

Decision of the European Ombudsman on complaint 844/2014/(PL)DR concerning the handling by the European Personnel Selection Office (EPSO) of computer problems in an open competition

Decision

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) |

The case concerned EPSO's actions following a computer-server crash during a test and EPSO's handling of the complainant's requests for review and for access to documents.

The Ombudsman inquired into the issue and found that EPSO (i) did not deal properly with the situation arising from the computer crash, (ii) failed to deal properly with the complainant's request for review and (iii) failed to handle properly the complainant's request for access to documents. Therefore, the Ombudsman made three recommendations to EPSO.

EPSO accepted the Ombudsman's first recommendation regarding how it should deal with technical problems during a computer-based test. The second recommendation was that EPSO should provide the complainant with a detailed explanation of how it had dealt with his request for a review. The Ombudsman did not find EPSO's response on this to be convincing and that EPSO's handling of the request for a review constituted maladministration. Finally, EPSO did not accept the Ombudsman's third recommendation regarding the provision of access to documents. The Ombudsman found that EPSO's failure to provide further documents also constituted maladministration. In addition to two findings of maladministration, the Ombudsman also made a suggestion to EPSO on how it could improve its contact service for candidates.

The background

1. The complainant, who was a candidate in an EPSO competition, had to retake computer-based admission tests (CBT) twice after technical problems occurred with the server during a test in May 2012. This meant that the complainant had to sit the test on three separate occasions.
2. When the complainant first took the test, a computer failure forced EPSO to abandon the test



before the complainant could complete all the questions. The complainant was asked to repeat the test. In the first retake, Prometric, a private company that had a contract with EPSO to run the tests, told the complainant to skip the parts of the test he had already completed during the first (abandoned) test. However, Prometric then found that it could not retrieve the complainant's results from the first (abandoned) test. EPSO then asked the complainant to retake the test a second time. Subsequently, the complainant was informed of his results. He did not obtain enough points to proceed to the next round of the competition.

3. In July 2012, the complainant asked EPSO to review that decision. In January 2013, after a reminder, EPSO replied that, even if his responses to four questions he had completed during the first (abandoned) test had been correct, he still would have been below the threshold required to pass to the next stage of the competition.

4. On 30 January 2013, the complainant requested EPSO to give him access to documents relating to his case. EPSO granted partial access to the documents. 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. The EPSO Director assured the complainant that he would personally look into the matter and get back to him with a detailed explanation.

5. Not having received any further communications from EPSO, on 8 May 2014, the complainant turned to the Ombudsman.

6. On 19 June 2014, the Ombudsman opened an inquiry into the complainant's following allegations and related claims [1] :

1) EPSO did not put in place adequate mechanisms to handle problems arising during examinations. The complainant claimed that EPSO should closely monitor the CBTs 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 to handle properly 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.

7. In the course of the inquiry, the Ombudsman received EPSO's opinion on the complaint and, subsequently, the comments of the complainant in response to EPSO's opinion. The Ombudsman also inspected EPSO's file concerning this case. The complainant submitted observations regarding the inspection report. On 29 May 2015, the Ombudsman made three recommendations to EPSO, to which EPSO replied on 30 September 2015. The Ombudsman received the complainant's comments on EPSO's reply on 14 November 2015.

8. In conducting the inquiry, the Ombudsman has taken into account the arguments and



opinions put forward by the parties.

Allegation that EPSO failed to put in place adequate mechanisms to handle problems arising during examinations and related claim

The Ombudsman's first recommendation

9. The Ombudsman noted that, although the computer crash was not EPSO's fault, EPSO had control over the follow-up to the crash. In particular, the Ombudsman expressed doubts about the degree of coordination between EPSO and its contractor, Prometric, following the computer crash. These doubts concerned EPSO's coordination with Prometric both in general terms and, in particular, in terms of how EPSO handled the problems the complainant had encountered.

10. The Ombudsman also noted that, although EPSO had shown itself to be willing to learn from this case, it did not point to any specific steps it intended to take. Additionally, EPSO failed to address the issue, raised several times by the complainant, regarding the fact that EPSO's Candidate Contact Service was handled by Prometric. In particular, the complainant had concerns about the limited time when Prometric was available.

11. In the light of the above, the Ombudsman made the following recommendation:

" 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 ".

12. In its **reply**, **EPSO** said that its contacts with Prometric include (a) weekly operational telephone calls (also called "Prometric implementation status meetings") (b) regular debriefing meetings and (c) quarterly meetings and one annual executive meeting to follow-up on strategy points.

13. In addition, EPSO said that it has in the meantime introduced a "CBT tracker" to avoid problems, such as the one the complainant encountered. The "CBT tracker" is a document drawn up by the EPSO team in charge of CBT testing. It is updated and discussed every week within the EPSO team's meetings. It lists, in its "To Do" section, the follow-up to specific cases, such as the complainant's case. EPSO also gave the Ombudsman an example of a CBT tracker for an on-going competition. It stated that it has proven very helpful and efficient in managing properly the coordination and follow-ups with Prometric on specific cases.

14. EPSO said that the complainant's case EPSO was dealt with during one of the weekly operational telephone calls and that it had done its best to accommodate the complainant's request to re-sit the test earlier than other candidates, who were re-tested at a later date. However, because he was the first one to re-sit the test, EPSO was not, at that stage, aware that it was not possible to recover the results from the first test. This was the reason the



complainant had to re-sit the test again. EPSO said that, in future, it would not allow compulsory re-testers to request an earlier/different test date. This, it stated, would reduce the risk of problems. EPSO finally pointed out that only 0.23 % of candidates tested in 2012 had to be retested. According to EPSO, the complainant's unfortunate experience was extremely exceptional.

15 . In his **observations on EPSO's reply** , **the complainant** welcomed EPSO's decision to at least keep written records of issues arising during CBT procedures. He was, however, surprised to learn that, previously, there was no written record of any discussion between EPSO and Prometric. He was also unhappy that candidates are led to believe that they speak to EPSO when using the contact form, when, in fact, they are put in contact with Prometric. In addition, the complainant claimed that EPSO still fails to supervise Prometric's work on a daily basis.

The Ombudsman's assessment after the first recommendation

16. The Ombudsman considers that EPSO has provided sufficient explanations on the measures it has taken to ensure better coordination with its test administrator.

17. Therefore, the Ombudsman considers that **EPSO has accepted her first recommendation**.

Allegation that EPSO failed to properly handle the complainant's request for review and related claim

The Ombudsman's second recommendation

18. The Ombudsman noted that the complainant's request for review was not dealt with until after the complainant had sent a reminder six months later. The Ombudsman noted also that EPSO had failed to provide the complainant with a written detailed explanation concerning the handling of his request for review, as promised by its Director in March 2013.

19. She therefore made the following recommendation:

" 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 ".

20. In its **reply** , **EPSO** stated that the incident was discussed during one of the weekly Prometric implementation status meetings. However, the complainant was not informed of the outcome of this discussion until he sent a reminder, six months after his request for review.



21 . EPSO has now confirmed that there was no written record of the discussion that took place concerning the complainant's specific case because the CBT tracker tool was not in place at the time. Therefore, EPSO was not able to trace in which of the Prometric implementation status meetings the complainant's request was reviewed. EPSO further stated that, apart from the documents already sent to the complainant, it could not trace any other correspondence or document recording any other details.

22 . In his **observations on EPSO's reply** , **the complainant** questioned EPSO's statement that it had discussed this issue in due time, since EPSO did not put forward any evidence to corroborate it. In addition, he pointed out that EPSO's Director had not yet sent him the explanation he promised in March 2013.

The Ombudsman's assessment after the second recommendation

23. EPSO admitted that, for technical reasons (see above paragraph 21), it could not trace either the date or the content of the discussions concerning the complainant's request for review. It is clear, therefore, that EPSO is not able to provide any further explanation as regards those discussions.

24 . In addition, as the complainant rightly pointed out, EPSO's Director has not yet replied to him in writing, despite the clear commitment to do so. EPSO did not provide any reason for this failure to reply in its response to the Ombudsman's recommendations.

25 . In the light of the above, the Ombudsman cannot consider that EPSO has implemented her second recommendation and finds that EPSO's explanations for failing to do so are not convincing. This, in the Ombudsman's view, is unacceptable. EPSO showed an inexplicable lack of courtesy and care to the complainant, who already felt very badly treated when he was asked to re-sit a test twice, when it failed to respond in good time to his reasonable requests. EPSO's failure to reply properly to the Ombudsman's recommendation can only reinforce the complainant's sense that EPSO simply does not care about him. Therefore, the Ombudsman **closes this aspect of the complaint with a finding of maladministration** on the part of EPSO.

26 . However, the Ombudsman welcomes the newly implemented CBT tracker method of keeping a written record of the weekly telephone calls between EPSO and Prometric in order to follow-up on issues that have risen during tests. The Ombudsman is aware that EPSO is facing difficulties in handling requests for review within a reasonable amount of time and, in response, has opened an own-initiative inquiry into EPSO's application of the review procedure [2] . She trusts that the new tool developed by EPSO will contribute to improving this procedure in the future.

Allegation that EPSO failed to properly handle the



complainant's request for access to documents

The Ombudsman's third recommendation

27. The Ombudsman noted, after inspecting the file, that two of the redacted paragraphs described the events surrounding the server crash; they contained technical details regarding the incident. The paragraphs did not contain personal data. The Ombudsman thus concluded that these paragraphs were not protected by the exception of Article 4(1)(b) of Regulation 1049/2001 [3] and that EPSO wrongly redacted part of the text in one of the documents provided to the complainant.

28. In addition, the Ombudsman found that neither the number of documents that fell within the scope of the request, nor their nature could justify EPSO invoking the exception laid down in Article 7(3) of Regulation 1049/2001 [4]. The Ombudsman also noted that EPSO has acknowledged its failure to provide the complainant with adequate grounds as to why it extended the 15-day deadline to reply to his request and welcomed EPSO's intention to improve its explanations in the future.

29. In light of the above, the Ombudsman made the following recommendation:

" 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 ."

30. In its reply, EPSO rejected the Ombudsman's recommendation. First, it insisted that the complainant's e-mail of 15 March 2013 [5] did not constitute an appeal (known as a "confirmatory application") because (a) neither the form nor content of the e-mail did contained anything to suggest that it was intended as an appeal, and (b) the complainant had been explicitly advised to submit a "confirmatory application" directly to the Secretariat-General of the Commission, which he failed to do. Furthermore, even if the complainant's email were to be considered as an appeal, the complainant did not raise the issue of the redaction of certain data from the disclosed documents. For these reasons, according to EPSO, the complainant's email of 15 March 2013 could not be considered as an admissible appeal.

31. In his **observations on EPSO's reply**, the complainant disagreed with EPSO's arguments and restated his position that his e-mail of 15 March 2013 was clearly to be understood as an appeal. He also stated that, by addressing the issue of the admissibility of his appeal only, EPSO failed to address the argument that, by extending the deadline for its reply, it had abused the procedure provided for in Regulation 1049/2001.

The Ombudsman's assessment after the third recommendation



32. The Ombudsman regrets that EPSO has not accepted her recommendation and has failed to provide convincing reasons for not accepting it. EPSO has taken a formalistic approach and has rejected her recommendation because the words "confirmatory application" or "appeal" were not included in the complainant's e-mail of 15 March 2013.

33. EPSO did not forward the complainant's e-mail to the Secretary-General of the Commission, as the appropriate body to deal with the matter, in accordance with Article 15 of the European Code of Good Administrative Behaviour. On the contrary, EPSO's **reply assured the complainant that its Director would personally look closely into the matter and get back to him**. Based on that reply, the complainant drew the reasonable conclusion that the issues raised in the e-mail would be handled by EPSO and duly investigated.

34. The Ombudsman does not agree with EPSO that the issue of the redacted data is inadmissible. EPSO argues that this issue was not raised in the complainant's e-mail of 15 March 2013. However, the redacted paragraphs contain information relevant to the complainant's request for access to documents. This became known only **after** the Ombudsman's file inspection. It was thus impossible for the complainant to have known and raised the issue in his e-mail of 15 March 2013.

35. Concerning EPSO's 15 days extension for providing the requested documents, the Ombudsman reiterates her position - which EPSO has not contested - that the reasons put forward by EPSO to justify this extension, namely that it was necessary due to a large volume of documents to be checked, are not sufficient and do not fit the exception of Article 7(3) of Regulation 1049/2001 [6].

36. In the light of the above, the Ombudsman maintains her view that EPSO did not act in accordance with the principles of good administration and failed to handle properly the complainant's request for access to documents. Consequently, **the Ombudsman finds that this constitutes maladministration** on the part of EPSO.

37. The Ombudsman expects that EPSO, in its response to this Decision, will inform the Ombudsman that it has released the redacted text to the complainant.

Conclusions

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion, critical remarks and suggestion for improvement:

Accepted recommendation

By explaining the mechanisms that it has or will put in place to ensure better coordination with Prometric, in order to avoid problems similar to those experienced by the complainant arising in the future, EPSO has accepted the Ombudsman's first



recommendation. To that extent, one aspect of this case has been settled.

Critical remarks

EPSO failed to provide the complainant with the detailed, written explanation regarding the handling of his request for review, as promised by its Director in March 2013; it has failed also to clarify how the complainant's request for review was investigated after it arrived in July 2012. This constituted maladministration on EPSO's part.

EPSO failed to handle properly the complainant's request for access to documents. This also constituted maladministration.

Suggestion for improvement

EPSO should address the issue, raised by the complainant, of the hours of availability of the Candidate Contact Service and should clearly explain to candidates that, when using the contact form to contact the Candidate Contact Service, they are being put in direct contact with Prometric rather than with EPSO.

The complainant and EPSO will be informed of this decision.

Emily O'Reilly

Strasbourg, 30/08/2016

[1] For further and more detailed 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 draft recommendation available at:

<http://www.ombudsman.europa.eu/cases/recommendation.faces/en/60001/html.bookmark> [Link]

[2] For further details, see the European Ombudsman's own-initiative inquiry OI/10/2015/NF concerning EPSO's procedure for dealing with requests for review made by candidates in open competitions. The letter to EPSO informing it of the opening of this inquiry is available at:

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/60261/html.bookmark> [Link].

[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 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 ."

[5] Although the correct date of the e-mail is 15 March **2013** , EPSO refers twice, regrettably, to the complainant's e-mail of 15 March **2015** .

[6] See footnote 4.