

Besluit over de weigering van het Uitvoerend Agentschap innovatie en netwerken (INEA) om het publiek volledige toegang te verlenen tot een document in verband met het project voor de basistunnel tussen Lyon en Turijn (zaak 465/2021/VB)

Besluiten

Zaak 465/2021/VB - Geopend op 16/03/2021 - Besluit over 27/01/2022 - Betrokken instelling Europees Uitvoerend Agentschap klimaat, infrastructuur en milieu |

De zaak had betrekking op de weigering van het Uitvoerend Agentschap innovatie en netwerken (INEA) om het publiek volledige toegang te verlenen tot een wijziging van een subsidieovereenkomst in verband met het project voor de basistunnel tussen Lyon en Turijn. Het INEA betoogde dat de volledige openbaarmaking van het document de commerciële belangen van de bij het project betrokken entiteiten zou schaden en de privacy en integriteit van personen zou ondermijnen.

Op basis van een inspectie van het gevraagde document was de Ombudsvrouw van mening dat er een hoger openbaar belang bestond in het openbaar maken van informatie met betrekking tot vertragingen in de voltooiing van het project. De Ombudsvrouw stelde daarom voor aan het Europees Uitvoerend Agentschap klimaat, infrastructuur en milieu (Cinea), dat het INEA op 1 april 2021 opvolgde en verving, om zijn standpunt betreffende het verzoek van klager te herzien, met het oog op het verlenen van de breedst mogelijke publieke toegang.

In zijn antwoord stemde het Cinea ermee in ruimere toegang tot het document te verlenen. Het agentschap betoogde echter dat verdere openbaarmaking de openbare veiligheid zou ondermijnen. Het agentschap merkte ook op dat de uitzondering ten behoeve van de openbare veiligheid in de EU-wetgeving inzake de toegang van het publiek tot documenten absoluut is en niet door een openbaar belang terzijde kan worden geschoven.

De Ombudsvrouw merkte op dat het agentschap voordien geen beroep had gedaan op de uitzondering betreffende de openbare veiligheid en achtte de door het Cinea in die zin gegeven motivering ontoereikend. Zij stelde daarom voor dat het Cinea klager een passende motivering zou verstrekken ter ondersteuning van de toepassing van de uitzondering ten behoeve van de openbare veiligheid.

In antwoord hierop stemde het Cinea ermee in klager aanvullende informatie te verstrekken. De Ombudsvrouw is van mening dat de aanvullende informatie voldoende is om de reden te



achterhalen waarom het Cinea zich beriep op de uitzondering ten behoeve van de openbare veiligheid. Gezien deze aanvullende informatie acht de Ombudsvrouw het ook redelijk dat het Cinea zich in deze zaak beroept op de uitzondering ten behoeve van de openbare veiligheid.

Aangezien het Cinea ermee instemde de suggestie van de Ombudsvrouw op te volgen, sloot de Ombudsvrouw de zaak met de conclusie dat verder onderzoek niet gerechtvaardigd is.

Background to the complaint

1. The Lyon-Turin railway link is a cross-border railway connection between France and Italy which includes a tunnel under the Alps. The project received EU funding, for a maximum amount of EUR 813 781 900, under the Connecting Europe Facility (CEF) Programme [1] for studies and works to be completed along the cross-border section of the project by the end of 2019. In 2020, the grant agreement was amended to extend its duration by 36 months to complete the activities that were delayed.
2. In December 2020, the complainant, an organised group that opposes the project, requested public access to the amendment to the grant agreement ("the amendment").
3. On 4 January 2021, the European Innovation and Networks Executive Agency (INEA) granted partial access to the amendment. It argued that disclosing the remaining parts could undermine the privacy and integrity of individuals [2] and the commercial interests of the parties concerned by the agreement [3]. In particular, INEA did not disclose the indicative start and end dates of the project's activities and information related to the milestones of the project, which INEA uses to monitor and verify beneficiaries' compliance with their obligations under the grant agreement.
4. The complainant requested INEA to review its decision, by making a 'confirmatory application'. It considered that the information disclosed was not sufficient for the public to follow the project's progress.
5. On 22 February 2021, INEA confirmed its initial decision to grant only partial access to the document. It reiterated its views that additional disclosure would negatively affect the commercial interests of the entities involved in the project and undermine the privacy and integrity of individuals whose personal data are included in the document. INEA also consulted the national authorities, in line with EU access to document rules [4], which objected to further disclosure of the document.
6. Dissatisfied with INEA's decision, the complainant submitted a complaint to the Ombudsman.

The Ombudsman's proposal for a solution



7. On 16 March 2021, the Ombudsman's inquiry team asked to inspect the document in question, as well as the documentation on the consultation of Member State authorities.
8. On 1 June 2021, based on an analysis of the inspected documents, the Ombudsman proposed a solution to the European Climate, Infrastructure and Environment Executive Agency (CINEA), which succeeded and replaced INEA on 1 April 2021.
9. In her solution proposal, the Ombudsman considered that there was an overriding public interest in disclosure of the information related to delays in completing the project. She noted that the Lyon-Turin base tunnel project is a large-scale infrastructure project, which received funding in order to be built within a certain timeline. The delays that led to the extension of the deadline for the project's completion arguably affect the public. By making public the adapted timeline, the public would be in a position to monitor the implementation of the project and check whether and why delays are occurring.
10. In view of these considerations, **the Ombudsman proposed to CINEA to review its position on the complainant's public access request, with a view to granting the widest possible access to the amendment.**
11. In reply, **CINEA agreed to grant wider public access to the document** . It agreed to disclose the past dates of activities and milestones already carried out and most of the information about the project's milestones.
12. However, CINEA maintained the Agency's position regarding the disclosure of sensitive future dates and of past dates that could reveal the timing of future ones. CINEA also invoked an additional exception under the EU's rules for access to documents, namely that disclosure of the remaining dates would undermine public security [5] .
13. The complainant commented on CINEA's reply that it was not satisfied with the additional information disclosed. It considered that, as most of the additional information is related to past dates, the public is still not in a position to monitor the implementation of the project. The complainant also questioned how the disclosure of additional dates could undermine public security.

The Ombudsman's further inquiries

14. The Ombudsman's solution proposal was based on the existence of an overriding public interest in disclosure of certain information contained in the amendment to the grant agreement. The public security exception, which CINEA invoked in reply to the Ombudsman's solution proposal, is absolute and cannot be overridden by a public interest in disclosure.
15. The public security exception was not previously relied on by the Agency in its initial and confirmatory decisions on the complainant's request for public access. This is regrettable. Had the Agency relied on the public security exception at an earlier stage, the complainant would



have had a better understanding of the reasons for the non-disclosure of certain parts of the document. In the context of future access requests, CINEA should ensure that it refers to all applicable exceptions in its decisions on access requests.

16. Institutions have a wide discretion in determining whether the disclosure of a document would undermine public security. [6] That said, the public security exception has to be supported by an appropriate statement of reasons, which has to be sufficient for the complainant to ascertain the reasons for the refusal and for EU courts to exercise their power of review [7] .

17. The Ombudsman considered that the reasoning provided by CINEA in its reply to the Ombudsman's proposal for a solution was not sufficient for the complainant, or for the Ombudsman, to understand how further disclosure of the document would undermine public security.

18. The Ombudsman therefore suggested to CINEA that it **should adopt the decision to grant wider public access to the document, as agreed in reply to the solution proposal, and include an appropriate statement of reasons supporting its reliance on the public security exception.**

19. On 30 November 2021, CINEA replied to the Ombudsman's suggestion. It also shared with the Ombudsman a draft decision addressed to the complainant on the disclosure of the requested document.

20. In its reply, CINEA agreed to even wider disclosure of the document. In the draft letter to the complainant, CINEA explains that the disclosure of additional dates could lead to situations, which, as in the past, could threaten the progress of the project and undermine security measures protecting the worksite and workers.

The Ombudsman's assessment after her suggestion

21. The Ombudsman welcomes CINEA's positive reply to her suggestion. By including an explanation of how full disclosure of the document could undermine public security in the decision that CINEA proposes to send to the complainant, CINEA followed the Ombudsman's suggestion.

22. The Ombudsman is aware that the implementation of this project was accompanied by protests, some of which were characterised by episodes of violence that led the Italian authorities to adopt measures aimed at securing the worksites. In light of this, the Ombudsman considers that it is reasonable for CINEA to invoke the public security exception in this case. The Ombudsman trusts that CINEA will now send the proposed letter to the complainant. In view of this, no further inquiries are justified at this stage.



Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

By including an explanation of how full disclosure of the document could undermine public security in the letter that CINEA proposes to send to the complainant, CINEA followed the Ombudsman's suggestion. The Ombudsman considers that it was reasonable for CINEA to invoke the public security exception in this case. Therefore, no further inquiries are justified at this stage.

The complainant and CINEA will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 27/01/2022

[1] The Connecting Europe Facility is a EU funding instrument to promote growth, jobs and competitiveness through targeted infrastructure investment at European level.

[2] Regulation 1049/2001, Article 4(1)(b).

[3] Regulation 1049/2001, Article 4(2) first indent.

[4] Regulation 1049/2001, Article 4(5).

[5] Regulation 1049/2001, Article 4(1)(a) first indent.

[6] Judgement of the General Court of 11 July 2018, *ClientEarth v Commission* , T-644/16, para

25,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&d>

[Link]; Judgement of the Court of Justice of 1 February 2007, *Sison v Council* , C-266/05 P, para

34,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=66056&pageIndex=0&doclang=EN&mode=lst&dir>

[Link].

[7] *Sison v Council* , para 80.