

Décision dans l'affaire 3193/2005/TN - Refus d'autoriser l'accès à une correspondance entre la Commission et le Danemark

Décision

Affaire 3193/2005/TN - **Ouvert le** 04/11/2005 - **Décision le** 26/07/2007

Un membre danois du parlement européen avait demandé à avoir accès à une correspondance échangée entre la Commission et les autorités danoises. La Commission avait rejeté cette demande au motif que la divulgation de ces documents porterait atteinte à la protection des objectifs des activités d'enquête (article 4, paragraphe 2, 3^e tiret, du règlement 1049/2001 [1]), ainsi qu'au processus décisionnel de l'institution, ces documents ayant trait à une question sur laquelle elle n'avait pas encore pris de décision (article 4, paragraphe 3, premier alinéa du règlement).

Au cours de l'enquête du Médiateur, la Commission a finalement autorisé l'accès aux documents demandés. Cependant, comme la Commission semblait convaincue du bien-fondé de son refus initial, le Médiateur a estimé qu'il pouvait être utile d'examiner si elle avait effectivement le droit de rejeter la première demande d'accès formulée par le plaignant.

La Commission a fait valoir que l'échange de lettres faisait partie de son processus de suivi destiné à vérifier le respect du droit communautaire, qui pouvait conduire à l'ouverture d'une procédure d'infraction au traité Euratom à l'encontre du Danemark. La Commission a indiqué que, compte tenu du caractère politiquement sensible de cette question, il aurait été prématuré de divulguer ces lettres.

Le Médiateur a demandé à la Commission d'expliquer, entre autres, à quel type d'investigation correspondaient les lettres demandées, afin de justifier l'application de l'article 4, paragraphe 2, 3^e tiret, du règlement.

La Commission a répondu que la question principale était de savoir si les autorités danoises devaient l'informer des résultats de la surveillance de la radioactivité dans l'environnement au Groenland, de manière à ce qu'elle puisse déterminer si des mesures correctives étaient nécessaires. La Commission a indiqué qu'elle avait initialement demandé cette information en présumant que le traité Euratom s'appliquait au Groenland, mais qu'elle avait ensuite reconnu que ce n'était pas le cas. La Commission a fait valoir



qu'au moment où le plaignant a formulé sa demande d'accès aux documents, elle ne savait pas encore si elle poursuivrait ses efforts en vue d'obtenir cette information du Danemark sur une base volontaire.

Le Médiateur a fait remarquer que, lors de l'examen de la demande d'accès, la Commission avait fait valoir que le suivi pouvait éventuellement donner lieu à une procédure d'infraction au traité Euratom, alors qu'à l'époque de la demande, elle avait déjà admis que le traité Euratom ne s'appliquait pas au Groenland. Le Médiateur a constaté que la Commission n'avait pas expliqué quel (autre) type d'enquête elle pouvait avoir menée dans le cadre de ses compétences. Par conséquent, le Médiateur a conclu que le refus initial de la Commission d'autoriser l'accès aux lettres n'était pas fondé sur des motifs valables et suffisants.

[1] Règlement (CE) n° 1049/2001 du Parlement européen et du Conseil du 30 mai 2001 relatif à l'accès du public aux documents du Parlement européen, du Conseil et de la Commission, JO 2001 L 145, p. 43.

Strasbourg, 26 July 2007

Dear Mr B.,

On 5 October 2005, you submitted a complaint to the European Ombudsman against the European Commission concerning its refusal to provide access to certain documents, in accordance with Regulation 1049/2001. On 19 October 2005, you submitted to the Ombudsman documents in support of your complaint.

On 4 November 2005, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 3 February 2006 and I forwarded it to you with an invitation to make observations, if you so wished, by 31 March 2006. No observations were received from you by that date.

On 27 September 2006, I wrote to the Commission, asking for further information in relation to your complaint. I also asked the Commission to allow my services to inspect the documents concerned. The Commission sent its reply on 30 January 2007. I forwarded it to you with an invitation to make observations, if you so wished, by 31 March 2007. No observations were received from you by that date.

I am now writing to let you know the results of the inquiries that have been made.

THE COMPLAINT

The complainant complained about the Commission's continuing refusal to provide access, in accordance with 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 (1) ("Regulation 1049/2001"), to the following documents:

- letter of 6 January 2004 from the Directorate-General for Energy and Transport to the Permanent Representation of Denmark (TREN D/03/22884);
- letter of 11 June 2004 from the Directorate-General for Energy and Transport to the Permanent Representation of Denmark (TREN D/04/8777); and
- letter of 15 September 2004 from the Permanent Representation of Denmark to the Directorate-General for Energy and Transport (TREN A/04/30692) (2) .

On the basis of the documents submitted in support of the complaint, the latter may be summarised as follows:

The Commission's reply to the request for access

On 2 June 2005, the complainant made a request to the Commission for access to certain documents related to Petition 720/02 to the European Parliament.

By letter of 6 July 2005, the Commission responded to the request, stating that the documents held by it that corresponded to the request were a letter of 15 September 2004 (TREN A/04/30692) from the Danish authorities to the Commission and two letters from the Commission to the Danish authorities, dated 6 January 2004 (TREN D/03/22884) and 11 June 2004 (TREN D/04/8777). The Commission pointed out that it had not identified any breach of Community law in the facts reported in Petition 720/2002. Further to the petition, it had nevertheless contacted the Danish authorities in the framework of its general competence of monitoring the Member States' compliance with Community law. Accordingly, the documents to which the complainant had requested access constituted part of preliminary consultations within the framework of the Commission's general competence of monitoring compliance with Community law by the Member States. The documents in question did originate from Petition 720/2002, but did not directly relate to the issue raised by the petition.

The Commission further argued that the letters were covered by two of the exceptions to the right of access laid down in Regulation 1049/2001.

According to the Commission, the documents formed part of the preliminary consultations that are necessary for the Commission's monitoring activities. Disclosure of these preliminary exchanges at a stage before any decision has been taken would render public internal preparatory discussions, which form an integral and necessary part of the Commission's decision-making process. Making the documents public would also risk creating confusion with regard to the institution's official position and intentions pertaining to its monitoring activities, thereby jeopardising the Commission's capacity to ensure the correct monitoring of the application of Community law. Disclosure of the preliminary consultations at the stage in which the monitoring process was at that point in time would undermine the protection of the purpose of the Commission's investigations and seriously undermine the protection of its decision-making process. Accordingly, the documents were covered by the exceptions laid down in Article 4(2), third indent (3) , and Article 4(3), first subparagraph (4) , of Regulation 1049/2001 and could not, therefore, be disclosed. According to the Commission, no partial access could be granted and there was no



overriding public interest in disclosure.

The Commission's reply to the confirmatory application

On 11 July 2005, the complainant submitted a confirmatory application for access to the three documents to the Commission.

The Commission replied to the complainant's confirmatory application on 2 August 2005, thanking him for his interest in the Commission's position regarding the implementation of Euratom legislation in Denmark. The Commission reiterated the content of its original reply to the complainant's request for access, that is, that the documents in question did not directly relate to the issue raised in Petition 720/2002, which was, in simple terms, the admissibility of the retroactive application of Euratom legislation. In relation to the Petition, the Commission did not identify any breach of Community law. However, the Petition led the Commission to monitor the state of implementation of Euratom legislation in Denmark. The Commission therefore requested information concerning Denmark's environmental monitoring activities as set out in Article 35 of the Euratom Treaty. Consequently, the requested documents are not directly linked to Petition 720/2002.

The correspondence to which the complainant requested access forms part of the preliminary consultations that are necessary for the Commission's monitoring activities. The Commission reserves the right further to ensure respect of radiation protection *acquis* and in general of Euratom health and safety provisions. The exchange of letters therefore constituted an information request made in the context of the monitoring process designed to verify current compliance with Community law. This could potentially result in the launching of an infringement procedure. Considering the political sensitivity of the issue of radiation protection and the necessity to safeguard the co-operation between the Commission and Denmark, disclosure of the requested documents at that stage of the consultations would have been premature and would have undermined the Commission's capacity to ensure the correct monitoring of the application of Community law. Granting access to the documents concerned before any decision had been taken would also risk confusing the Commission's monitoring activities with its official position in Petition 720/2002. As a consequence, disclosure of the requested documents at the time in question would have seriously undermined the Commission's ongoing decision-making process. The documents were therefore covered by the exceptions in Article 4(2), third indent, and Article 4(3), first subparagraph, of Regulation 1049/2001. No partial access could be granted and the Commission did not find that the complainant had put forward any argument establishing an overriding public interest in disclosure.

The complainant's allegation

The complainant alleged that the Commission wrongly refused access to the above-mentioned documents.

THE INQUIRY The Commission's opinion

In its opinion, the Commission made, in summary, the following comments:

Background

The documents to which the complainant requested access pursuant to Regulation 1049/2001 constituted correspondence between the Commission and the Danish authorities undertaken within the wider context of Petition 720/2002 which was submitted



to Parliament and concerned the retroactive applicability of Euratom legislation and the long-term health problems of Danish workers who removed radioactive material from the crash site of an accident involving a US military aircraft in Greenland in 1968. The petitioners, who had worked on the site, claimed that Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation (5) (the "BSS Directive") should be applied. The Commission informed the responsible Parliament committee that it did not consider possible a retroactive application of the BSS Directive to the pre-accession period. However, as a result of the Petition, the Commission contacted Denmark and requested information concerning the environmental monitoring activities of Denmark as set out in Article 35 of the Euratom Treaty. Consequently, the correspondence to which the complainant requested access related to the latter request for information and not to the Petition.

The request for access

The correspondence to which the complainant requested access forms part of the preliminary consultations that are necessary for the Commission's monitoring activities. The Commission reserves the right further to ensure respect of the radiation protection legislation and in general of Euratom health safety provisions. The exchange of letters therefore constituted an information request concerning the monitoring process designed to verify compliance with Community law at the time. The Commission went on to point out that the monitoring process in question could potentially result in the launching of an infringement procedure with regard to the situation. The proper conduct of infringement proceedings aims in particular at allowing the Member State concerned to comply voluntarily with the Treaty requirements or to justify its position. This rationale applies even more so with regard to preliminary consultations. Indeed, considering the political sensitivity of the issue, that is, radiation protection, and the necessity to safeguard the co-operation between the Commission and Denmark, disclosure of the requested documents at that stage of the consultations would have been premature and would have undermined the Commission's capacity to ensure the correct monitoring of the application of Community law. Moreover, it would have reduced the willingness of the Danish authorities to co-operate with the Commission. For the above reasons, the documents in question were covered by the exception as laid down in Article 4(2), third indent, of Regulation 1049/2001, which stipulates that "*the institution shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits*".

Furthermore, as long as the Commission has not taken a decision on opening an infringement procedure according to Article 141 Euratom, which is equivalent to Article 226 in the EC Treaty, disclosure of the documents concerned would seriously undermine the ongoing decision-making process according to Article 4(3), first subparagraph, of Regulation 1049/2001. Disclosing the documents at that stage of the proceedings would have exposed the Commission to undue external pressure and would thereby have hindered a free exchange of views within the Commission as well as co-operation with the Danish authorities. It is absolutely essential for the institution's decision-making process that its services be able to require information from a Member State and analyse, free from



external pressures, all aspects of the situation that may lead to the opening of a formal infringement procedure. The Commission's services also have to be free to put forward ideas and proposals, without having to take into account the possibility that their opinions and assessments could be disclosed to the public. As the decision-making process relates to the preliminary monitoring activities of the Commission, the same reasoning as above applies.

At that stage of the proceedings, no partial access under Article 4(6) (6) of Regulation 1049/2001 could be granted without undermining the Commission's investigations and seriously undermining its decision-making process.

The exceptions of Article 4(2) and (3) of Regulation 1049/2001 apply unless they are waived by an overriding public interest in disclosure. However, the complainant did not put forward any arguments demonstrating that such an overriding interest did indeed exist. Consequently, the prevailing interest in the case lies rather in protecting the purpose of the Commission's investigations and its decision-making process.

The complainant's observations

The Commission's opinion was sent to the complainant for possible observations. No observations were submitted by the complainant.

Further inquiries

After careful consideration of the Commission's opinion, it appeared that further inquiries were necessary.

The Ombudsman noted the Commission's argument that the letters to which access was requested constituted part of the Commission's "monitoring process". However, Article 4(2), third indent, of Regulation 1049/2001 refers to inspections, investigations and audits, not to monitoring processes. Furthermore, it follows from the case-law of the Community Courts that the exceptions set out in Article 4 need to be interpreted restrictively. In view thereof, and in order to justify the application of Article 4(2), third indent, of Regulation 1049/2001, the Commission was asked to explain:

- what kind of inspection, investigation or audit the relevant letters belonged to;
- how a disclosure of the letters could undermine the purpose of that inspection, investigation or audit; and
- what relevance Article 4(3), first subparagraph, of Regulation 1049/2001 has for the Commission's letters of 6 January and 11 June 2004, sent to the Danish authorities.

In accordance with Article 3(2) of the Ombudsman's Statute, the Commission was also asked to allow the Ombudsman's services to inspect the documents in question.

The Commission's reply

In reply to the Ombudsman's further inquiries, the Commission stated that the main question in the case is whether the Danish authorities should inform it of the results of the monitoring of the environmental radioactivity in Greenland, so that it can determine whether remedial action would now be appropriate in the area where the accident occurred in 1968.



Originally, the Commission requested information from the Danish authorities on the assumption that the Euratom Treaty applied to Greenland (letter of 6 January 2004). The Danish authorities replied by fax on 30 January 2004, arguing that the Euratom Treaty did not apply to Greenland. Attached to this fax message, the Danish authorities sent the record of rectification of the Treaty on European Union.

The Commission acknowledged that the Euratom Treaty is not applicable to Greenland. On 11 June 2004, it asked the Danish authorities to provide the requested information on a voluntary basis.

At the time the complainant requested access to the exchange of letters between the Commission and the Danish authorities, it was still unclear whether the Commission would pursue its efforts to obtain information on the level of radioactivity in Greenland. The Commission therefore refused to disclose the correspondence with the Danish authorities in order not to jeopardise the chances of co-operation on a voluntary basis. The Commission considered that disclosure, at that time, would reduce the willingness of the Danish authorities to provide the information on a voluntary basis, which would have undermined the purpose of the investigation it intended to carry out. Furthermore, pending a decision on the action to be taken, disclosure would also seriously affect the Commission's ability to take a decision based on an understanding with the Danish authorities.

For the above reasons, the Commission took the view that the exceptions set out in Article 4(2), third indent, and in Article 4(3), first subparagraph, of Regulation 1049/2001 prevented disclosure of the correspondence with the Danish authorities.

With the passing of time, the reasons for withholding the requested documents no longer apply. The Commission has consulted the Danish authorities regarding the possible disclosure of the fax of 30 January 2004 from the Danish Ministry of Foreign Affairs and of the letter of 15 September 2004 of the Permanent Representation of Denmark. The Danish authorities gave their consent to disclosure of their part of the correspondence. Consequently, the Commission is now disclosing the complete exchange of letters with the Danish authorities regarding the provision of information concerning the level of radioactivity in Greenland.

Enclosed with its opinion, the Commission provided copies of the correspondence. Since the Commission had disclosed the documents to which the complainant had requested access, it considered that there was no longer any need for an inspection of the documents by the Ombudsman services.

The complainant's comments

The complainant was invited to submit comments on the Commission's reply, if he so wished. No comments were received from him.

THE DECISION 1 Preliminary remark

1.1 In connection with his further inquiries of 27 September 2006, the European Ombudsman also asked the European Commission, in accordance with Article 3(2) (7) of



the Ombudsman's Statute, to allow his services to inspect the documents concerned by the present case.

1.2 In the context of the Ombudsman's further inquiries, the Commission provided the complainant with copies of the documents in question.

1.3 In view of the fact that the Commission has granted access to the relevant documents, the Ombudsman no longer considers an inspection of the documents in question to be relevant. However, the Commission granted access while appearing still to defend the propriety of its challenged (initial) refusal. For this reason, the Ombudsman considers it relevant and appropriate to examine whether the Commission wrongly refused access to the documents in question, by its reply of 6 July 2005 to the complainant's access request and by its decision of 2 August 2005 on the complainant's confirmatory application.

2 The challenged refusal to grant access

2.1 The complaint concerned the Commission's refusal to provide access, in accordance with 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 (8) (" Regulation 1049/2001"), to the following documents: (i) a letter of 6 January 2004 from the Directorate-General for Energy and Transport to the Permanent Representation of Denmark (TREN D/03/22884); (ii) a letter of 11 June 2004 from the Directorate-General for Energy and Transport to the Permanent Representation of Denmark (TREN D/04/8777); and (iii) a letter of 15 September 2004 from the Permanent Representation of Denmark to the Directorate-General for Energy and Transport (TREN A/04/30692) (9) . The complainant alleged that the Commission wrongly refused access to the documents in question.

2.2 According to the Commission, the documents to which the complainant had requested access constituted correspondence between the Commission and the Danish authorities undertaken within the wider context of Petition 720/2002 which was submitted to the European Parliament and concerned the retroactive applicability of Euratom legislation. The Commission informed the responsible Parliament committee that it did not consider possible a retroactive application of the legislation to the pre-accession period. However, as a result of the Petition, the Commission contacted Denmark requesting information concerning the environmental monitoring activities of Denmark as set out in Article 35 of the Euratom Treaty.

2.3 The Commission argued that the correspondence to which the complainant requested access formed part of the preliminary consultations that are necessary for the Commission's monitoring activities. The Commission reserves the right further to ensure respect of the radiation protection legislation and in general of Euratom health safety provisions. The exchange of letters therefore constituted an information request undertaken within a monitoring process which was designed to verify compliance with Community law at the relevant time and could potentially result in the launching of an infringement procedure with regard to the situation. The proper conduct of infringement proceedings aims in particular at allowing the Member State concerned to comply



voluntarily with the Treaty requirements or to justify its position. This rationale applies even more so with regard to preliminary consultations. Indeed, considering the political sensitivity of the issue, that is, radiation protection, and the necessity to safeguard the co-operation between the Commission and Denmark, disclosure of the requested documents at that stage of the consultations would have been premature and would have undermined the Commission's capacity to ensure the correct monitoring of the application of Community law. Moreover, it would have reduced the willingness of the Danish authorities to co-operate. For the above reasons, the documents in question were covered by the exception laid down in Article 4(2), third indent, of Regulation 1049/2001, which stipulates that "*the institution shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits*".

2.4 The Commission further argued that as long as it has not taken a decision on opening an infringement procedure according to Article 141 Euratom, which is equivalent to Article 226 in the EC Treaty, disclosure of the documents concerned would, as provided for in Article 4(3), first subparagraph, of Regulation 1049/2001, seriously undermine the ongoing decision-making process. Disclosing the documents at that stage of the proceedings would have exposed the Commission to undue external pressure and would thereby have hindered a free exchange of views within the Commission as well as co-operation with the Danish authorities. It is absolutely essential for the institution's decision-making process that its services can, free from external influences, require information from a Member State and analyse all aspects of the situation that may lead to the opening of a formal infringement procedure. The Commission's services also have to be free to put forward ideas and proposals, without having to take into account the possibility that their opinions and assessments could be disclosed to the public. As the decision-making process relates to the preliminary monitoring activities of the Commission, the same reasoning as that mentioned in point 1.3 above applies.

2.5 The Commission finally argued that at that stage of the proceedings, no partial access under Article 4(6) of Regulation 1049/2001 could be granted without undermining its investigations and seriously undermining its decision-making process. It further pointed out that the complainant had not put forward any arguments demonstrating that there was an overriding public interest in disclosure.

2.6 On the basis of the Commission's opinion, the Ombudsman found that further inquiries were necessary. The Ombudsman noted the Commission's argument that the letters to which access was requested constituted part of the Commission's "monitoring process". However, Article 4(2), third indent, of Regulation 1049/2001 refers to inspections, investigations and audits, not to monitoring processes. Furthermore, it follows from the case-law (10) of the Community Courts that the exceptions set out in Article 4 need to be interpreted restrictively. In view thereof, and in order to justify the application of Article 4(2), third indent, of Regulation 1049/2001, the Commission was asked to explain:

- what kind of inspection, investigation or audit the relevant letters belonged to?,
- how a disclosure of the letters could undermine the purpose of that inspection, investigation or audit?, and



- what relevance Article 4(3), first subparagraph, of Regulation 1049/2001 has for the Commission's letters of 6 January and 11 June 2004, sent to the Danish authorities?

2.7 In reply to the Ombudsman's further inquiries, the Commission stated that the main question in the case is whether the Danish authorities should inform it of the results of the monitoring of the environmental radioactivity in Greenland, so that it can determine whether remedial action would now be appropriate in the area where the accident occurred in 1968. Originally, the Commission requested information from the Danish authorities on the assumption that the Euratom Treaty applied to Greenland (letter of 6 January 2004). The Danish authorities replied by fax on 30 January 2004, arguing that the Euratom Treaty did not apply to Greenland. Attached to this fax message, the Danish authorities sent a report of rectification of the Treaty on European Union. The Commission acknowledged that the Euratom Treaty is not applicable to Greenland. On 11 June 2004, it asked the Danish authorities to provide the requested information on a voluntary basis.

2.8 In its reply, the Commission further argued that at the time the complainant requested access to the exchange of letters between the Commission and the Danish authorities, it was still unclear whether the Commission would pursue its efforts to obtain information on the level of radioactivity in Greenland. The Commission therefore refused to disclose the correspondence with the Danish authorities in order not to jeopardise the chances of co-operation on a voluntary basis. The Commission considered that disclosure, at that time, would have reduced the willingness of the Danish authorities to provide the information on a voluntary basis. Such an eventuality would have undermined the purpose of the investigation which the Commission intended to carry out. Furthermore, pending a decision on the action to be taken, disclosure would also seriously affect the Commission's ability to take a decision based on an understanding with the Danish authorities. For the above reasons, the Commission took the view that the exceptions set out in Article 4(2), third indent, and in Article 4(3), first subparagraph, of Regulation 1049/2001 prevented disclosure of the correspondence with the Danish authorities.

2.9 The Commission finally stated that with the passing of time, the reasons for withholding the requested documents no longer apply. The Commission has consulted the Danish authorities regarding the possible disclosure of the fax of 30 January 2004 from the Danish Ministry of Foreign Affairs and of the letter of 15 September 2004 of the Permanent Representation of Denmark. The Danish authorities gave their consent to disclosure of their part of the correspondence. Consequently, the Commission is now disclosing the complete exchange of letters with the Danish authorities regarding the provision of information concerning the level of radioactivity in Greenland.

2.10 The Ombudsman notes the following as regards the content of the documents in question. In its letter of 6 January 2004, the Commission recalled that according to Article 36 of the Euratom Treaty, "*each Member State shall establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards.*" The Commission also recalled that according to Article 36 of the Euratom Treaty, "*the appropriate authorities shall periodically communicate*



information on the checks referred to in Article 35 to the Commission so that it is kept informed of the level of radioactivity to which the public is exposed. " The Commission informed the Danish authorities that reports submitted to the Commission in the past on the monitoring activities set out in Article 35 of the Euratom Treaty did not contain any information on environmental radioactivity concerning Greenland. The Commission argued that the Euratom Treaty was applicable to Greenland and asked the Danish authorities to transmit to it the relevant data for Greenland for the period January 1994 to December 2002. In its response of 30 January 2004 (11) , the Danish authorities informed the Commission that the Euratom Treaty does not apply to Greenland. By letter of 11 June 2004, the Commission acknowledged that the Euratom Treaty does not apply to Greenland, and asked the Danish authorities to disregard the fact that the request for information of 6 January 2004 was based on the applicability of the Euratom Treaty provisions to the territory of Greenland. Instead, the Commission asked the Danish authorities to agree to provide the relevant data available for Greenland on a voluntary basis. By letter of 15 September 2004, the Danish authorities pointed out that since Greenland is not part of the Community, data from that territory are not relevant for the annual monitoring reports produced by the Commission. The Danish authorities therefore asked the Commission to explain the background of its request to obtain, on a voluntary basis, information on environmental monitoring data concerning Greenland.

2.11 The Ombudsman recalls that the Commission refused access to the documents in question on the basis of Article 4(2), third indent, of Regulation 1049/2001. The Commission argued that the exchange of letters constituted an information request undertaken within the context of a monitoring process that was designed to verify compliance with Community law and could potentially result in the launching of an infringement procedure according to Article 141 Euratom. Article 4(2), third indent, of Regulation 1049/2001 provides that the institution shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits. The Ombudsman notes from the content of the documents in question that the Commission's initial information request concerned radioactivity data relating to Greenland and suggested that the Danish authorities might have failed to fulfil its obligations under Article 35 and Article 36 of the Euratom Treaty. The Ombudsman considers, however, that at the time of the request for access, it was clear that the information request could not lead to an infringement procedure under the Euratom Treaty, since the Commission had acknowledged that the Euratom Treaty does not apply to Greenland. Furthermore, in its reply to the Ombudsman's further inquiries, the Commission provided an argument that was different from the one contained in its reply to the complainant's confirmatory application. In the new argument, the Commission contended that disclosure at the time would reduce the willingness of the Danish authorities to provide the information on a voluntary basis, and that such an eventuality would " *undermine the purpose of the investigation, which the Commission intended to carry out* ". However, bearing in mind that there could be no infringement procedure under the Euratom Treaty regarding the matter, the Commission has not explained what kind of investigation (within its competence) it referred to in its reply to the further inquiries. In view of the above, the Ombudsman considers that the Commission has failed to give valid



and adequate grounds for its reliance on the exception provided for in Article 4(2), third indent, of Regulation 1049/2001.

2.12 The Ombudsman recalls that the Commission also invoked Article 4(3), first subparagraph, of Regulation 1049/2001 as grounds for its refusal to grant access to the documents in question. The Commission argued that granting access to the documents concerned before any decision had been taken would risk confusing the Commission's monitoring activities with its official position in Petition 720/2002, thus seriously undermining its ongoing decision-making process. In its reply to the Ombudsman's further inquiries, the Commission made the additional statement that "*pending a decision on the action to be taken, disclosure would also seriously affect the Commission's ability to take a decision based on an understanding with the Danish authorities.*" Article 4(3), first subparagraph, of Regulation 1049/2001 stipulates that access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter for which a decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process. In the Ombudsman's view, the Commission's letters to the Danish authorities cannot reasonably be considered as documents drawn up by an institution for internal use. Article 4(3), first subparagraph, of Regulation 1049/2001 could therefore possibly apply only to the letter of 15 September 2004 from the Danish authorities. However, to the extent the Commission's argument for refusing access appears to relate to a possible future decision to launch an infringement procedure in accordance with Article 141 Euratom, it has already been concluded, in point 2.11 above, that there could be no such decision. In addition, to the extent this argument might refer to another kind of decision, the Ombudsman is of the opinion that such argument would be too general in nature, since the Commission has not made any specific reference to another possible kind of decision (within its competence). In view of the above, the Ombudsman considers that the Commission has failed to give valid and adequate grounds for its reliance on the exception provided for in Article 4(2), third indent, of Regulation 1049/2001.

2.13 On the basis of the conclusions reached in points 2.11 and 2.12 above, the Ombudsman finds that the Commission's refusal to provide access to the documents in question, as this refusal was expressed in its letters of 6 July 2005 and 2 August 2005 to the complainant, was not based on valid and adequate grounds. This constitutes an instance of maladministration. Taking into account that the Commission provided access to these documents only in the context of the present inquiry, the Ombudsman will make a relevant critical remark.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

The Commission refused access to the documents in question on the basis of Article 4(2), third indent, and Article 4(3), first subparagraph, of Regulation 1049/2001. The Commission argued that the documents concerned related to radioactivity data for Greenland that it had requested in the context of its verification of Denmark's compliance with Community



law. It went on to point out that this verification process could potentially result in the launching of an infringement procedure, under the Euratom Treaty. The Commission has also acknowledged, however, in this regard that the Euratom Treaty does not apply to Greenland. Hence, there could be no infringement procedure, under the Euratom Treaty, regarding the matter. Nevertheless, the Commission has not explained what kind of investigation it could conduct or decision it could reach, within its competence, in relation to the documents at issue. In light of the above, the Commission's refusal to provide access to these documents, as this refusal was expressed in its letters of 6 July 2005 and 2 August 2005 to the complainant, was not based on valid and adequate grounds. This constituted an instance of maladministration.

Given that the Commission has now granted access to the documents in question, it is not relevant to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2001 L 145, p. 43.

(2) In his complaint, the complainant stated that the letter in question was a letter of 15 September 2004 from the Directorate-General for Energy and Transport to the Danish authorities. However, it appears from the Commission's opinion and, subsequently, from the disclosed documents that the letter in question is in fact a letter from the Danish authorities to the Commission. This issue has not been questioned by the complainant during the course of the inquiry.

(3) "*The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*"

(4) "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*"

(5) OJ 1996 L 159, p. 1.

(6) "*If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.*"



(7) " *The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy. (...)* ".

(8) OJ 2001 L 145, p. 43.

(9) In his complaint, the complainant stated that the letter in question was a letter of 15 September 2004 from the Directorate-General for Energy and Transport to the Danish authorities. However, it appears from the Commission's opinion and, subsequently, from the disclosed documents that the letter in question is in fact a letter from the Danish authorities to the Commission. This issue has not been questioned by the complainant during the course of the inquiry.

(10) See, e.g., Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 45.

(11) Although this letter was not covered by the request for access, a copy of it was provided by the Commission in its response to the Ombudsman's further inquiries.