



PETER HUSTINX  
SUPERVISOR

Mr Guido STRACK  
Taunusstrasse 29a  
D-51105 Köln

Brussels, 30 October 2006  
PH/ab D(2006)1145 C 2006-0390

Dear Mr Strack,

I am writing, further to my letter of 13 October and email message of 27 October, to inform you about my decision as to your request for access to documents in our files, as submitted under point 5 of your letter of 28 July 2006.

Earlier than expected, I can now also inform you about my conclusion and decision as to your request for revision of 28 July 2006, under points 1 to 4, about the way in which the first part of your initial complaint of 9 March 2006 has been dealt with. This part of your initial complaint relates to the fact that you were not allowed access to certain documents relating to you at the European Commission PMO.

For practical purposes, I will first deal with your complaint, and subsequently with your request for access. However, let me also mention that the second part of your initial complaint is currently still under investigation. A conclusion as to this part of your complaint is likely to be reached by mid November. In any case, you will be informed about this conclusion as soon as possible.

#### **1. Access to documents at PMO (first part of initial complaint)**

As mentioned in my letter of 13 October, I have requested PMO to send me a copy of the full text of any documents – relevant in the context of your request for revision – to which you were not granted access.

It has become quite clear to me, that this part of your initial complaint is focussed on the medical report by Dr Helmer. At the time of your visit to PMO on 2 March 2006, this report was only available in a preliminary version and still waiting for input from a medical expert. Meanwhile, the report has been submitted in a final version. After a careful scrutiny of this final report, I have found no reason why you should not be allowed full access to it. Therefore, I will recommend to PMO to provide such access as soon as possible, and I have reasons to believe that PMO will follow this recommendation.

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As to the preliminary version, let me point out here that Article 13 of Regulation (EC) 45/2001 provides for a right of the data subject to have access to personal data relating to him. However, Article 20 of the Regulation also provides for restrictions of this right, if the conditions for such restrictions have been fulfilled. If a restriction is relied upon to deny access to the data subject, it is the task of the European Data Protection Supervisor (EDPS), according to Article 20 (4), to investigate, in full confidentiality, whether the relevant provisions have been respected.

Some of the conditions for imposing a restriction may also be relevant in situations, such as yours, where a medical report is being prepared about the question whether someone's physical or mental condition is related to professional circumstances, more specifically whether a certain condition qualifies for recognition as an occupational disease. This may in particular be the case if that report is available in a preliminary version, reflecting only a part of the work considered necessary to reach a conclusion on the issue.

It was against this particular background that our letter of 27 July 2006 mentioned that your personal data had been processed correctly. This letter did not contain a detailed analysis of the relevant provisions, because this was not felt relevant or appropriate at that time. However, circumstances have changed, and I will now also recommend to PMO to reconsider carefully whether there still is a sufficient need to restrict access to the preliminary version of the report.

Finally, it should be noted that transmission to a medical doctor, of the staff member's choice, is standard procedure at PMO when the report is of a sensitive nature. This is a general rule which is applicable to all staff members in such cases and which PMO intends to follow in your case as well, in accordance with Article 20(1)(c) of the Regulation, which provides for restrictions necessary to prevent undue harm of the data subject. There is no reason to think that this would be inappropriate in your case.

Let me also mention that Article 46 sub (a) of Regulation 45/2001 contains a duty for the EDPS to hear and investigate complaints, and to inform the data subject of the outcome within a reasonable period. Article 32(2) provides furthermore that in the absence of a response of the EDPS within six months, the complaint shall be deemed to have been rejected. This latter provision is designed to enable a complainant to take further steps, if a response within six months has not been given. However, the way in which your complaint of 9 March 2006 has been dealt with has remained well within these limits. This also applies to the second part of that complaint since you have been informed at regular intervals about its progress.

Your letter of 28 July also points at the fact that our letter of 27 July to you has been marked as confidential. This was only aiming at third parties and not intended to limit you in any way.

## **2. Request for access to documents at EDPS**

As to your request for access to documents in our files, let me mention first that your reference to Article 255 of the EC Treaty and therefore implicitly also to Regulation 1049/2001, suggests that it should be considered as a request for *public* access under these provisions. If such a request relates to sensitive personal files, it is likely to meet certain restrictions, especially those designed to protect the privacy of individuals to whom these documents relate. However, if a request is made by a data subject and is designed to exercise his right of access under Article 13 of Regulation 45/2001, it should be considered

accordingly, unless special circumstances indicate otherwise. Therefore, I have decided to deal with your request in a way most favourable to your position.

***Case 2006-0120***

As to our case file relating to your complaint of 9 March 2006, we have distinguished three categories of documents:

*a. documents exchanged between yourself and my office*

These documents will not be made available to you, since they are already in your possession. A detailed list of these documents is laid down in annex A.

*b. documents exchanged between my office and PMO*

These documents are relevant for the investigation of your complaint. As to the first part of your complaint, some elements have been received under strict confidentiality. As to the second part of your complaint, the investigation is still ongoing. Most of these elements have been excluded from access, because they are covered either by Article 4(2) of Regulation 1049/2001 or the confidentiality which is inherent in the role of the EDPS further to Article 20(4) of Regulation 45/2001. This obligation is expressed in Article 45 of Regulation 45/2001. Disclosing them would undermine the supervisory task of the EDPS. A further decision will be taken as soon as the second part of your complaint has been dealt with.

All other documents or relevant parts are attached and have been listed in annex A. In some cases you have had access to certain documents before. In such cases they have not been attached again.

*c. documents for internal use within my office*

These documents are excluded from access, because they are covered by Article 4(3) second paragraph of Regulation 1049/2001 or Article 45 of Regulation 45/2001. This relates to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution. Disclosing them, either now or at a later stage, would seriously undermine the decision making process. However, please note that relevant elements have been included in the final versions of documents sent to you earlier or made available now.

***Case 2005-0015***

As to our case file on your complaint of 26 January 2005, we have distinguished two categories of documents:

*a. documents exchanged between yourself and my office*

These documents will not be made available to you, since they are already in your possession. A detailed list of these documents is laid down in annex B.

*b. documents for internal use within my office*

These documents are excluded for similar reasons as mentioned above. However, please note again that relevant elements have been included in the final versions of documents sent to you earlier.

Finally, it should be noted that a preliminary evaluation of your complaint in this case led to the conclusion that no further action should be taken. As you know, a copy of our letter of 19 May 2005 has been sent to the Data Protection Officers of the European Commission and OLAF for their information. Other documents have not been exchanged in this case.

### 3. Conclusions

The preceding considerations lead to the following conclusions and decisions:

- Your complaint of 28 July 2006, as to the first part of your initial complaint, is partially justified in view of present circumstances. PMO will be recommended to provide access to the final version of the report by Dr. Helmer, and to reconsider whether there still is a sufficient need to restrict access to the preliminary version of the report (see point 1).
- Your request for access to documents in case files 2006-0120 and 2005-0015 will be granted in part (see point 2 and annexed documents). A further decision will be taken when the second part of your initial complaint in case 2006-0120 has been dealt with.

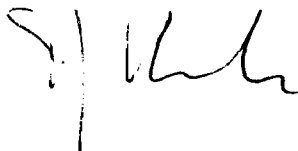
If you do not agree with these decisions, you could take the following actions.

As to the decision on your request for revision, you could ask the Court of First Instance to annul it. This should be done within two months after you received this decision.

As to the decision on your request for access to our case files, you could ask for reconsideration. This should be done within 15 working days of receiving this letter.

A copy of this letter and annex A has been sent to PMO and the Data Protection Officer of the European Commission for their information.

Sincerely yours,



Peter HUSTINX