

# NOTES FOR THE PRESENTATION BY THE EUROPEAN OMBUDSMAN, Mr P. Nikiforos DIAMANDOUROS

## Reform of Regulation 1049/2001 on public access to documents

European Parliament - Committee on Civil Liberties, Justice and Home Affairs, *Brussels*, **29 November 2007**.

- Ladies and gentlemen, Members of the European Parliament and of the Committee on Civil Liberties, Justice and Home Affairs!
- I am delighted to have been invited by this Committee to contribute to today's discussion on the reform of Regulation 1049/2001 on public access to documents.
- The discussion takes place at a time when the right of public access to documents looks set to become formally recognised as a fundamental right in EU law. This will happen when the Lisbon Treaty enters into force, giving Treaty status to the Charter of Fundamental Rights. Article 42 of the Charter recognises public access to documents as a fundamental right of citizenship of the Union. It is indispensable to bear this in mind when we discuss possible improvements to Regulation 1049/2001.
- The European Ombudsman has published decisions in almost sixty cases concerning Regulation 1049/2001. Drawing on this considerable experience, I will provide you with an outline of the problems that, in my view, are of particular importance and which lend themselves to legislative reform.
- Before addressing the relevant procedural and substantive issues, I would like to draw your attention to the contribution I made in response to the Commission's Green Paper on the reform of Regulation 1049/2001. That contribution was made on 11 July this year, and is available on the European Ombudsman's website.

## Problems of procedure

### *Delays*

- The value of openness in a modern democracy is strongly affirmed in Regulation 1049/2001, which provides, amongst other things, that "openness enables citizens to participate more closely in the decision-making process".
- For the most part, this participation takes the form of involvement in the public debate, an activity which is fast-moving and increasingly so. In recognition of this, Regulation 1049/2001 lays down that its purpose is to establish rules ensuring the easiest possible exercise of the right of access, and to promote good administrative practices in the area of access to documents.
- These aims are concretely implemented in particular, in the rules governing the handling of applications. Articles 7 and 8 of the Regulation provide that
  - applications shall be handled "promptly";
  - applications shall, at any rate, be replied to within a deadline of 15 working days
  - an extension of the deadline is possible, but only in "exceptional cases". Here the institutions are obliged to notify the applicant in advance and provide him or her with detailed reasons.
- Regrettably, I see much too frequently that these provisions are not respected. The deadline of 15 working days for taking a decision on applications is frequently exhausted by the institution, apparently without any consideration of the obligation to handle the application "promptly". It should be recalled that the 15 day deadline lays down a maximum length; it is not a definition of "promptly". Furthermore, delays are caused by the late registration of applications. Since the 15 day deadline only runs, strictly speaking, from the date of registration, by delaying registration the institution concerned effectively grants itself a considerably longer deadline than foreseen in the Regulation.
- In the same vein, the deadline for replying to applications is too frequently extended without consideration of the obligation to do

so only in "exceptional" cases. And the applicants are too frequently informed of the extension very late (i.e., not in advance) and without being informed of any "detailed reasons" for the extension.

- Let me illustrate the practical consequences of these problems: In an unproblematic case in which the initial 15 day deadline has, first, effectively been prolonged through late registration, and in which the possibility of extending the deadline has been used, both in respect to the initial and the confirmatory application, the citizen concerned only receives a final decision on the request for access after three to four months. This is clearly not what the Community legislator had in mind when it introduced the obligation to handle applications "promptly".
- In order to remedy such problems, it is crucial that the relevant services of the institutions have the resources to deal adequately with access applications. I would therefore like to repeat a proposal that I made in my response to the Commission's Green Paper, namely that the provision of adequate resources could be specifically mentioned in the recital to the revised Regulation.

#### *Definition of "document"*

- In recognition of the fact that documents may take very many forms, the Community legislator wisely decided on a broad definition of the term 'document' when it adopted Regulation 1049/2001. A document within the meaning of the Regulation is *any content whatever its medium*.
- It nevertheless remains the case that Regulation 1049/2001 only applies to existing documents. It does not oblige the institutions to actually create new documents.
- Although the distinction between existing and non-existing documents may seem relatively straight forward, practice has shown an urgent need for clarification in an area of utmost importance, namely the application of the Regulation to the content of databases. In a case in which I will soon publish my findings, the European Commission has argued that Regulation 1049/2001 basically does not apply to the content of databases

unless the content is identifiable in the form of, for instance, a word or a PDF document.

- Given the vast amount of information contained in public databases, it cannot be considered acceptable that the content of databases is simply not covered by the Community legislation implementing the fundamental right of public access to documents.
- Unless the Community legislator decides to adopt legislation giving a right of access not only to documents but also to information more generally - and this may not necessarily be advisable - the revised Regulation 1049/2001 ought to contain specific and clear rules in respect of the content of databases.
- Given that there are technical as well as legal problems in this area, I proposed in my response to the Commission's Green Paper the introduction of a general obligation to take the needs of transparency into account whenever the Administration designs new databases.
- However, a satisfactory solution is also needed for the very many existing databases. I am currently considering the possibility of calling upon the European Network of Ombudsmen to obtain useful information on national solutions to the problem of databases. Needless to say, I will make any such information available to Parliament and this Committee specifically, in due course.

### Problems of substance

With regard to problems of substance, I will briefly address three issues:

- i) the issue of a "space to think",
- ii) the "overriding public interest", and
- iii) the issue of special confidentiality provisions in other Community acts.

*The issue of a "space to think"*

- I mentioned before that Regulation 1049/2001 specifically refers, in its Recitals, to the fact that "openness enables citizens to participate more closely in the decision-making process".
- As a logical consequence of this, the Community legislators *refrained* from granting the institutions a right of confidentiality whenever a document concerns their decision-making processes.
- All Regulation 1049/2001 provides is that an institution may refuse access to documents if disclosure would *seriously undermine* its decision-making process. In order to justify secrecy, it is up to the institution to demonstrate *why* and *how* its decision-making process would be *seriously undermined* if the documents concerned were to be disclosed.
- In light of this standard laid down by the Community legislator, it appears obvious that a general wish to discuss issues in private before adopting a decision cannot, in and of itself, constitute sufficient justification for secrecy. If this is the interest that the Community legislator intended to protect, it would surely not have needed to formulate the specific standard of "serious undermining of the decision-making process".
- However, complaints to the Ombudsman have too frequently shown that the important exception here concerned is invoked simply to protect the institutions' general wish to discuss issues in private. One of the arguments put forward is that institutions' internal services would simply not state their views frankly if these might at some point be disclosed to the public.
- A revised regulation could address this issue by either laying down guidelines as to what may amount to "serious undermining of the decision-making process", or simply by requiring the institutions to give detailed reasons when they invoke this exception.

*The notion of an "overriding public interest"*

- Regulation 1049/2001 provides that even if certain of the exceptions apply - such as commercial interests or the protection of the decision-making process - public access must

be granted if there is an 'overriding public interest'. It is thus an "exception to the exceptions".

- The actual impact of this provision has seemingly been rather low. Although some complainants to the Ombudsman have argued that there was an overriding public interest, the cases concerned could usually be solved without addressing that issue. The same appears to be the case in disputes before the Courts. Overall, it is far from clear that the notion of an overriding public interest, as currently provided for, has helped to further the aims of the Regulation.
- It would accordingly be desirable to have better guidance in the Regulation as to what might constitute an "overriding public interest".
- The question is, however, whether this 'exception to the exceptions' could be made effective simply through the adoption of new written rules. In my view, serious consideration should be given to the possibility of an independent external mechanism which, in selected cases, could help resolve the issues of whether an 'overriding public interest' exists.
- In this respect, it is important to emphasise two points: first, the notion of an 'overriding public interest' is not just an additional argument for those who wish to obtain access to public documents. As Advocate General Maduro has pointed out today in his opinion on cases Sweden and Turco against Council, 'overriding public interest' is also a legal basis for the institutions themselves to disclose documents that would otherwise be exempt from disclosure. Second, Regulation 1049/2001 is not only applied by the Commission, Council and European Parliament, which have ample experience to formulate views on whether an overriding public interest is at stake, but also by a wealth of smaller bodies and agencies that may feel uncertain about how to apply the notion.

#### *The Regulation and other confidentiality provisions*

- Regulation 1049/2001 obliged the Commission to "examine the conformity of the existing rules on access to documents with this Regulation."

- In 2003, the Commission concluded that there was no discrepancy between Regulation 1049/2001 and special confidentiality provisions. It did so by indicating, in a document provided to Parliament and Council, how those special confidentiality provisions implicitly reflected the specific exceptions laid down in Regulation 1049/2001 itself.
- This of course creates the impression that the existence of special confidentiality provisions is entirely unproblematic for the application of Regulation 1049/2001.
- Regrettably, practice shows that the issue still gives rise to unsatisfactory approaches and outcomes, partly, it seems, due to confusion as to what is the actual and correct state of the law in this area.
- For instance, a problem of the hierarchy of norms persists. In a concrete case, I have been faced with the argument that a secrecy provision contained in a mere implementing regulation adopted solely by the Commission should, automatically, take precedence over the right of public access to documents laid down in Regulation 1049/2001 adopted by Parliament and Council in implementation of Article 255 of the EC Treaty. It is notable that this view of the Commission was barely reasoned; it was simply applied as a matter of course.
- The obvious discrepancy in such cases is of course even more apparent when we recall that access to documents is set to become a fundamental citizens' right.
- In my view, it is therefore desirable that the revised Regulation calls for a re-examination of the special confidentiality provisions in Community law. This examination should be carried out on the basis of one of the fundamental principles laid down by the Community Courts, namely that the exceptions to public access must be interpreted restrictively. The consequence of this principle can only be that existing special confidentiality provisions that do not fall squarely within one of the exceptions in the Regulation must be considered inapplicable.
- With the European Union extending its competencies and activities into more fields, several of which are highly sensitive

policy areas, it can only be expected that there will be a felt need to adopt more special confidentiality provisions.

- In my view, it is of utmost importance to also lay down in a revised Regulation that such special confidentiality provisions must always be subjected to an test of compatibility with the revised Regulation on public access, and that such provisions cannot impinge on the fundamental right of public access to documents unless the same institutions that adopted the Regulation - i.e. Parliament and the Council - have so decided in relevant legislation.
- Ladies and gentlemen, thank you for your attention!