containing the board's comments on the quality of their translations. This new procedure should be in place by 2016.

19. When closing that inquiry, the Ombudsman found that it was now clear (from the Court's case law) that selection boards do not need to give candidates (i) the corrected version of their tests, (ii) reasons why their replies were erroneous, or (iii) the evaluation grids used for the written and oral tests, since these documents form part of the selection board's comparative assessments and are covered by the secrecy of the selection board proceeding. The Ombudsman therefore found no maladministration by EPSO. This conclusion is directly applicable to the allegation made by the complainant in the present case, which was not taken up for inquiry by the Ombudsman.



The complainant's allegation that EPSO wrongly refused to grant access to the source texts

20. During the inquiry, EPSO agreed to disclose the source texts requested by the complainant. The Ombudsman applauds EPSO's willingness to review its policy relating to the disclosure of the source texts of translation tests in open competitions and welcomes the new policy whereby EPSO automatically publishes them on its website. This change of policy of EPSO is fully justified since a source text used in a translation competition can certainly not be considered as a document revealing the deliberations of the selection board. EPSO's change of policy will assist candidates in future competitions to prepare by informing them of the type of translations that will be required of them. It will also help candidates who have completed competitions to reflect on their performance in the competition.

21. The complainant has argued that EPSO should have provided him with a copy of the source text of test B in time to allow him to use it in his request for review.

22. The Ombudsman notes that the scope of her inquiry related only to the non-disclosure of the source texts. It does not deal with an allegation of a limitation on the complainant's right to request a review. The Ombudsman considers it useful, for the purpose of reassuring the complainant that his legal rights have not been curtailed, to refer back to the points made above in paragraphs 16 to 19. It is evident that, as regards the exercise by a candidate of his or her **legal right** to request a review of a decision excluding him or her from a competition, that the right to all information necessary to request a review **is complied with when the candidate is given his or her marks**. No additional information is deemed necessary, by the EU courts, in order to allow a candidate to request a review. The fact that EPSO now chooses also to provide a copy of the source texts does not alter the fact that, from a strictly legal perspective, EPSO is only required to disclose to a candidate his or her marks.

23. The complainant, in this case, received the source text during the Ombudsman's inquiry. However, this disclosure came at a point in time when he could not use the source text in a request for review. As is evident from paragraph 22 above, however, the disclosure after the request for review had been completed does not imply that his request for review was illegally curtailed. Notwithstanding this point, the Ombudsman considers that it would still be good administrative practice if EPSO were in future to make available the source texts as soon as possible, namely, immediately after the relevant phase of the open competition has been completed.

24. In light of the above, the Ombudsman finds that EPSO has settled the matter and she therefore closes her inquiry.

Conclusion

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



conclusion:

EPSO has settled the matter.

The complainant and EPSO will be informed of this decision.

Emily O'Reilly

Strasbourg, 22/06/2015

[1] The translation tests consisted of two parts: (i) a translation from the first source language into Portuguese (translation test A); and (ii) a translation from the second source language into Portuguese. The pass mark for each translation test was 40 out of 80 points. Failure to reach the passmark in translation test A meant that translation test B was not even marked.

[2] Case F-127/11 of 12 February 2014 *Gonzalo de Mendoza Asensi v European Commission*, not yet published, paragraph 99.

[3] F-127/11 *De Mendoza Asensi v Commission*, cited above, paragraph 99.

[4] Complaint 1136/2014/DK, available on the Ombudsman's website:
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[5] See Case 69/83, *Lux/Court of Auditors*, [1983] ECR-I-1785, paragraph 36; and Case F-127/11 *De Mendoza Asensi v Commission*, cited above, paragraph 92.

[6] Article 6 of Annex III to the Staff Regulations provides that the proceedings of the selection board shall be secret.

[7] Case 89/79 *Bonu v Council* [1980] ECR I-553, paragraph 5; Case C-254/95 P *Parliament v Innamorati* [1996] ECR I-3423, paragraph 24; Case F-127/11, *De Mendoza/Commission*, cited above, paragraphs 92-93.

[8] Case C-254/95 P *Parliament v Innamorati*, cited above, paragraphs 30-31; and F-127/11, *De Mendoza Asensi v Commission*, cited above, paragraph 94.

[9] *Parliament v Innamorati*, as above, paragraph 32; and Case F-127/11 *De Mendoza Asensi v Commission*, cited above, paragraph 95.

The case concerned the complainant's request for access to the source texts of the translation tests in an EPSO open competition.



The Ombudsman inquired into the issue and asked EPSO to explain why it departed from its earlier policy of providing candidates with the source texts in open competitions. In reply, EPSO stated that it had reviewed its policy again and decided to publish on its website the source texts used in future open competitions. In accordance with its revised policy, EPSO sent to the complainant a copy of the source text in question.

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The background to the complaint

1. In 2013, the complainant participated in Open Competition EPSO/AD/270/13 organised for the recruitment of Portuguese language lawyer-linguists (AD7). He passed the admission test and was therefore invited to do the translation tests [1] .
2. In May 2014, EPSO informed the complainant that his application was not admitted to the next stage of the competition (assessment centre) as he did not obtain the passmark in test B (he obtained 27 out of 80 points).
3. The complainant then asked EPSO to have access to (i) the source text, (ii) his translation and (iii) the evaluation criteria used by the Selection Board. He argued that he needed to have access to these documents in order to be able to submit an appropriately reasoned request for review.
4. In reply, EPSO provided the complainant with an uncorrected version of his translated text for translation tests A and B. However, it refused to provide him with the source texts, arguing that they are taken from a database, developed by EPSO, and are likely to be used in future competitions. It also refused access to the evaluation grid and his corrected translation text on the basis that these are covered by the confidentiality of the Selection Board's work.
5. On 26 June 2014, the complainant complained to the European Ombudsman against EPSO's refusal to provide him with the requested documents.

The inquiry

6. The Ombudsman decided to open an inquiry into the following allegation and claim:

Allegation:

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EPSO should provide the complainant with a copy of the source text of test B.

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9. In the course of the inquiry, the Ombudsman received the opinion of EPSO on the complaint and, subsequently, the observations of the complainant in response to EPSO's opinion.

Allegation of failure to provide the source text of the complainant's translation test

Arguments presented to the Ombudsman

10. In its opinion, EPSO stated that in light of its ongoing commitment to maintaining and improving high standards of selection and transparency, it had reviewed its policy concerning the disclosure of source texts within the context of competitions for translators. As a result, EPSO decided that all source texts in future open competitions for translators would be published on its website, thereby guaranteeing direct access to candidates. EPSO also stated that, by e-mail of 26 November 2014, it sent to the complainant a copy of the source text of his translation test B.

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13. Finally, the complainant observed that the reserve list of successful candidates in the competition has now been published. Therefore any request for review would be devoid of any useful purpose.

The Ombudsman's assessment



Preliminary remark

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17. EPSO went on to state that it therefore had no obligation to disclose to the candidates the **corrected test papers** , the **correction methods** , the **evaluation sheets** , the **marking criteria** , or the **reasons why certain elements of the candidates' performance were deemed insufficient** . On the contrary, all these elements **form an integral part of the comparative assessment performed by the selection board with regard to the candidates' merits, and they are therefore covered by the secrecy of the board's proceedings under Article 6 of Annex III of the Staff Regulations.**

18. While stating the above, EPSO reassured the Ombudsman that the transparency of its selection procedures would, in any case, be enhanced by the introduction of competency and skills-based tests, and by the provision of a competency passport to candidates, which summarises the results of the skills tested. It also stated that candidates who do not receive a competency passport because they are eliminated from the competition at an earlier stage can now request EPSO to provide them with comments. Finally, EPSO has stated that it is developing a new procedure that will allow candidates, who do not receive a competency passport, to obtain the selection board's reasoned decision, containing the board's comments on the quality of their translations. This new procedure should be in place by 2016.

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The complainant's allegation that EPSO wrongly refused to grant access to the source texts

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24. In light of the above, the Ombudsman finds that EPSO has settled the matter and she therefore closes her inquiry.

Conclusion

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

EPSO has settled the matter.

The complainant and EPSO will be informed of this decision.

Emily O'Reilly

23/06/2015

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[2] Case F-127/11 of 12 February 2014 *Gonzalo de Mendoza Asensi v European Commission* ,



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