

Ombudsman finds in favour of the right of Mepa's Audit Officer to communicate his reports to interested parties, foremost among them complainants, other than Mepa.

The Complaint

Mr Joseph Falzon, Audit Officer of the Malta Environment and Planning Authority (MEPA), requested my advice on a matter of principle of good administration.

By letter dated 23 October 2006 he informed me that when the Audit Office of the MEPA was established in April 2004, he consulted my predecessor on the way that Office should operate. He had taken a decision after his advice that a copy of his report if any, following an investigation, was to be transmitted to the complainant, where applicable. He then thus proceeded:

"The MEPA has consistently objected to this practice claiming that section 17C(3) of the Development Planning Act precludes me from doing so. The MEPA claims that this paragraph is exclusive and requires that copies of our reports be transmitted only to the MEPA. I disagree with this interpretation since I believe that according to the Act, I must hand a copy of the report to the MEPA but it does not exclude me from handing the report to other interested parties in particular the complainants."

The Audit Officer, therefore, asked me whether I would go into the matter and advise him accordingly.

MEPA's position

Limiting myself strictly to the terms of reference of the complaint, I can state MEPA's position on the issue in its own terms as set out by the letter of the Board Secretary, Mr Francis Tabone, to the Audit Officer dated 17 October 2006:

"The Development Planning Act is quite clear on the availability of audit reports. The Authority points out that the distribution and circulation of your reports is regulated by article 17C(3) of the Development Planning Act. This requires the Audit Officer to transmit a copy of all reports drawn up by him specifically and explicitly to the Board of the Authority. The distribution and/or circulation of your reports to anyone else, be it a ministry, agency of government, the complainant or other parties, is in breach of the law. This position is strengthened by the next article of the Act, article 17C(4), which requires the Authority to transmit a copy of all the reports drawn up by the Audit Officer to the Minister and shall inform him of any action taken by it in connection with the Audit Officer's report."

The Audit Officer's position

The Audit Officer replied to MEPA by letter of 19 October 2006. He took exception to the comments in relation to the availability of audit reports and disagreed completely with the MEPA stance. He maintained that:

"You state incorrectly that the only channel through which the audit reports can be communicated "specifically and explicitly" is to the Board of the Authority.

In my view, subsection (3) of section 17C of the Development Planning Act is not exclusive. It rather lays down the minimum reporting requirements thereafter linking with the duty of the MEPA Board in subsection (4) to inform the Minister. The Development Planning Act, contrary to what is stated in your above reference communication, does not exclude other avenues through which the audit reports can be communicated.

This course of action, whilst not excluded by the Development Planning Act, is also dictated by common sense and by good administration. It is inconceivable how MEPA has the audacity to demand that complainants are not informed of the conclusions of investigations carried out as a result of their complaints.

I also consider that it is necessary to inform other persons or bodies whenever the need for this arises. In the case under examination, in view of the fact that a senior public officer had, in my view, acted incorrectly, I considered it appropriate to draw the attention of the Prime Minister to the issue in order that he would consider whether to initiate any action on his part as a result of the audit report.

It is incomprehensible how MEPA should consider it necessary to shield abusive/inappropriate action of public officers by trying to obstruct the communication of a report to who has the authority to act."

The Ombudsman's Competence to Investigate

The Audit Officer interprets the attempt by MEPA to redefine his method of operation as *"one intended to restrict and control access to information essential for my functioning."*

He considers that MEPA, through its position taken on the availability of audit reports, is seriously undermining the independence of his office. It is because of this conviction that he has drawn the attention of the Ombudsman in order that I may investigate the matter in terms of law.

This is therefore a formal complaint alleging maladministration by a public authority established by law that it definitely within my remit. The requested investigation which would lead to an opinion on the correctness of the Audit Officer's insistence that he has the right to communicate his reports to other interested parties apart from MEPA, falls squarely within the strict parameters of the Ombudsman's function to promote good administrative practice. It would also determine whether MEPA's objection to his doing so was justified or whether, on the contrary, it constitutes a violation of the right of the citizen to demand and obtain full information on matters which affect his rights and interests.

Interpretation of section 17c

The Audit Officer is essentially asking me for an interpretation of subsection 3 of section 17C

of the Act that establishes the Office of the Audit Officer in the light of basic fundamental principles of administrative law.

It is not the practice of this Office to give advice on the legal interpretation of provisions of law. Nor would my interpretation be final or binding. Ultimately it is a Court of Law that has the jurisdiction and vires in this sphere. I can and should, however, give an opinion on whether an action that falls within my purview and which forms the subject matter of an investigation, appears to be contrary to law or was in accordance with a law or a practice that is or may be unreasonable, unjust, offensive or improperly discriminatory or was based wholly or partly on a mistake of law.

If it results that the complaint that provokes the investigation is justified, I have the right not only to recommend that any practice on which the administrative decision, recommendation, act or omission was based should be reconsidered but also if the merits of the case so warrant, that any law on which such practice is based should also be revisited (section 22(3) of Act XXI of 1995).

A Matter of substantial public interest

The Audit Officer is raising a matter of substantial public interest regarding the nature of his Office, directly affecting the rights and interest of citizens, which my Office is in duty bound to investigate.

It is essential from the outset to underline what is the nature of the Office of the Audit Officer set up by an amendment to the Development Planning Act enacted by Act XX1 of 2001. It is clear even from a cursory reading of section 17C that the legislator did not set up the Audit Office merely to provide a mechanism for internal audit to improve administrative practice and promote efficiency. The legislator intends the Audit Officer to operate in a framework outside the administration of the Authority and independently of it. The Audit Officer has to be seen to be the guarantor of the citizen's right to be treated fairly and indiscriminately by the Authority. His main function is to investigate complaints, identify shortcomings or abuse and suggest redress, if any.

The raison d'être of the Audit Officer

It is obvious that the *raison d'être* of the Audit Officer is akin to that of the Ombudsman. He is seen as a tool to ensure a transparent and fair administration in the way the Authority conducts its business. He is neither an advocate for complainant nor for the Authority. He ascertains the facts of the case under review and reaches an impartial and independent conclusion on the merits.

The Audit Officer should not be seen to be, and should not act in, a state of contrast and continuous conflict with the Authority but rather as a means to promote its efficiency. His essential duty remains that of providing a check on possible arbitrary or improper use of power and a break on inefficiency and dereliction of duty. In this respect, therefore, the nature of the Office of Audit Officer can be likened to that of the Ombudsman insofar as the Audit Officer

can be considered to be, by definition, a defender of people's rights and interests.

The Authority itself is bound to recognise these distinctive features of the Audit Officer and in particular his autonomy, impartiality and independence of judgement. It is also bound to accept that, when drawing up his reports, he is bound to act on his individual judgement and shall not be subject to the direction of any other person or authority including of course MEPA itself. This is expressly provided for in the law.

It is therefore right and proper for the Audit Officer to assert his autonomy and be jealous of his independence. He has the duty to do so and the Authority is bound to refrain from any act that seeks to undermine and weaken the Audit Officer's authority.

The functions of the Audit Officer

The functions of the Audit Officer are set out in subsections 1 and 2 of section 17C of the Development Planning Act (Chapter 356). They can be identified thus:

" the Audit Officer shall review all the functions and working of the Authority; " he shall investigate, either on his own motion or following a complaint received by him, the functions and working of the Authority. He may suggest to the Authority what redress, if any, should be given.

The complaint referred to me by the Audit Officer, now being reviewed, does not require me to analyse in detail and define the parameters of his functions. I shall limit myself to the following observations necessary for the present investigation:

(a) The Audit Officer is entrusted with the review of all the functions and working of the Authority. These terms of reference are indeed very wide but the Audit Officer should be careful not to read into them more than what the law empowers him to do. The Audit Officer is not an Appeal Board from decisions of the Authority or any of its organs set up by law. In reviewing the functions and working of the Authority, the Audit Officer has to be careful to limit his investigation to an assessment as to whether the Authority acted correctly in the exercise of its functions and whether its workings were carried out in strict conformity with its functions as established by law, rules, regulations and the Authority's own policies. The Audit Officer has no right to substitute his discretion to that of the Authority when it results that such discretion was exercised according to law in a reasonable, fair and just manner.

(b) The Audit Officer is bound to investigate the functions and working of the Authority either on his own motion or following a complaint received by him. It is clear that the law wants to create a mechanism whereby the citizen can seek redress against alleged injustice, abuse or improper discrimination. An investigation following the receipt of a complaint necessarily implies that the complainant must show that he has a personal interest in the merits of his complaint insofar as his interests or rights were actually or potentially put in jeopardy as a result of an act or omission of the Authority.

(c) A complaint must therefore be substantial, actual and above all personal to the complainant. The law enjoins the Audit Officer to make an independent investigation into that complaint. It gives him the administrative means to conduct the investigation and authorises

him to suggest to the Authority what redress, if any, should be given to complainant. The law therefore decrees that the investigation of a complaint has to be conducted *ad personam* and that the redress that the Audit Officer might suggest is intended primarily, though not necessarily exclusively, to rectify any prejudice that complainant might have been found to have suffered or will suffer as a result of the Authority's actions.

Principles of Good Administration

Having established that the Office of Audit Officer is intended primarily as an added safeguard for the citizen against administrative abuse and improper discrimination and not merely as an internal audit, it is clear that the principles governing good administration, insofar as they govern citizens' rights, are applicable. These principles have developed into rights, based on natural justice, that not only guarantee transparency and fairness in administrative decisions but also due process.

These principles are translated into duties that the public administration has to perform towards the citizen who, on his part, acquires the corresponding right to be treated accordingly. Foremost among these principles are the following relevant to the present case:

- it is today accepted that the administration has the duty to state the grounds for its decision. Consequently, the citizen has the right to expect that every decision which may adversely affect his rights or interests shall state the grounds on which it is based by indicating clearly the relevant facts and the legal or policy basis for it;
- it is also today accepted that the administration has the duty to notify the citizen of its decisions and hence the citizen has the corresponding right to expect to be so notified. An official within the public administration is bound to ensure that decisions which affect the rights and interests of individual persons are notified in writing to them as soon as the decision has been taken.

These basic principles are enshrined in *The European Code of Good Administrative Behaviour* as part of the right to good administration to which every EU citizen is recognised to be entitled. This right is today recognised as a fundamental right according to Article 41 of the *Charter of Fundamental Rights of the European Union* which Malta ratified. These principles bind the Audit Officer just as much as they bind MEPA

The right to be informed

There is no doubt that the investigation carried out by the Audit Officer into a complaint made by a citizen directly affects his rights or interests. Nobody questions the fact that the conclusions of the Audit Officer and the motivation on which they are based could materially affect the outcome of an application before the Authority's institutions and could be a determining factor in its approval or refusal.

There can be, therefore, no doubt that a complainant submitting a case before the Audit Officer has the right not only to be informed whether, as a result of the Audit Officer's investigation, it has been established that his rights and interests were correctly evaluated and determined by MEPA according to law, subsidiary legislation, rules and regulations but also, and more

importantly, whether he was unjustly subjected to improper discrimination or unfairly treated.

There can be no doubt that the complainant therefore not only has the right to be informed of the outcome of the decision of the Audit Officer on his complaint and its motivation but also of any recommendation for redress which the Audit Officer might think fit to make. This right, naturally, presupposes that the Audit Officer conducts his investigation strictly within the parameters of his functions and according to the basic rules governing due process. It is inconceivable - as MEPA seems to suggest - that the law intends to exclude the person directly concerned with the findings of the Audit Officer and whose rights and interests have been the subject of the investigation from the whole process that could lead to potential redress to rectify the abuse or injustice he is proved to have suffered.

Analysis of Section 17C

MEPA is objecting to the practice of the Audit Officer of sending his report to a complainant. MEPA interprets this subsection as requiring the Audit Officer to transmit copies of all reports drawn up by him, specifically and exclusively to the Board of the Authority, and that the distribution of such report to any other party, including complainant, is a breach of the law. It quotes subsection (4) of the same section in support of this interpretation whereby MEPA is required to transmit a copy of all reports drawn by the Audit Officer to the Minister.

Subsection (2) of section 17C provides that:

"The Audit Officer shall investigate either on his own motion or following a complaint received by him, the functions and working of the Authority. The Audit Officer may suggest to the Authority what redress, if any, should be given."

Subsection (3) of the same section provides that:

"The Audit Officer shall transmit a copy of all reports drawn up by him to the Board of the Authority. He shall draw up an annual report which shall be published in its entirety as part of the Authority's annual report."

Subsection (4) provides that:

"The Authority shall transmit a copy of all the reports drawn up by the Audit Officer to the Minister and shall inform him of any action taken by it in connection with the Audit Officer's reports and where no such action as recommended by the Audit Officer is taken, it shall inform the Minister of the reasons why no such action is taken."

These provisions suggest the following considerations:

1. It is immediately apparent that the Audit Officer is not by law enjoined to report to the Board of the Authority. He is only bound to transmit a copy of all reports drawn up by him to that Board. His reports therefore remain the property of his Office; he is not bound by secrecy of office. He is certainly not bound to hand his reports solely and exclusively to the Board of the Authority. He is free and he can be in duty bound to communicate his report certainly to the complainant but also, if he so deems fit, to others. The law leaves this matter in his hands,

trusting that he would act reasonably and judiciously as befits his Office. It does so to assert his authority and independence as well as to give him an effective means to adequately guarantee the rights and interests of complainant.

2. The fact that the Audit Officer is bound to transmit a copy of all reports drawn up by him to the Board of the Authority imposes a specific duty on him that he cannot avoid. The law reasonably requires the Audit Officer to transmit to the Authority a copy of the full report. Likewise the Authority on its part is bound to transmit a copy of all reports drawn up by the Audit Officer to the Minister. Even in this case the Authority has to transmit a full copy. It also has to inform him of any action taken by it in connection with the Audit Officer's report. This procedure, strictly regulated by law, is necessary and intended to ensure that the Audit Officer properly and effectively exercises his functions.

3. Contrary to what MEPA maintains, however, these provisions in no way limit the right of the Audit Officer to give a copy of his report to complainant or to any other interested party, or indeed to make use of it to influence public opinion in the normal democratic process. If the law had wished this to be so, it would have stated so - *ubi lex voluit, dixit*. Indeed the law could not wish that it be so because that would mean that basic principles of good administration would be breached.

4. It is interesting to note that the Authority is bound to publish in its entirety, as part of its annual report, the annual report drawn up by the Audit Officer. It is obvious that the publication of the Authority's annual report would in this case have to include all or any report which its Audit Officer chose to include, even verbatim, in his annual report. This alone defeats and negatives MEPA's contention that the Audit Officer's reports are to be given exclusively to its Board and not to complainant.

5. It is also interesting to note that the wording of the sections under review is distinctly different from that used by the legislator in other laws setting up commissions or authorities with investigative functions. Thus, for example, Act XV of 1987 which made provision for the establishment and functions of a Commission for the Investigation of Certain Injustices - the precursor of the Ombudsman Act - clearly stated in section 10 that:

"The Commission shall send to the Prime Minister, at the earliest opportunity, a report of the result of the investigation ... and where the Commission finds that an injustice has been committed or sustained, the report shall contain recommendations as to the redress that the Commission considers appropriate in the circumstances."

In that case the Commission sent its report to the Prime Minister and was reporting to him directly. It was not therefore free to divulge that report to any other person since that report, even materially, should be transmitted and communicated solely to the Prime Minister. In that case the circumstances that the legislator was providing for were totally different from those under review. That law was politically charged and was eventually repealed by section 30 of the Ombudsman Act, 1995 which was in turn followed by the setting up of a tribunal having judicial functions. However, even in those exceptional circumstances the legislator felt that:

"The Commission shall also inform the complainant, in writing, of the justification or otherwise of his complaint. "

The legislator was therefore conscious that the fundamental right of good administration

requires that the citizen be informed of administrative actions that affect his rights and interests. It was for this reason that the Commission was bound to inform the complainant of the outcome of the investigation even though the Commission was specifically, in that case, not free to divulge the whole contents of the report. That limitation cannot be deduced from the wording of section 17C.

6. It is also to be noted that MEPA may not unreasonably ignore the Audit Officer's report. It is by law bound to consider any remedial action suggested by him. It has to actively examine whether that action was appropriate and, if so, proceed to act accordingly. It can only not do so if it could reasonably justify its rejection of the suggested remedy and it would then be bound to inform the Minister of the reasons why no such or alternative action was taken.

7. The law, therefore, provides specific checks and balances to ensure that the complainant is given satisfaction that his rights and interests are being fully safeguarded by the Authority. These checks and balances would not make any sense unless complainant is made fully aware of the Auditor's findings, their motivation and recommended redress.

8. It is relevant to note that the amendment to the Development Planning Act (Chapter 356) that provides for the Office of Audit Officer was enacted in 2001 following widespread criticism of the workings of the Planning Authority. The Government rightly took action to provide a measure of open government through a mechanism which is meant to ensure uniformity and transparency in decisions taken. This at a time when MEPA was topping the list of public organisations against which my Office was receiving the greatest number of complaints. It was definitely a step in the right direction to provide the citizen with access to an independent and impartial officer who could specifically investigate whether his rights and interests were being fairly and justly dealt with by the Authority and to give him full satisfaction. This independently of the quasi judicial and judicial remedies to which he was, by law, entitled.

9. It is imperative that this process remains an open and transparent one and that the workings of the Authority, within its functions, are subjected to the scrutiny and judgement of public opinion. MEPA's interpretation of this section of its law reduces this democratic process inherent in good public administration to a secretive and negative one. The law undoubtedly does not intend this to be so while it also expects the Audit Officer to act strictly within the parameters of his functions.

The Conclusion

I am therefore of the opinion that MEPA's interpretation of section 17C of the Planning Development Act is erroneous at law and that the Audit Officer is entitled to give a copy of his report or part of it, as he deems appropriate, to those interested persons who, in his opinion, have a right to it, foremost among them the complainant/s