

# THE EUROPEAN OMBUDSMAN

P. NIKIFOROS DIAMANDOUROS

Mr Tony Bunyan  
STATEWATCH  
PO Box 1516  
London N16 0EW  
ROYAUME UNI

Strasbourg, 10/10/2007

## **Decision on complaint 668/2007/MHZ against the European Commission**

Dear Mr Bunyan,

On 28 February 2007, you made a complaint on behalf of STATEWATCH against the European Commission

On 28 March 2007, I forwarded your complaint to the Commission.

On 16 April 2007, you clarified your allegation and claim.

On 25 April 2007, I informed the Commission of the above clarification.

On 10 July 2007, the Commission sent its opinion, which I forwarded to you with an invitation to make observations.

On 12 September 2007, you sent your observations.

On 28 September 2007, my services called you as regards your complaint.

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

## **THE COMPLAINT**

The complainant, an NGO, noted that, up to the date of submitting its complaint to the European Ombudsman, the European Commission had not published its annual report for the year 2005 concerning the number of cases in which it refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register. According to the complainant, the Commission should publish annually a report for the preceding year pursuant to Article 17(1) of 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 ("Regulation 1049/2001")<sup>1</sup>. The complainant noted therefore that the Commission's annual reports for the years 2002, 2003 and 2004 were published, respectively, on 29 April 2003, 30 April 2004 and 29 July 2005. Moreover, in the complainant's view, the only way that citizens can become informed of the Commission's response to applications for access to its documents is through its annual report.

In its original complaint to the Ombudsman, which was clarified in its further letter of 16 April 2007, the complainant alleged that the Commission failed to publish the 2005 annual report in 2006 as required under Article 17(1) of Regulation 1049/2001 and that this was a clear case of maladministration

The complainant claimed that the Commission should publish its 2005 annual report.

## **THE INQUIRY**

### ***The Commission's opinion***

The Commission sent its opinion in July 2007. It stated that "*it [was] well aware*" of the obligation to publish an annual report. However, the drafting of the annual report for 2005 was delayed due to (i) the priority given to launching the public consultation on the review of Regulation 1049/2001, including the drafting, adoption and publication of the Green Paper; and (ii) a major turnover of staff in the service in charge of implementing Regulation 1049/2001. The Commission added that a draft annual report for 2005 was currently being translated with a view to its adoption and publication in July 2007.

### ***The complainant's observations***

The complainant sent observations on 12 September 2007, stating, in summary, that, as of 11 September 2007, the Commission had still not produced its annual report for 2005 on access to documents under Regulation 1049/2001. The complainant reiterated that the Commission has a legal obligation under Regulation 1049/2001 to produce each year an annual report regarding the previous year. The complainant recalled therefore Article 17 of Regulation 1049/2001 which states that the Commission has to report by 31 January 2004 on the implementation of the Regulation and make recommendations. Furthermore, in that report, which was indeed published on 31 January 2004, there was no recommendation to introduce changes to Regulation 1049/2001 (the complainant quoted the relevant excerpt).

As regards the first reason given by the Commission for its delay, the complainant took the view that, even if the Commission's priority were the publication of the Green

---

<sup>1</sup> OJ 2001 L145, p. 43. Article 17(1) of Regulation 1049/2001 provides:

*"Each institution shall publish annually a report for the proceeding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register."*

Paper, the Commission's first obligation would be to respect its legal duty. The complainant pointed out, therefore, that the Green Paper was an internal matter for the Commission to decide after it fulfilled its legal obligations. In this respect, the complainant also noted that the Commission had promised to prepare the Green Paper for October 2006 but it only appeared in April 2007. The complainant also stated that "*it [was] hard to see*" any case for giving priority to the Green Paper as the EU constitution was "dead" and discussions were underway with respect to the Reform Treaty, in view of the EU's 50<sup>th</sup> anniversary celebrations, which were taking place in Berlin.

As regards the Commission's second reason, the complainant took the view that, precisely because of the "major turnover of staff" the Commission had experienced, it should have given priority to its legal obligations over its optional initiatives. Given the length of time which has passed and the fact that the Commission had still not produced the 2005 annual report, it appeared that the Commission's resources and staff were not being allocated to meet its legal obligations. In such a situation, the complainant considered that the Commission's internal audit services and possibly the Court of Auditors should be informed of the Commission's above failure.

The complainant concluded that both of the Commission's explanations reinforced its view that this was a case of maladministration. The complainant recalled therefore that, according to the case-law of the Court of Justice, Member States cannot plead administrative or political difficulties as an excuse for their failure to implement EC law correctly within the applicable deadline. According to the complainant, the same rule applies to the EU institutions and, in particular, to the Commission.

### ***The telephone call of 28 September 2007***

On 28 September 2007, the Ombudsman's services called the complainant's representative to inform him that the Ombudsman had become aware that the Commission has now published its Report on the application in 2005 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2007) 548 final, 24 September 2007).<sup>2</sup> The Ombudsman's services also informed him that the Ombudsman had intended to address a draft recommendation to the Commission, but that this no longer seemed useful. The complainant's representative explained that he had already seen the Commission's Report and was glad that the Commission had finally published it. He agreed that a draft recommendation would no longer serve any purpose. However, he hoped that the Ombudsman would confirm that the failure of the Commission to publish the Report on time was maladministration.

---

<sup>2</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007\\_0548en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0548en01.pdf)

## THE DECISION

### 1 Alleged delay in publishing the annual report for 2005

- 1.1 The complainant, an NGO, alleged that the European Commission failed to publish the 2005 annual report in 2006 as required by Article 17(1) of 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<sup>3</sup> ("Regulation 1049/2001"). According to the complainant, the Commission's above failure was a clear case of maladministration.

The complainant claimed that the Commission should publish its 2005 annual report.

- 1.2 In its opinion, the Commission stated that it expected to publish its report in July 2007. The Commission also stated that "*it [was] well aware*" of its obligation to publish an annual report.

The Commission provided the following reasons in order to explain its delay in publishing the 2005 report: *first*, because priority was given to the publication of the Green Paper concerning the review of Regulation 1049/2001<sup>4</sup>, and, *second*, because of "the major turnover of staff" in the service in charge of implementing that Regulation.

- 1.3 At the outset, the Ombudsman notes that the Commission had published its 2005 annual report only on 28 September 2007 despite having informed the Ombudsman and the complainant<sup>5</sup> in its opinion that it would do so by July 2007.

The Ombudsman emphasises in this respect that citizens can hardly trust the institutions if they are not able to respect the deadlines they themselves set.

- 1.4 The Ombudsman further recalls that Article 17(1) of Regulation 1049/2001 provides that:

*"Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register."* (emphasis added).

- 1.5 The Commission has acknowledged that the above Article required it to publish its annual report for 2005 before the end of 2006 and that it failed to comply with

---

<sup>3</sup> OJ 2001 L 145, p. 43.

<sup>4</sup> Com(2007)185 final, Green Paper Public Access to Documents held by the European Community A review.

<sup>5</sup> In accordance with the Ombudsman's standard practice, his services sent the complainant the Commission's opinion.

that obligation. In the Ombudsman's view, the reasons given by the Commission to explain its failure, which refer to administrative and organisational constraints, do not show that there was an objective impossibility for the Commission to comply with its legal obligation (*ultra posse nemo obligatur*<sup>6</sup>).

The Commission's failure to publish the 2005 report before the end of 2006 was, therefore, an instance of maladministration and the critical remark will be made below.

- 1.6 The Ombudsman considers that the instance of maladministration revealed by the present inquiry is especially deplorable since the publication of reports is a key mechanism of accountability to, and communication with, European citizens. The Commission should set a good example to the many new Community Agencies which have recently been established by giving high priority in future to the timely publication of reports. The Ombudsman will make a further remark on this point.

## **2 Conclusion**

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

The Commission's failure to comply with its legal obligation to publish its 2005 annual report in accordance with Article 17 of Regulation 1049/2001 was an instance of maladministration.

Since the Commission finally published the report in September 2007, the Ombudsman closes the case.

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

## **FURTHER REMARK**

The publication of reports is a key mechanism of accountability to, and communication with, European citizens. The Ombudsman encourages the Commission to set a good example to the many new Community Agencies which have recently been established, by giving high priority in future to ensuring the timely publication of reports.

P. Nikiforos DIAMANDOUROS

---

<sup>6</sup> See Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 48.