

Decision in case 709/2015/MDC on the Commission's refusal to grant public access to drafts of the final Impact Assessment Report accompanying its proposal for a Directive amending the Fuel Quality and Renewable Energy Directives

Decision

Case 709/2015/MDC - Opened on 15/06/2015 - Decision on 04/10/2017 - Institution concerned European Commission (No further inquiries justified) |

The case concerned the Commission's refusal to grant public access to draft versions of an Impact Assessment Report (IAR) on indirect land-use change related to biofuels (ILUC). Disclosure of the documents was refused on the ground that it would undermine the Commission's decision-making process. The complainant, a group of organisations, considered that it should be granted access to the documents it requested.

The Ombudsman inquired into the issue. She noted that in September 2015, Parliament and Council adopted Directive 2015/1513. That Directive was based on the Commission's legislative proposal to which the impact assessment report, the draft versions of which were at issue in this case, was attached. The Ombudsman therefore proposed that, in light of these new circumstances, the Commission grant public access to the requested documents. *The Commission disagreed, arguing that there had been no maladministration on its part. It however invited the complainant to make a new request for access to documents, in light of the new circumstances. The complainant later informed the Ombudsman that, following a new request for access to documents, the Commission granted access to the documents it had requested. The Ombudsman thus closed the case with a finding that no further inquiries into the complaint were justified. She also pointed out that the Ombudsman is entitled to ask an institution to take into consideration, when responding to a proposal for a solution of the Ombudsman in an access to documents case, new arguments as to why a document should be released.*

The background

1. This case concerns a request for public access to documents which the complainant, a group of organisations, submitted to the European Commission. The complainant requested access to, among other documents, drafts of the final impact assessment report on indirect land-use change related to biofuels (ILUC) [1] , its annexes and associated correspondence



and summaries. These documents were drawn up in the context of the Commission's proposal for amendments to the existing Fuel Quality Directive [2] and the Renewable Energy Directive [3] .

2. The Commission granted access to some of the requested documents and denied access to some other documents on the basis of Article 4(3) of Regulation 1049/2001 [4] (which allows an institution to deny access to a document if its disclosure would seriously undermine the institution's decision-making process).

3. The complainant later made two further requests for access to the same documents which were both rejected by the Commission.

4. Since it was not satisfied with the Commission's response, the complainant lodged a complaint with the European Ombudsman in April 2015. The complainant contended that **the Commission had wrongly denied access to eight of the requested documents** . The Ombudsman opened an inquiry into the complaint [5] .

Denial of access to eight of the requested documents

The Ombudsman's proposal for a solution

5. In December 2016, taking into account the arguments and views put forward by the parties, the Ombudsman made a proposal for a solution to the Commission. The Ombudsman noted that in September 2015, Parliament and Council adopted the ILUC Directive (Directive (EU) 2015/1513 [6]). That Directive was based on the Commission legislative proposal to which the impact assessment report, the draft versions of which are at issue in this case, was attached.

6. The Ombudsman pointed out that in a similar case which had been brought before the General Court [7] , once the revised Directive was adopted (and before the Court gave judgment), the Commission decided to grant access to the draft versions of the Impact Assessment Report prepared in the context of the Commission's proposal for a revision of that Directive. The Ombudsman considered that the Commission could adopt the same approach in this case. She therefore proposed that, "**in light of the fact that Directive 2015/1513 has now been adopted, the Commission grant public access to the seven [8] remaining requested documents.**"

7. The Commission disagreed with the proposed solution. It argued that the Ombudsman had not contested that its decision refusing access to the requested documents was legally and factually correct at the point in time when it was taken. There was therefore no maladministration in the Commission's conduct. The Commission did not agree that it should take the new circumstances into account at that stage. However, it went on to state that it was up to the complainant to make a new request for access to documents in light of the new circumstances if it so wished [9] . It therefore invited the complainant to do so.



8. In July 2017, the complainant informed the Ombudsman that, following a new request for access to documents, the Commission provided it with the seven remaining requested documents. The complainant expressed its gratitude to the Ombudsman, but stated that the case could now be closed.

The Ombudsman's assessment after the proposal for a solution

9. The Ombudsman uses this opportunity to stress again that her procedures are not analogous to court proceedings, where the only issue under consideration (in an access to documents case) would be whether the institution's original decision refusing access was valid. In contrast, the Ombudsman is perfectly entitled to ask an institution also to take into consideration, when responding to a proposal for a solution of the Ombudsman, new arguments as to why a document should be released. These can include arguments relating to new circumstances which result in the inapplicability of a previously applicable exception to disclosure [10]. This should not be taken as implying any criticism of the original decision.

10. A more constructive approach, taking the passage of time and changed circumstances into consideration, instead of a bureaucratic and legalistic approach, requiring a new request in identical terms to one already made, would serve citizens better. The Commission would thereby demonstrate a higher level of citizen awareness and citizen friendliness, in line with the principles of good administration.

11. In light of the fact that the Commission has now disclosed the requested documents and that the complainant has asked the Ombudsman to close the case, no further inquiries into the complaint are justified.

Conclusion

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

No further inquiries into the complaint are justified.

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

Emily O'Reilly

European Ombudsman



Strasbourg, 04/10/2017

[1] Biofuel production typically takes place on cropland which was previously used for other agricultural purposes such as growing food or feed. Since this agricultural production is still necessary, it may be partly displaced to previously non-cropland such as grasslands and forests. This process is known as indirect land use change (ILUC). Indirect land use change risks negating the greenhouse gas savings that result from increased biofuels because grasslands and forests typically absorb high levels of CO₂. By converting these land types to cropland, atmospheric CO₂ levels may increase.

[2] Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ 1998 L 350, p. 58.

[3] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion

of the use of energy from renewable sources and amending and subsequently repealing Directives

2001/77/EC and 2003/30/EC, OJ 2009 L140, p. 16.

[4] 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 L145, p. 43.

[5] For further 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 proposal for a solution,

available at: <https://www.ombudsman.europa.eu/cases/solution.faces/en/84306/html.bookmark>
[Link]

[6] Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ 2015 L 239, p. 1.

[7] See order of the General Court of 3 September 2015, *Philip Morris Benelux v Commission*, T-520/13, ECLI:EU:T:2015:702.

[8] The Commission informed the complainant that one of the requested documents (an e-mail exchange) no longer existed since it had not been archived. It apologised for its error.



[9] The Commission referred to the judgment of the Court of Justice of 26 January 2010 in Case C-362/08 P, *Internationaler Hilfsfonds v Commission*, ECLI:EU:C:2010:40. The Court of Justice held, in paragraph 57, that: “ *a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime.* ”

[10] It should be borne in mind that when the Ombudsman makes a proposal for a solution, this does not necessarily mean that she has taken the preliminary view that the conduct of the institution concerned amounts to maladministration. A proposal for a solution should be viewed as an opportunity for the institution concerned to do away with the contentious issue without the Ombudsman having taken a stand on the question whether maladministration has occurred.