

European Parliament - Committee on Civil Liberties, Justice and Home Affairs (LIBE)

Public hearing on the right to access to EU documents: implementation and future of Regulation 1049/2001

“What to learn from complaints sent to the Ombudsman”

Wednesday 13 April 2011, 09.00–12.30, Room ASP 3 G 3

Speaking notes of the European Ombudsman, P. Nikiforos Diamandouros

1226 words (just under 10 minutes at 125 words per minute).

- Good morning, ladies and gentlemen!
- First of all, I would like to thank the LIBE Committee and especially the three rapporteurs, Mrs Hautala, Mrs Jätteenmäki and Mr Cashman, for organising a public hearing on this important subject, action on which is, in my view, both pressing and long overdue.
- I have been asked to speak on what can be learnt from complaints to the Ombudsman. I believe that we can learn five main things.
- The first is that few citizens know that the Lisbon Treaty extends the right of public access to all EU institutions, bodies, offices and agencies. I would add that even some of the institutions, bodies, offices and agencies themselves are unaware of this fact.
- (By the way, from now on I will just refer to “institutions”, rather than repeat the whole formula).
- What can be done about this problem? My suggestion is to separate it from the more contentious issues that have arisen in the debate on the Commission’s proposal, made three years ago, to re-cast Regulation 1049/2001.
- At a meeting with the College of Commissioners on 15 February, I suggested they consider submitting a limited proposal for revision of the Regulation, to take account of the broader scope of access following the Lisbon Treaty.

- I am glad that the Commission has now put forward a proposal for this purpose. I hope that this limited change, which is surely uncontroversial, could be adopted rapidly in the interests of legal certainty for citizens.
- Secondly, in all the complaints I have dealt with, I have not come across a single case in which I thought the exceptions to the right of access were too narrowly drawn to protect the public or private interests identified in Article 4 of the Regulation.
- On the contrary, in those cases where I have inspected documents and considered that their disclosure would be damaging, there was no doubt that one or more of the exceptions applied. My experience, therefore, provides no support for any broadening of the existing exceptions.
- The third point to emerge clearly from the complaints concerns the problem of delay in the Commission's handling of applications.
- All too often, the Commission explains its failure to meet deadlines by telling us that a Member State did not respond in a timely way when consulted about access to a document originating from that State.
- According to the case law, there should be a genuine dialogue between the Commission and the Member State. I do not believe that a genuine dialogue should lead to lengthy delays that frustrate the citizens' fundamental right of public access, established by the Treaty and the Charter of Fundamental Rights.
- I hope that the Commission will agree that it should not allow its own implementation of a fundamental right to be taken hostage in this way.
- The other main cause of delays - and my fourth point - is that the institutions have not yet properly addressed the question of the resources needed to put the right of public access into effect.
- Under Regulation 1049, if an initial application is refused in whole or in part, or if the institution fails to answer, you can make a confirmatory application. If that is refused, or there is no answer, you can turn to the Court, or to the Ombudsman.
- One of the keys to good administration of this system is to minimise the number of cases where a document is released only after a confirmatory application. In order to do this, it is necessary to

_____ and accurately.

- The other key to good administration is to avoid the need even for initial applications. That can be done by proactively putting into the public domain the documents and information that citizens want.
- One of the proposals I have made for better administration of the fundamental right to public access is that each institution should have one or more information officers, charged with putting the right of public access into effect.
- They should ensure that applications are dealt with rapidly and that negative answers are properly grounded and convincingly explained.
- Information officers should also ensure that the institution has a proactive policy to put documents and information into the public domain. A related task would be to play an educative role, explaining not only the legal rules, but also their rationale and the benefits of working openly.
- In this connection, I commend to you a paper that the European Data Protection Supervisor published on 24 March this year, updating his 2005 guidance on the relationship between public access to documents and data protection, in the light of the judgment in the *Bavarian Lager* case.
- In his new paper, the EDPS urges the institutions to develop a proactive approach. By this, he means that they should assess and make clear to data subjects the extent to which the processing of their data includes, or might include, public disclosure. And here is the point: they should do this before they collect such data, or at least at the moment they do so.
- The EDPS says that complicated situations arise, as in *Bavarian Lager* itself, when institutions fail to address the question of public disclosure until they receive a request for public access. Being proactive would benefit the institutions by reducing the number of such complicated situations.
- I agree fully with this view of the EDPS. Indeed, my experience with complaints - and this is my fifth point - leads me to believe that good administration requires the institutions to be proactive not only as

interests protected by Article 4 of Regulation 1049. _____

- In particular, I am persuaded that the Commission should be proactive in ensuring that third parties, including Member States, understand that the basic rule is public access. A third party that provides a document to the Commission should clearly identify any material to which one or more of the exceptions under Article 4 applies, and justify why those exceptions apply, at the time when the document is sent to the Commission.
- For its part, the Commission should routinely monitor, when it receives documents, that these requirements have been properly respected. If they have not, it should immediately take action to ensure that they are respected. This would go a long way towards ensuring that citizens who apply for access can enjoy both the fundamental right of public access to documents and the fundamental right to good administration.
- I remain firmly convinced that it would be appropriate and desirable for Regulation 1049 to be amended to include both a deadline for Member States to respond to consultations and greater requirements for proactivity.
- However, in my view, there is no need to wait for legislation. The institutions, especially the Commission, could start taking action now to implement the fundamental right of public access more effectively. In particular, they could appoint information officers with the key functions that I have outlined here; that is to say, ensuring prompt and accurate responses to applications for access and promoting a proactive approach to transparency.
- Thank you for your attention.