



## Päätös asiassa 676/2008/RT - Asiakirjajulkisuutta koskeva laiminlyönti keskeisten asiakirjojen osalta

Päätös

**Kanteluasia** 676/2008/RT - **Tutkittavaksi otetut kantelut, pvm** 28/03/2008 - **Suositus** 27/10/2008 - **Erityiskertomukset, pvm** 28/03/2008 - **Päätökset, pvm** 07/07/2010

Kantelija on ympäristönsuojelualan kansalaisjärjestö. Se pyysi komissiolta 1. maaliskuuta 2007 tietoja ja asiakirjoja komission ja autonvalmistajien edustajien välisistä kokouksista, joissa keskusteltiin komission lähestymistavasta autojen hiilidioksidipäästöihin. Komissio antoi luvan tutustua pyydettyihin asiakirjoihin vain osittain. Se kieltäytyi antamasta kolmea kirjettä, jotka Porsche AG oli lähettänyt entiselle varapuheenjohtaja Verheugenille. Syyksi se esitti, että asiakirjojen antaminen haittaisi Porsche AG:n kaupallisten etujen suojelemista.

Kantelija ei ollut tyytyväinen komission kantaan ja kääntyi sen vuoksi oikeusasiamiehen puoleen.

Oikeusasiamiehen tutkimuksen aikana komissio pysyi kannassaan. Tarkastettuaan kyseiset asiakirjat 27. lokakuuta 2008 oikeusasiamies teki komissiolle suositusluonnoksen siitä, että tämä antaisi luvan tutustua kokonaisuudessaan kolmeen Porsche AG:n entiselle varapuheenjohtaja Verheugenille lähettämään kirjeeseen tai harkitsisi niiden antamista ainakin osittain.

Komissio vastasi oikeusasiamiehen suositusluonnokseen vasta 11. maaliskuuta 2010 eli lähes 15 kuukautta myöhässä kolmen kuukauden määräajasta, jonka oikeusasiamies oli antanut Euroopan unionin toiminnasta tehdyn sopimuksen 228 artiklan mukaisesti. Tänä aikana oikeusasiamies toimitti parlamentille erityiskertomuksen komission laiminlyönnistä vastata suositusluonnokseen määräajassa.

Vastauksessaan komissio hyväksyi vain osittaisen tutustumisen kolmeen kirjeeseen, jotka Porsche AG oli lähettänyt entiselle varapuheenjohtaja Verheugenille. Se katsoi, että Porsche AG:n kaupallisten etujen suojelemiseen liittyvät paljastamattomat osat kuuluvat poikkeuksen piiriin.

Oikeusasiamies katsoi, että komissio ei tarjonnut vakuuttavia lisäselityksiä tapauksen yksittäisistä asioista perustelemaan päätöstään myöntää kyseisiin asiakirjoihin vain osittainen tutustumismahdollisuus. Oikeusasiamiehen kantana olikin, että kyseessä oli hallinnollinen epäkohta, koska komissio jätti perustelematta asianmukaisesti kieltäytymisensä antaa tutustua Porsche AG:n entiselle varapuheenjohtaja Verheugenille lähettämään kolmeen kirjeeseen kokonaisuudessaan. Oikeusasiamies antoi asiasta kriittisen huomautuksen.



## THE BACKGROUND TO THE COMPLAINT

1. The complainant is a non-governmental organisation acting in the field of environmental protection. On 1 March 2007, it asked the Commission for access to information and documents held by the Directorate-General (DG) for Enterprise and Industry, and by former Vice-President Verheugen. The information and documents requested related to meetings between the Commission and representatives of car manufacturers, during which the Commission's approach to carbon dioxide emissions from cars as of 1 January 2006 was discussed. The Commission gave only partial access to the requested documents.

2. On 25 June 2007, pursuant to Article 7, second paragraph [1], of Regulation 1049/2001 of 31 May 2001 regarding public access to European Parliament, Council and Commission documents ('Regulation 1049/2001'), the complainant submitted a confirmatory application to the Commission, which replied on 9 August 2007.

3. The Commission informed the complainant that, in order to assess whether an exception to the right of access, as provided for in Article 4(1) [2] or 4(2) [3] of Regulation 1049/2001, applied to the content of the said letters, it needed to consult the authors [4] of 18 letters which former Vice-President Verheugen received from various car manufacturers. It indicated that, following this consultation, it would give the complainant access to all of the letters which were not subject to the aforementioned exceptions.

4. On 14 November 2007, the Commission informed the complainant that 15 of the letters involved were not subject to an exception to the right of access. The complainant was therefore granted access to these letters. However, the Commission refused to grant access to three letters which Porsche AG had sent to former Vice-President Verheugen. In so doing, it based its decision on the exception set out in Article 4(2), first paragraph of Regulation 1049/2001 [5], namely, that their disclosure would undermine the protection of the company's commercial interests.

## THE SUBJECT MATTER OF THE INQUIRY

5. The complainant alleged that the Commission:

- wrongly refused access to the Porsche AG letters, on the basis of the first paragraph of Article 4(2) of Regulation 1049/2001; and
- wrongly refused partial access to the Porsche AG letters, on the basis of Article 4(6) of Regulation 1049/2001 [6].

The complainant claimed that the Commission should grant it access to the requested letters in their entirety.

## THE INQUIRY

6. The complaint was forwarded to the Commission with a request for an opinion on its content to be provided by 31 May 2008. The Commission requested an extension of time, which was granted until 30 June 2008. Once received, the Commission's opinion was subsequently forwarded to the complainant with an invitation to submit observations. The complainant submitted its observations on 4 September 2008.

7. On 25 September 2008, in accordance with Article 3(2) of the Ombudsman's Statute, the



Ombudsman's services carried out, at the Commission's premises, an inspection of the documents to which the complainant referred.

8. A copy of the inspection report was sent to both the complainant and the Commission.

9. On 27 October 2008, the Ombudsman made a draft recommendation to the Commission.

10. Throughout the six months following the original deadline set by the Ombudsman for a reply to his draft recommendation, the Commission repeatedly asked for extensions to that deadline. The Commission stated that it was aware that it could not indefinitely postpone its reply to the Ombudsman's draft recommendation, but that it preferred to exhaust all possibilities of reaching an agreement with the third party (Porsche AG) rather than simply "*confirm its decision not to disclose the documents*". The Ombudsman granted the Commission all of its deadline extension requests.

11. On 30 September 2009, the Commission sent a letter to the Ombudsman, in which it stated that it had decided to grant partial access to the three letters and had, therefore, created edited versions of the documents. The Commission submitted this proposal to grant partial access to Porsche AG. However, the latter failed to inform the Commission of its opinion on the matter.

12. On 27 October 2009, the Commission's services clarified that "*the procedure of disclosure of the three letters could not advance before mid November 2009*". The Commission further stated that it could provide the Ombudsman, if he so wished, with a copy of the notification letter to be sent to Porsche.

13. On 9 November 2009, the Ombudsman sent another letter to the Commission, in which he requested (i) a copy of the notification letter which the Commission sent to Porsche AG, and (ii) information about the outcome of the procedure initiated by the Commission in order to grant access to the relevant letters.

14. On 4 December 2009, the Commission replied that (i) the notification letter would be sent shortly to Porsche AG, and (ii) a copy of the notification letter would be forwarded to the Ombudsman. The Commission was contacted again in this respect, but it appeared that, by 15 December 2009, the notification letter to Porsche had still not been sent out.

15. Therefore, on 24 February 2010, the Ombudsman submitted a Special Report to Parliament in which he presented his findings, namely, that, by delaying its reply to his draft recommendation, and by failing to implement its undertaking to notify Porsche AG of its intention to disclose, the Commission infringed its obligation, as provided for in Article 13, paragraph 2 of the Treaty on European Union [7], to cooperate sincerely and in good faith with him in the course of his inquiry [8].

16. On 11 March 2010, the Commission sent its reply to the Ombudsman's draft recommendation, which was forwarded to the complainant with an invitation to submit observations. On 6 May 2010, the complainant sent its observations.



## **A. Allegation of failure to grant access to the relevant documents and related claim**

### *Arguments originally presented to the Ombudsman*

17. The complainant alleged that the Commission wrongly refused (i) access to the Porsche AG letters, on the basis of the first indent of Article 4(2) of Regulation 1049/2001, and (ii) partial access to the Porsche AG letters, on the basis of Article 4(6) of Regulation 1049/2001. It also claimed that the Commission should grant it access to the requested letters in their entirety.

18. The complainant argued that the Commission failed to give a detailed explanation as regards the commercial interests of Porsche AG, and that it did not take into account the overriding public interest in disclosure.

19. In its opinion, the Commission argued that the three letters in question provided details of Porsche AG's "*specific position on the automobile market*". The Commission went on to say that it could not provide further details regarding the content of the letters without revealing their content. It concluded that disclosure of the letters would undermine the protection of Porsche AG's commercial interests.

20. In addition, the Commission pointed out that it did in fact carry out "*the public interest test*" and concluded that Porsche AG's commercial interests outweighed the public interest in disclosing the letters. Partial access could not be granted because the letters did not contain parts which could be disclosed without harming Porsche AG's commercial interests.

### *The Ombudsman's inspection of documents*

21. The Ombudsman's services visited the Commission's premises and inspected the following documents, which the Commission considered to be confidential:

(i) The letter dated 28 November 2005, plus annexes, from Mr. Wiedeking, President of Porsche AG, to Vice-President Verheugen.

(ii) The letter dated 15 December 2006 from Mr. Wiedeking to Vice-President Verheugen.

(iii) The letter from Porsche AG dated 2 February 2007, forwarding copies of letters sent by Mr Wiedeking to Chancellor Merkel, President Barroso and Vice-President Wallström.

(iv) An exchange of e-mails between the Commission and Porsche AG in which the Commission informed Porsche AG that it intended not to disclose the above letters.

### *The Ombudsman's assessment leading to a draft recommendation*



22. Article 1(a) of Regulation 1049/2001 provides that the aim of this Regulation is to ensure the widest possible access to documents held by the Council, the European Parliament and the Commission. According to the established case-law of the Community courts, any exceptions to this principle have to be interpreted strictly.

23. In order to process a request for access to documents, the Commission has to follow the assessment sequence [9] outlined below and to examine whether:

(i) the requested document falls within the scope of one of the exceptions provided for in Article 4 of Regulation No 1049/2001;

(ii) disclosure of a document would specifically and actually undermine the protected interest;

(iii) there is no overriding public interest in disclosure; and

(iv) the need for protection applies to the whole document in question.

24. The Commission refused to grant the complainant access to the three Porsche AG letters, on the basis of Article 4(2), first indent, of Regulation 1049/2001. According to this provision, "[t] he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property ...".

25. The three Porsche AG letters were written when the Commission consulted key stakeholders concerning the review of the Community Strategy to reduce carbon dioxide emissions from passenger cars. It was therefore likely that the three letters contained information on Porsche AG's business relations. Consequently, the Commission could have regarded them as falling within the scope of the exception laid down by Article 4(2), first indent, of Regulation No 1049/2001.

26. In this respect, the Ombudsman examined whether the information contained in the relevant documents was indeed so sensitive that disclosure of the latter would seriously affect Porsche AG's commercial interests.

27. The Commission's only specific reference to the content of the letters was that "*in these letters Porsche AG explained its specific position on the automobile market*".

28. This could reasonably be understood as pertaining to Porsche AG's commercial interests in a broad sense, including its market share; its commercial strategy; industrial, financial, banking or commercial data, including information relating to the company's business relations or contracts; its methods of assessing costs; and its company know-how.

29. The Ombudsman's inspection of the documents established that these letters and/or their annexes, did not relate exclusively to the protected commercial interests described above. Moreover, it could not be ruled out that some of the information contained in the letters was already available in the public domain, either disclosed by the company itself, or



by other entities, such as the competent national authorities for the sector, or even by specialised publications dealing with the automobile industry.

30. In this regard, Article 4(1) of the Ombudsman's Statute stipulates that the Ombudsman and his staff " *shall be required not to divulge information or documents which they obtain in the course of their inquiries* ". The Ombudsman is therefore prevented from quoting from documents which the institution considers to be confidential, or from referring to them in such a way that their contents might be disclosed.

31. Even if the letters had contained exactly the kind of information described in paragraph 28 above, this fact alone would not necessarily mean that their disclosure would specifically and actually undermine the commercial interests of Porsche AG. As the Court of First Instance (now the General Court) held in a recent judgment [10] , if all information relating to a company and its business relations were regarded as being covered by the protection given to commercial interests in accordance with Article 4(2), first indent, of Regulation No 1049/2001, effect would not be given to the general principle of giving the public the widest possible access to documents held by the institutions.

32. The Commission's mere reference to Porsche AG's " *specific position on the automobile market* ", which was not backed up by any other reference to the individual facts of the case, was not sufficient to conclude that the exception laid down in Article 4(2), first indent, of Regulation 1049/2001 is applicable.

33. The Ombudsman therefore considered that the Commission failed to show that disclosure of the relevant documents would specifically and actually undermine Porsche AG's commercial interests. Moreover, the Ombudsman was not convinced by the Commission's argument that partial access, if granted, would necessarily harm Porsche AG's commercial interests.

34. If the Commission's intent had been to support its refusal to grant access by indicating (and showing the Ombudsman the relevant documents mentioned under (iv) above during the inspection) that Porsche AG itself had asked it not to disclose the letters, the Ombudsman points out that, according to the Community case-law, the views expressed by the third party author of a document, in the framework of the consultation provided for in Article 4(4) of the Regulation No 1049/2001, is not binding on the Commission [11] . Despite Porsche AG's request, the Commission was still obliged to carry out its own assessment as regards the applicability of the exceptions provided for under Article 4(1) or (2) of Regulation No 1049/2001.

35. From the evidence available, it was not possible to establish whether the Commission carried out the public interest test. Nevertheless, in view of the findings in paragraph 33, in conjunction with paragraph 23 above, it was not necessary to examine whether there was an overriding public interest in disclosure.

36. In light of the above considerations, the Ombudsman concluded that the Commission wrongly refused access to the three Porsche AG letters on the basis of Article 4(2), first



indent, and Article 4(6) of Regulation 1049/2001. This was an instance of maladministration. He therefore made a draft recommendation to the Commission, in accordance with Article 3(6) of his Statute. This draft recommendation is presented below, under the heading "*Draft recommendation*".

#### *Draft recommendation*

" *The Commission should grant access to the three letters sent by Porsche AG to Vice-President Verheugen in their entirety or consider partially disclosing them.* "

#### *The arguments presented to the Ombudsman after his draft recommendation*

37. In its reply to the Ombudsman's draft recommendation, the Commission stated that it had decided to grant partial access to the three Porsche AG letters to former Vice-President Verheugen, and enclosed copies of the said letters in which certain information had been blanked out. The Commission explained that, by letter dated 11 January 2010, it had informed Porsche AG of its intention to partially disclose the three letters. On 5 March 2010, Porsche AG informed the Commission by e-mail that it accepted the latter's proposal for partial disclosure.

38. Finally, the Commission expressed its regret for the considerable delay in responding to the Ombudsman's draft recommendation. In this respect, it stated that the present case was the first in which the Ombudsman had recommended that the Commission should overrule a third-party's objection to the disclosure of documents. The Commission explained that the reply was delayed due to the efforts it had made to reach an agreement with Porsche AG on partial disclosure, in order to avoid unnecessary litigation.

39. In its observations on the Commission's reply, the complainant pointed out that the Commission should grant full access to the three Porsche AG letters.

#### *The Ombudsman's assessment after his draft recommendation*

40. The Ombudsman understands that the Commission refused to grant access, in their entirety, to the three Porsche AG letters to former Vice-President Verheugen on the basis of the first paragraph of Article 4(2) of Regulation 1049/2001.

41. However, in its original opinion, and in the delayed reply to the Ombudsman's draft recommendation, the Commission did not offer any explanation regarding the individual facts of the case which could justify applying the above exception to the deleted paragraphs. As mentioned in paragraph 33 above, the Commission did not establish that disclosure of the relevant documents in their entirety would specifically and actually undermine Porsche AG's commercial interests.

42. The Ombudsman recalls that Regulation 1049/2001 provides for a right of access to Commission documents as a matter of principle, and that a decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation 1049/2001 [12]



. Any exceptions to this principle have to be interpreted strictly [13] .

43. Moreover, the Ombudsman points out that he did not ask the Commission to "overrule" a third-party's objection to disclosure of documents. As already stated above in paragraph 34, he pointed out that, according to Community case-law, such objections are not mandatory for the Commission. The Commission remains bound to carry out its own assessment, and to put forward legally convincing arguments as to why full disclosure is not possible. The Commission did not follow this procedure, even after consulting the third-party concerned. This is an instance of maladministration and the Ombudsman will make a critical remark below.

44. Finally, the Ombudsman does not find it necessary further to elaborate on the Commission's delay in replying to his draft recommendation, which became the subject of a special report submitted to Parliament. He acknowledged the Commission's expression of regret and trusts that it will do its utmost to avoid similar situations in the future.

## **B. Conclusions**

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

By failing properly to justify why it refused access in their entirety to the three letters sent by Porsche AG to former Vice-President Verheugen, the Commission committed an instance of maladministration.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 7 July 2010

[1] OJ 2001 L 145, p. 43. Article 7, second paragraph, of Regulation 1049/2001 provides that: "*In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.*"

[2] Article 4(1) of Regulation 1049/2001 reads as follows: "*The institutions shall refuse access to a document where disclosure would undermine the protection of:*

*(a) the public interest as regards:*





- *public security,*
- *defence and military matters,*
- *international relations,*
- *the financial, monetary or economic policy of the Community or a Member State;*

*(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. "*

[3] Article 4(2) of Regulation 1049/2001 reads as follows: "*The institutions shall refuse access to a document where disclosure would undermine the protection of:*

- *commercial interests of a natural or legal person, including intellectual property,*
- *court proceedings and legal advice,*
- *the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure "*.

[4] Article 4(4) of Regulation 1049/2001 reads as follows: "*As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. "*

[5] See footnote 5.

[6] Article 4(6) of Regulation 1049/2001 reads as follows: "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. "*

[7] Article 13, paragraph 2, TEU reads as follows: "*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation. "*

[8] The Report is available on the Ombudsman's website at the following address:  
<http://www.ombudsman.europa.eu/cases/specialreport.faces/en/4639/html.bookmark>

[9] In accordance with Case T-380/04, *Terezakis v. Commission* , judgment of 30 January 2008, paragraph 88, [2008] ECR-II-11.

[10] See Case T-380/04, *Terezakis v. Commission* , paragraph 93, [2008] ECR-II-11.

[11] *Idem*, paragraph 60.

[12] Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 57 and Case



C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62.

[13] Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 66; case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63.