

## Decision in case OI/7/2015/ANA concerning the European Commission's refusal to give access to its comments on draft Serbian legislation

Decision

**Case** OI/7/2015/ANA - **Opened on** 12/05/2015 - **Decision on** 02/09/2016 - **Institution concerned** European Commission ( No maladministration found ) |

The case concerned the Commission's refusal to grant public access to its opinion on the draft Serbian law on Free Legal Aid.

The Ombudsman inquired into the issue and carried out an inspection of the document concerned. The Ombudsman assessed the information on file and found the Commission's refusal was justified under the relevant applicable rules on access to documents (Regulation 1049/2001).

Therefore, the Ombudsman closed the case with a finding of no maladministration. *That said, the Ombudsman's findings are based on the interpretation of the law as it applied on the date on which the Commission gave its decision on the complainant's confirmatory application. Nothing precludes the Commission, acting in the public interest, to strive for greater transparency in the manner in which it conducts the pre-accession negotiation and as the negotiation progresses or is eventually concluded. The entry into force of the draft Free Legal Aid Act, the provisional closure of Chapter 23 of the accession negotiations and the eventual Serbian accession to the EU are all times when the Commission could reassess the situation so as to establish whether the reasons justifying its refusal to grant access to the requested document still apply. The Ombudsman trusts that the Commission will carry out this reflection.*

## The background to the complaint

1. The complainant is a Serbian NGO that provides free legal aid.
2. On 12 January 2015, the complainant requested the Commission to grant it public access to a Commission opinion on the draft Serbian Free Legal Aid Act. In its reply of 3 March 2015, the Commission refused to disclose the document because, it argued, its disclosure would undermine " *the public interest as regards international relations* ". [1]



3. On 19 February 2015, the complainant challenged that refusal by making a "*confirmatory application*".
4. On 30 March 2015, the Commission confirmed its decision to refuse access to the document. It based its decision again on the need to protect international relations. It also argued that the disclosure of the document would seriously undermine its decision-making process [2] .
5. As it was not satisfied with the position taken by the Commission, the complainant submitted a complaint to the European Ombudsman on 31 March 2015.

## The inquiry

6. Given that the complainant does not reside in a Member State, the Ombudsman was not authorised to accept the complaint and was obliged to reject it [3] . However, the Ombudsman considered that her intervention in this case would serve the public interest of ensuring appropriate transparency of the pre-accession process relating to Serbia. Consequently, she decided to investigate this case as an own-initiative inquiry.
7. The Ombudsman included in her inquiry the following allegation and claim made by the complainant:

### **Allegation**

Contrary to Regulation 1049/2001, the Commission failed to disclose its opinion on the draft Serbian Free Legal Aid Act.

### **Claim**

The Commission should disclose its opinion on the draft Serbian Free Legal Aid Act.

8. In the course of the inquiry, the Ombudsman received the Commission's opinion and the comments of the complainant in response to it. The Ombudsman also carried out an inspection of the Commission's file and the withheld document. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation that the Commission failed to disclose its opinion on the draft Serbian Free Legal Aid Act and the related claim**

### Arguments presented to the Ombudsman



## The Commission's opinion

9. In its opinion, the Commission emphasised the importance of the Free Legal Aid Act as part of the accession negotiations with Serbia. The Commission stated that it was essential to preserve a "*trust-based relationship*" with its national counterparts. It added that the disclosure of its comments entails a real risk of discouraging the Serbian authorities from consulting the Commission on sensitive draft laws in the context of the pre-accession discussions.

10. The Commission said that the risk of undermining international relations with Serbia is reasonably foreseeable, taking into account the politically delicate environment surrounding the Act, exemplified by a 4-month strike of the Serbian Attorney's Bar.

11. The Commission argued that the fact that the Serbian Ministry of Justice has published the subsequent draft version of the Act does not call into question the argument that disclosure of the document would undermine international relations because the draft is the result of Serbian Ministry's evaluation as to which comments to implement.

12. The Commission argued that although the public should be kept informed about international agreements, the EU institutions possess wide discretion in determining whether the disclosure of documents could undermine the public interest [4] .

13. As regards the complainant's argument concerning the effect of its refusal on "*the public discourse with civil society*", the Commission pointed out that it regularly holds meetings with civil society representatives on issues of particular concern, such as free legal aid. Moreover, the Commission's Annual Progress Report informs civil society of the general recommendations given on the measures the Serbian authorities need to undertake to meet the accession requirements in the area of judiciary and fundamental rights.

14. With respect to the exception concerning the protection of the Commission's decision-making process (Article 4(3), first subparagraph of Regulation 1049/2001), the Commission stated that its comments reflect a continuously evolving internal position and remain part of ongoing discussions. Its comments may, it insisted, evolve further, in line with the on-going changes of the draft legislation.

15. The Commission argued that there is no overriding public interest in the disclosure of its comments on the draft legislation, and stated that its Annual Progress Report sufficiently informs the public of its opinion. In its view, protecting the trust between the EU and the Serbian authorities in the accession negotiations should be a priority.

## The complainant's comments

16. As regards the need to protect international relations (Article 4(1)(a) of Regulation 1049/2001), the complainant pointed out that the Ministry of Justice of Serbia posted all existing



versions of the draft Act on its website, including the versions drafted before and after the Commission's comments. It argued that these texts already reveal the general direction of the Commission's comments. Therefore releasing the document would not reveal the changes that were made to the draft Act in light of the Commission's comments and hence would not compromise the secrecy of the pre-accession negotiations between the EU and Serbia.

**17.** The complainant did not agree that disclosing the document would jeopardise the atmosphere of mutual trust between the Serbia and the Commission or that it would that adversely affect the negotiations on the accession of Serbia to the EU. It insisted that making the comments public would not risk depriving the Commission of the needed data and cooperation of future applicant states because such states are obliged to provide this data in the EU pre-accession process.

**18.** Regarding the need to protect the Commission's decision-making (Article 4(3), first subparagraph of Regulation 1049/2001), the complainant argued that disclosure of the document would not undermine the Commission's decision-making process either because the Commission's opinion has already been implemented in the revised version of the draft.

**19.** Finally, the complainant argued that the Commission's refusal to give public access to its opinion on the draft Free Legal Aid Act limits "*the public discourse between Serbian civil society and the EU*".

**20.** The complainant finally argued that the refusal to grant public access to the document goes against the protection of fundamental rights and the rule of law in Serbia.

## The Ombudsman's assessment

**21.** Article 4(1)(a) of Regulation 1049/2001 provides that EU institutions shall refuse access to documents where disclosure would undermine the public interest as regards international relations. The Court of Justice of the EU has said that the risk must be reasonably foreseeable and not purely hypothetical [5] and that the institution must show that the document requested specifically and actually undermines the interest protected by the exception [6] .

**22.** The Commission explained that it relied on the need to protect international relations because of its efforts to preserve a relationship of trust with its Serbian counterparts in the accession negotiations. The Commission argued that the draft legislation is part of these negotiations and that, therefore, the risk of undermining the protection of public interest as regards international relations is not purely hypothetical. Disclosure of its comments would entail a reasonably foreseeable risk of discouraging the Serbian authorities from engaging fully in future consultations on sensitive draft laws in the pre-accession context.

**23.** The Ombudsman agrees with the Commission that disclosure of the Commission's comments on the draft Legal Aid Act could undermine the pre-accession process. The Ombudsman notes that, as the Commission stated, this process is currently conducted within a



politically delicate environment. To illustrate this, the Commission stressed that the Serbian Bar Association went on a 4-month long strike as a response to proposed judicial reform, which included the draft Free Legal Aid Act.

**24.** The Ombudsman considers that the disclosure of the Act's subsequent draft versions by the Serbian Ministry of Justice is not sufficient to call into question the Commission's arguments. In fact, it is at the discretion of the Serbian authorities to decide what comments to implement and how. The mere publication of the revised versions of the draft Act does not in itself reveal the Commission's comments.

**25.** Turning to the protection of the Commission's decision-making process, it is the Ombudsman's view that disclosure of the Commission's comments would specifically and actually undermine the protected interest because they reflect a temporary, and continuously evolving, internal position on specific issues related to the Act. Since Serbia has not yet enacted the legislation, and the discussions are ongoing, the comments may very well be adapted further in response to subsequent amendments of the draft Act. Moreover, the Ombudsman agrees with the Commission that there is no apparent public interest that would override the protection of the on-going decision-making process.

**26.** With respect to the possibility of granting partial access to the document (Article 4(6) of Regulation 1049/2001), the Ombudsman, having also inspected the document in question, agrees with the Commission that meaningful partial access is not possible because it would not only undermine the interests described above, but also create a misleading picture of the current situation, as the document reflects only a small part of the legislation analysed by the Commission under the ongoing pre-accession monitoring mechanism. The Ombudsman notes that some of the information contained in the requested document will be incorporated in the Annual Progress Report, which should adequately inform the public of the general recommendations directed at the Serbian authorities.

**27.** In the light of the above, the Ombudsman concludes that the Commission's refusal to grant access to its comments on the draft Free Legal Aid Act was justified under Regulation (EC) 1049/2001. Therefore, the Ombudsman makes a finding of no maladministration.

**28.** The Ombudsman considers it useful to clarify that her findings are based on the circumstances as on 30 March 2015, the date on which the Commission rendered its decision on the complainant's confirmatory application. That said, nothing precludes the Commission, acting in the public interest, to strive for greater transparency in the manner in which it conducts the pre-accession negotiation and as the negotiation progresses or is eventually concluded. The entry into force of the draft Free Legal Aid Act, the provisional closure of Chapter 23 of the accession negotiations and the eventual Serbian accession to the EU are all points in time when the Commission could reassess the situation so as to establish whether the reasons justifying its refusal to grant access to the requested document still apply. The Ombudsman trusts that the Commission will reflect on this at the appropriate times.



## Conclusion

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

**The European Commission's refusal to grant public access to its comments on the draft Serbian Free Legal Aid Act does not constitute maladministration.**

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

Emily O'Reilly

European Ombudsman

Strasbourg, 02/09/2016

[1] It referred to Article 4(1)(a), third indent of Regulation 1049/2001 regarding public access to European Parliament, Council, and Commission documents, which states that "*The institution shall refuse access to a document where disclosure would undermine the protection of (a) the public interest as regards international relations.*"

[2] It referred to Article 4(3), first subparagraph, of Regulation 1049/2001 which states that "*Access to a document...shall be refused if disclosure of the document would seriously undermine the institution's decision-making process...*"

[3] Article 228(1) of the Treaty on the Functioning of the European Union provides "[the] Ombudsman...shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State..."; Article 2(2) of the Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[4] Judgment of the Court of 3 July 2014 in case C-350/12 P, *Council of the European Union v Sophie in't Veld*, paragraph 64; *See also*, *Sison v Council*, C-266/05, paragraph 35.

[5] Judgment of the Court of 21 July 2011 in Case C-506/08 P *Sweden v MyTravel and Commission* ECR I-6237, paragraph 76.

[6] Judgment of the Court of 28 November 2013 in Case C-576/12 P *Ivan Jurasinovic v Council of the European Union*, paragraph 45.