

COMPLAINT 723/2006/(WP)PB

NOTE FOR THE FILE

Subject: further correspondence in case 723/2006/(WP)PB

(communication from Mr Guido Strack, a former Commission official (and a lawyer), dated 18 January 2008, made in response to the EO's decision on his complaint 723/2006/(WP)PB)

(1) The complainant had requested access to his personal and medical files. The first allegation examined in the above decision was that "*the Commission wrongfully rejected the complainant's application for access, insofar as it was based on Regulation 1049/2001.*" In his decision, the Ombudsman found (in light of relevant case-law) reasonable the Commission's approach that the rules of Articles 26 and 26(a) of the Staff Regulations concerning the officials' right of access to their personal and medical files take precedence over the general provisions, regarding access to documents, laid down in Regulation 1049/2001. Hence, he concluded that the Commission's contested decision did not amount to an instance of maladministration, to the extent that the complainant's access request concerned documents contained in his personal and medical files referred to in Articles 26 and 26(a) of the Staff Regulations.

In his e-mail of 18 January 2008, states that he does not agree with the EO's above-mentioned finding. However, he states that he understands the reasoning underlying this finding. It seems that no reply to these statements is needed.

(2) After having received the complainant's observations on the Commission's opinion on the complaint, the Ombudsman decided to extend his inquiry into the new allegation that that "the Commission removed 'the most interesting documents' from the files to which the complainant was granted access." The relevant points of the Ombudsman's decision read as follows:

"2.2 *With regard to this allegation, the Commission explained that no documents had been removed from the files shown to the complainant. It presumed that the complainant had expected to find in the said file medical reports concerning his request for the recognition of an occupational disease. However, the doctors who had examined the complainant had not yet submitted their final report. The final report would be transmitted to a doctor of the complainant's choice.*

2.3 *In his relevant observations of 10 December 2006, the complainant made a number of arguments to the effect that various documents should have been on the files to which he was granted access, and/or that documents which were covered by his access request of 25 November 2005 were not communicated to him.*

outside the scope of the inquiry, since in his relevant request to the Commission he had expressly asked for access to "all documents in connection with his occupational disease".

4. The complainant furthermore addressed the EO's finding in point 2(4) of the decision, stating that he wished a re-examination of the issue mentioned therein.

As regards the first remark made by the complainant, the following may be noted in the reply to the complainant. The above additional allegation was quite serious, insofar as it referred to a deliberate concealment of certain documents. Moreover, both the Commission and the complainant did not contest, in the course of the inquiry, the Ombudsman's decision to examine the issue, a decision which served the complainant's best interests. Under these circumstances and independently of the plausibility of the approach indicated by the complainant, it would not be justified to pursue the matter raised by him.

As regards the complainant's failure to understand point 2(3) of the decision, the following may be noted in the reply to the complainant. The issue whether various documents should have been, in accordance with the pertinent rules, in the files to which he was granted access was clearly outside the scope of the inquiry. The same is with the issue whether documents which were covered by the complainant's access request of 25 November 2005 were not communicated to him. In this regard, it must be noted that the Ombudsman's inquiry into the first allegation was clearly limited to the problem whether the Commission wrongfully rejected the complainant's application for access, insofar as this application was based on Regulation 1049/2001. The relevant inquiry did not turn on the general matter whether the Commission might have wrongly refused or failed to provide access to documents requested by the complainant (independently of the complainant's reliance on and invocation of Regulation 1049/2001, as legal basis of the request).

As regards the complainant's dissatisfaction with point 2(4) of the decision and relevant request for reconsideration, the following may be noted in the reply to the complainant. The allegation inquired into was that "the Commission removed 'the most interesting documents' from the files to which the complainant was granted access" under the Staff Regulations. The term "removed" clearly implied that (a) the documents concerned had, as a matter of fact, been on these files, and (b) that the Commission had, as a matter of fact, removed (taken away) those documents previous to granting the complainant's access to the said files. The Ombudsman remarked, in his decision, that the Commission's factual statement that no documents had been removed from the files shown to the complainant, pursuant to the Staff Regulations, carries with it a (refutable) presumption of truthfulness and also supported this remark by a reference to relevant case-law. Furthermore, he found that the complainant had not made any cogent arguments, supported by

appropriate evidence, refuting this presumption. After re-examining the relevant arguments made by the complainant, the Ombudsman can only confirm this finding.

Relatedly, it must also be noted that the existence of certain documents referred to by the complainant and not included in the file(s) shown to him does not demonstrate the two facts implied by the allegation. The problems whether these documents should have been, in accordance with the pertinent rules, in the files to which the complainant was granted access, under the Staff Regulations, and whether the same documents were (wrongly) not communicated to him, although they were covered by his access request of 25 November 2005 are distinguishable from the factual issues raised by the complainant's second allegation examined in the decision. In the decision, the Ombudsman did not examine these problems, because they did not fall within the scope of the inquiry. He also informed the complainant that he could consider submitting a new complaint to the Ombudsman about these matters and, relatedly, recalled the conditions for opening an inquiry provided for in Articles 1-3 of the Statute of the European Ombudsman.

PB 06 February 2008 (*submission date; ID-approved 31/01/08*)