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European Ombudsman

Mr Arun Dohle

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Strasbourg, 20/05/2014

Decision of the European Ombudsman closing the inquiry into complaint  
1743/2013/TN against the European Commission

Dear Mr Dohle,

On 12 September 2013, you submitted a complaint to the European Ombudsman against the Commission concerning its handling of a request for access to documents relating to its correspondence with the Italian adoption agency Amici dei Bambini.

After a careful analysis of all the information submitted to me, I have decided to close my inquiry with the following conclusion and further remarks:

### **Conclusion**

**No further inquiries are justified by the Ombudsman.**

### **Further remarks**

**(i) If an EU institution has to consult a third party with a view to assessing whether any of the exceptions to access set out in Regulation 1049/2001 apply, the institution should give the third party a deadline for its response. This deadline should be set so as to allow the institution to handle the request for access promptly.**

**(ii) If the third party does not respond within the set deadline, the institution should proceed to an examination of the documents, bearing in mind that, in principle, all documents should be accessible to the public.**

**(iii) Any decision to refuse access to third-party documents, whether following initial application or a confirmatory application, must be based, on the exceptions to access set out in Regulation 1049/2001 and not merely on the third party's undefined reservations regarding disclosure.**

**(iv) If the third party has not responded to an institution's consultation in respect of an initial application for access, there should**



normally be no reason for the institution to carry out a new consultation in respect of a confirmatory application for access.

(v) Given that the identity of an applicant has no bearing on the decision as to whether any of the exceptions to access in Regulation 1049/2001 applies, a third-party author's request for information on the identity of the applicant should be dealt with separately and that request should not be allowed to delay the institution's processing of the application for access to third-party documents.

Please find enclosed my decision on your complaint.

Yours sincerely,

Emily O'Reilly

Enclosure:

- Decision on complaint 1743/2013/TN



## Decision

of the European Ombudsman closing the inquiry into complaint 1743/2013/TN against the European Commission

### The background to the complaint

1. The complaint is about the Commission's handling of a request for public access to documents<sup>1</sup>, made in February 2013, relating to contacts between the Commission's DG Justice and the Italian adoption agency *Amici dei Bambini* between January 2007 and December 2009.

### The subject matter of the inquiry

2. In his complaint to the Ombudsman, the complainant alleged that the Commission failed properly to handle the request for access to documents.

3. The complainant claimed that the Commission should provide full access to its correspondence with *Amici dei Bambini*.

4. In support of his allegation and claim, the complainant argued that the Commission failed to deal with the confirmatory application in accordance with the applicable procedures and within the established time limits, and that the Commission failed to provide reasoning for its refusal to grant access to third-party documents.

### The inquiry

5. The Ombudsman opened an inquiry on 14 October 2013. The Commission submitted its opinion on 6 December 2013. The complainant made his observations on the opinion on 30 January 2014.

<sup>1</sup> Made on the basis of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents



## The Ombudsman's analysis and conclusions

### A. Alleged failure properly to handle a request for access to documents

#### Arguments presented to the Ombudsman

6. According to the complainant, the Commission granted access to a number of documents. However, access was refused to other documents, originating from a third party, *Amici dei Bambini*. The third party had objected to disclosure, arguing that it needed to consult its lawyers.

7. The complainant stated that, on 1 July 2013, the Commission provided him with the documents to which it had granted access on 2 May 2013 (the complainant never received the Commission's letter of 2 May 2013). The Commission also informed him that it had not received any agreement from the third party to disclose the correspondence submitted by it. The Commission considered this to constitute an implicit refusal of the access request. Following this refusal by the Commission to grant access to the third-party documents, the complainant made a confirmatory application on 21 July 2013. The Commission informed him that his confirmatory application had been made too late. The complainant wrote again to the Commission, stating that the refusal to grant access to the third-party documents was made only on 1 July 2013 and that his confirmatory application thus had been made within the applicable time limit. On 6 August 2013, the Commission acknowledged that the confirmatory application had indeed been made within the time limit. The confirmatory application was registered on that same day. When he did not receive a reply from the Commission within the stipulated deadline, the complainant turned to the Ombudsman.

8. In its opinion, the Commission stated that it provided access to nine out of 19 relevant documents on 2 May 2013, with the exception of personal data. Access was refused to the remaining documents, which were third-party documents, because the third-party author had expressed its reservations. When the complainant informed the Commission that he had not received the documents to which access had been granted, they were resent to him on 1 July 2013.

9. According to the Commission, the complainant's confirmatory application dated 21 July 2013 was registered on 6 August 2013. The Commission consulted the third-party author again on 9 and 17 September, at the same time as sending holding letters to the complainant. In its holding letters, the Commission expressed its regret about the delays and sincerely apologised for any inconvenience caused. On 15 September 2013, the third-party author asked for the identity of the complainant. On 19 September 2013, the Commission asked the complainant if he agreed to his identity being disclosed to the third-party author. He replied positively on 20 September 2013. On 15 October 2013, in the absence of any final position from the third-party author, the Commission sent the complainant its reply, granting access to all the relevant documents, with the exception of personal data.

10. The Commission argued that it was unable to take a decision on the confirmatory application within the prescribed time limit mainly due to the number of documents concerned and the fact that some of the documents were drafted by a third party. The Commission also had to ask for the complainant's



consent to disclose his identity to the third-party author and it had to give the third party a reasonable time to respond to the consultation.

**11.** The Commission argued that it made considerable efforts to provide a reply as soon as possible, which it considers to be demonstrated by the fact that, in the absence of a reply from the third-party author within reasonable time, it proceeded to taking a decision on the access request.

**12.** The Commission argued that it was correct to refuse access to the third-party documents at the initial stage, because the third party had not explicitly agreed that public access could be granted.

**13.** In his observations on the Commission's opinion, the complainant argued that the Commission consulted the third-party author more than a week after the deadline for responding to his confirmatory application had expired. The complainant is of the view that the Commission should have given the third party an explicit time limit within which to respond to the first consultation. A lack of reaction is not a valid reason to refuse access under Regulation 1049/2001. The Commission should have analysed the complainant's confirmatory application without undertaking a second consultation with the third-party author. In addition, he never received the Commission's holding letters.

**14.** The complainant is not convinced that he has received all the relevant correspondence and he would like to know if correspondence to a personal mailbox of a civil servant is considered private and non-official.

#### **The Ombudsman's assessment**

**15.** Requests for access to documents shall be handled promptly.<sup>2</sup> In general, the applicant should thus be able to expect a response within the stated time limits. At the same time, these time limits are there to give the applicant the right to remedies in case of an implicit refusal to grant access, such as initiating court proceedings or making a complaint to the Ombudsman<sup>3</sup>, which the complainant availed himself of in the present case.

**16.** Although the complainant argued that he did not receive the Commission's holding letters, the Ombudsman finds nothing to suggest that these letters were not sent. The Commission's action in this regard was thus in line with principles of good administration, which require the EU administration to inform applicants of delays in handling access requests, allowing them to make informed decisions as to whether to wait for the response or complain immediately to the Ombudsman.

**17.** On the basis of the above, and given that the Commission eventually provided an explicit response to the confirmatory application by granting access to the requested documents, the Ombudsman finds no grounds to pursue, the Commission's failure to respond to the request for access within the time limits set out in Regulation 1049/2001.

**18.** As regards the reasons for refusing access, the Ombudsman considers that the Commission was wrong to refuse access to the initial application on the basis that the third party had not explicitly agreed to disclosure, but had

<sup>2</sup> Articles 7(1) and 8(1) of Regulation 1049/2001.

<sup>3</sup> Article 8(3) of Regulation 1049/2001



expressed "reservations". As correctly pointed out by the complainant, access can be refused only if one (or several) of the exceptions to access set out in Regulation 1049/2001 applies. The Ombudsman notes, however, that the Commission granted access to the relevant documents during the course of the Ombudsman's inquiry (except for personal data, the redaction of which the complainant does not seem to question). The Ombudsman welcomes the Commission's decision in this regard and will therefore not pursue the matter of the Commission's response to the initial application any further. However, she will make a further remark for the Commission to take into consideration when handing future requests for third-party documents.

**19.** The Ombudsman will also clarify certain other issues, allowing the Commission to provide more prompt replies to requests for access in future.

**20.** If an EU institution has to consult a third party with a view to assessing whether any of the exceptions to access set out in Regulation 1049/2001 apply<sup>4</sup>, the institution should give the third party a deadline for its response. This deadline should be set so as to allow the institution to handle the request for access promptly. (It is not clear whether the Commission did so in the present case.) If the third party does not respond within the set deadline, the institution should proceed to an examination of the documents, bearing in mind that, in principle, all documents should be accessible to the public. (This is what the Commission eventually did in the present case.) If the third party has not responded to an institution's consultation in respect of an initial application for access, there should normally be no reason for the institution to carry out a new consultation in respect of a confirmatory application for access.

**21.** Given that the identity of an applicant has no bearing on the decision as to whether any of the exceptions to access in Regulation 1049/2001 applies, a third-party author's request for information on the identity of the applicant should be dealt with as a separate issue and that request should not be allowed to delay the institution's processing of the application for access to third-party documents (which it did in the present case).

**22.** On the basis of the above, the Ombudsman finds no grounds to pursue further inquiries into the present case. However she will make further remarks to the Commission in respect of the issues clarified above.

**23.** If the complainant has further questions in respect of possible documents held by the Commission, he should address those directly to the Commission.

## B. Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**No further inquiries are justified by the Ombudsman.**

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

<sup>4</sup> Article 4(4) of Regulation 1049/2001



## Further remarks

(i) If an EU institution has to consult a third party with a view to assessing whether any of the exceptions to access set out in Regulation 1049/2001 apply, the institution should give the third party a deadline for its response. This deadline should be set so as to allow the institution to handle the request for access promptly.

(ii) If the third party does not respond within the set deadline, the institution should proceed to an examination of the documents, bearing in mind that, in principle, all documents should be accessible to the public.

(iii) Any decision to refuse access to third-party documents, whether following initial application or a confirmatory application, must be based, on the exceptions to access set out in Regulation 1049/2001 and not merely on the third party's undefined reservations regarding disclosure.

(iv) If the third party has not responded to an institution's consultation in respect of an initial application for access, there should normally be no reason for the institution to carry out a new consultation in respect of a confirmatory application for access.

(v) Given that the identity of an applicant has no bearing on the decision as to whether any of the exceptions to access in Regulation 1049/2001 applies, a third-party author's request for information on the identity of the applicant should be dealt with separately and that request should not be allowed to delay the institution's processing of the application for access to third-party documents.

Emily O'Reilly

Done in Strasbourg on 20/05/2014