FOLKETINGETS
OMBUDSMAND

Case No 13/00559/ KA/JV/LNI

2. September 2014

The Parliamentary Ombudsman has in recent years processed a number of cases in which IT has played a central role and where, regrettably, it had to be concluded that the IT solutions had not measured up to the requirements in administrative law. The main message is that these requirements must be met regardless of the purely technical way in which an administrative body solves an administrative task. Therefore, the general rules which the authority must observe still apply when computers replace paper.

Another important point is that it is the responsibility of the individual administrative authority that its solutions measure up to the requirements in administrative law – and it is still the responsibility of the authority, even though it has chosen an off-the-shelf system which turns out to be inadequate. This is also the case, even when suppliers of IT systems are quite unable to offer a solution which meets the requirements.

This summary paper provides an outline of those IT-related problems which have been uncovered in the course of the Ombudsman's work.

Authentic copies and keeping them on file

An old age pensioner was of the opinion that the municipality had used an incorrect basis of calculation for his pension. The authorities, however, considered the old age pensioner to have been passive by not contacting them about it until the spring following the pension year. Therefore, he would have to carry the consequences of the error. The notifications of pension could not be reconstructed, however. The Ombudsman was therefore of the opinion that the risk of evidential uncertainty in the case should rest with the public authority. In general, the Ombudsman said, it must be an absolute requirement that a public authority has in its case files either copies of documents produced by the authority or is able, quickly and securely from an electronic system, to make a completely accurate printout (corresponding to a copy) of the document. Neither does a public authority's choice of an electronic instead

of a paper-based medium warrant the destruction of a document at an earlier stage than would have been the case for a paper document[1].

As for the requirements for the "authentic copy" which the authorities are obliged to keep on file, the Ombudsman has stated[2] that an outgoing letter is either to be saved in the shape of a hard copy or in an electronic version fully identical with the original letter, and as such also showing who has signed it. It cannot be required, however, that the electronic version of a letter also includes a copy of the actual signature, but as a minimum requirement it must be evident with certainty from the electronic document who signed the original letter. It applies generally to any case, by the way, that authentic copies must be kept on file. The case is referred to further under the heading "Signing, dating and sending letters".

In a case[3] concerning the Copenhagen City Council the city administration was unable to reconstruct payment demand letters sent in cases involving collection of alimony. The Ombudsman stated that the council was not entitled to choose not to have copies of the payment demand letters printed out regularly. In addition, the letters cannot be discarded until such time when there is no further legal or administrative need for them, in other words when it is certain that any demands arising from the case are either expired or are inadmissible due to the debtor's death.

The demand for the preservation of an authentic copy also applies in cases where an authority only communicates digitally. The Danish Market Management and Intervention Board had in an e-mail replied to an employee's application for leave of absence. The Ombudsman stated that the Board should have stored the e-mail, either in the form of a printout or electronically[4].

Authenticity requirements for documents sent electronically

It is a minimum requirement that the contents of those documents which the authorities send electronically to the citizens cannot easily be altered after they have been sent.

In two instances the National Social Appeals Board had sent out decisions as ordinary Word files. This meant partly that the decision letters changed date every time the documents were opened, and partly that the contents of the documents could be changed easily after the documents had been opened. The Ombudsman stated[5] that an electronically sent document could instead

[1] Annual Report of the Parliamentary Ombudsman 1997 (in Danish), p. 198.
[2] Annual Report of the Parliamentary Ombudsman 2008 (in Danish) p. 79, especially p. 85.
[3] Annual Report of the Parliamentary Ombudsman 2003 (in Danish), p. 686.
[4] Annual Report of the Parliamentary Ombudsman 2001 (in Danish), p. 290.
[5] Annual Report of the Parliamentary Ombudsman 2009 (in Danish), Case No. 4-7. (Annual Report of the Parliamentary Ombudsman 2009 (in English), Annex D, Case No. 4-7)

be sent as a PDF file or be converted into an image and sent in a certified image format, for example as a TIFF file. This prevents the document from being automatically changed every time it is opened, just as it prevents any other unintentional changes being made to the document. The Ombudsman referred to the basic requirements pursuant to the Danish standard for information security, DS 484, which all sectors of the State must adhere to (see homepage of the Danish Agency for Digitisation (in Danish only) http://nwww.itst.dk/sikkerhed/standarder-1/ds-484). The Ombudsman did not give an opinion on whether it will in all cases be sufficient that electronically transmitted documents be sent as PDF files or image files or whether documents in certain cases may be sent with a lesser degree of security. Thus, the Ombudsman only considered the issue of whether or not decisions may be sent as Word files.

In another case a municipality used Word files to send letters electronically. In the Word file the signature field was formatted with a field code which meant that the user opening the document in some instances accidentally appeared from the letter to be the signer[6]. With reference to the above-mentioned case involving the National Social Appeals Board, the Ombudsman informed the municipality of the problem. The municipality then changed its practice so that it subsequently no longer used Word in connection with the creation of automatic signatures with the use of field codes. The municipality also stated that when sending documents electronically to citizens it would in future use a file format which ensured that the content of a decision could not be changed.

In addition, those *original* letters which the authorities send to the citizens must as a minimum meet the requirements for those *copies* which, regardless of the method of conveyance, the authorities have to keep on file, cf. the above-mentioned cases.

Search options and registration in IT systems

Administrative IT systems must be organised so that it is possible to search for and retrieve relevant cases based on content-related criteria. In connection with an own-initiative project regarding police fine cases, it was not possible with the help of the police IT system to retrieve those cases involving refusal of payment instalments, payment respite and remission which the Ombudsman wished to investigate[7]. In a later case the Ombudsman criticised that the electronic file system of the University of Copenhagen only allowed case searches when a person's civil registration number was used as a search criterion. Consequently, the University could not carry out a case search based

[6] Case No. 13/02325: not published.
[7] Annual Report of the Parliamentary Ombudsman 2004 (in Danish), p. 569, especially p. 571f and 622f.

on a specific subject or on specific provisions in the study grant legislation. The authorities have to observe the equality principle of administrative law, and they can only do so if they are able to retrieve earlier, relevant cases, and furthermore have a sufficiently reliable grasp of their own practice[8].

Moreover, the authorities' IT system registrations have to be clear and sufficient. As an ombudsman case from 2007[9] showed, confusion resulted from the National Social Appeals Board's practice of registering the *receipt date* for incoming letters in a field entitled 'Letter date' in the electronic case and document management system. Further, the system was inadequate because it did not at all register the *date* written on the incoming letters. This was problematic, as a citizen is entitled to have access to a document list. The intention is *partly* to provide the citizens with information on the processing of the case, and *partly* to give the citizens the opportunity to check that they have had access to all the documents to which they believe they are entitled to have access. As, however, the citizen cannot know when the authority has received a letter, it must (also) be necessary to register the date on the letter in order to identify it.

Signing, dating and sending letters

In different contexts it is of vital importance that the date on which an authority has sent letters is reliably documented. This is true in relation to, i.a., the calculation of deadlines, including deadlines for complaint. When calculating complaint deadlines, it must be safe to assume that the authorities' decisions are sent out in accordance with the date on the letter.

The Ombudsman has investigated the system and practices of the National Board of Industrial Injuries in connection with the dating and sending of letters. The system is organised in such a way that most outgoing letters are dated automatically and put in envelopes by machine. However, a not inconsiderable number of letters are still dealt with manually, and the Ombudsman pointed out a number of opportunities for error which may have an impact on the calculation of the complaint deadline. Among other things, the Board must have routines which ensure that manually handled letters which are not sent on the same day as the system dates the letter will be printed out again with the date when the letter is actually sent[10].

The many letters which the National Board of Industrial Injuries prints and puts in envelopes by machine are then sent to the recipient through the postal service. These letters are not signed by hand. The Ombudsman has also

[8] Annual Report of the Parliamentary Ombudsman 2006 (in Danish), p. 390.
[9] Case No. 2007-3631-009; not published.
[10] Annual Report of the Parliamentary Ombudsman 2007 (in Danish), p. 399.

looked into the issue of signatures on the Board's letters[11]. All letters in decision cases must be signed, including the letter containing the actual decision in a case. However, the letters need not be signed by hand but can be signed by a facsimile signature (a rendering of the actual signature) being inserted electronically in the letter. There are several reasons why a signature is required in decision cases. It must be possible to allocate an individual responsibility; it must also be possible to see that the decision has been made by an authorised employee; and it must be possible to see that the document in question is a final document and not a draft. The signature counteracts forgery, and it must be possible for the recipient of the letter to assess whether the signer is disqualified due to a conflict of interest. The Ombudsman only had the opportunity to come to a definite conclusion on the requirements for letters sent by post. The same considerations and requirements apply in relation to letters which are e.g. sent via e-mail; but a future case must show precisely how a purely electronic solution may be designed so that it fulfils all the legal requirements.

The right of a party to be represented, notification of decisions, electronic applications, guidance

When an authority during processing of a case communicates with a citizen, the citizen has a right to be represented by other persons, cf. the Public Administration Act, Section 8. This applies also when the communication is done electronically. This was the issue in a case[12] concerning the universities who can choose to decide that all communication between university and students and between the university and applicants for the university's (study) programmes must take place electronically. The Ombudsman stated that the right to be represented is met if the university creates the IT system in a way that makes it possible for others to use it on behalf of the student or the applicant. This is also possible if the university, as part of the decision to introduce obligatory electronic communication, establishes the possibility of being exempted if a student or an applicant wants to be represented by other persons. The Ombudsman moreover assumed that the IT system would inform the student or the applicant about the possibility of being represented by others. If the system did not provide that option – and the student or the applicant therefore could be exempted from the obligation to use electronic communication – the Ombudsman took it for granted that the student or the applicant would receive clear and relevant guidance about that possibility.

[11] Annual Report of the Parliamentary Ombudsman 2008 (in Danish), p. 79.
[12] File No. 2011-0050-7091, published as Case No. 2011 12-1 (in Danish) at www.ombudsmanden.dk

In two other cases[13] the Ombudsman has examined the issue of being represented by other persons in relation to the electronic self-service systems minSU (student grants) and mitUddannelseskort (grant aided transport in youth education). These cases revealed that the systems were not developed in a way that rendered it technically possible to be represented by others. If a student wanted to be represented by others, the student should therefore have the right to apply for and to be notified of the decision about student grants and grant aided transport, respectively, in a letter sent through the post. The Ombudsman stated the necessity of giving a clear and relevant guidance to the applicants about this possibility of being exempted from using electronic communication when wanting to be represented by others. With regard to grant aided transport in youth education the case generated a further question regarding the right to be represented by other persons due to the special parental responsibility between parents and their under-age children. The Ombudsman thus stated that it was necessary that the custodial parent also received clear and relevant guidance about the possibility of being exempted from using electronic communication if he or she wanted to represent his or her child.

In a case[14] concerning the (former) National Education Agency, the Ombudsman became aware that the agency in cases about special educational assistance gave notification of its decisions only by placing them in the agency's computer network. It was hereafter up to the applying educational institution to enter the system in order to see whether the agency had made a decision in the case or not. Thus, notification of the decision was neither given to the educational institution who had applied, nor to the pupil who was supposed to receive the special educational assistance. The Ombudsman stated that a citizen who is a party to a case must be informed directly when an authority arrives at a decision. Because the pupil was a party to the case about special educational assistance, the agency should therefore give notification of the decision directly to the pupil. The case also generated questions about the agency's notification of the decision to the educational institution; thus, there was not sufficient legal basis for the agency to require the use of the agency's computer network in order for the applicant to receive the decisions.

Moreover, administrative bodies cannot just summarily require citizens to write to them electronically. They can only do so if it is required by law. This was stated by the Ombudsman in a case[15] about a municipality which had decided to disregard future applications for employment, if they were not sent by e-mail. Having heard about the municipality's practice, the Ombudsman chose

[13] File No. 2011-0051-7093 and 2011-0107-7093, published as Case No. 2012-5 (in Danish) at www.ombudsmanden.dk

[14] File No. 2010-1527-7093, published as Case No. 2011 18-1 at www.ombudsmanden.dk

[15] File No. 2011-1776-8100, reported as part of a publication 21 December 2011 (in Danish) at www.ombudsmanden.dk

on his own initiative to investigate whether this method was legal. The Ombudsman wrote to the municipality that Section 32 A of the (Danish) Public Administration Act states that the minister concerned may lay down rules about the right to use digital communication when contacting a public body. In the explanatory notes to the enactment it is said, among other things, that there are "no legal grounds for giving directions, which exclude other ways of communication than digital comminication (e.g. by specifying that a citizen's inquiry to a public body can only happen by means of digital communication)". The municipality was of the opinion that its procedure was legal because, among other things, the issue in question was applications for employment in the municipality, and the municipality presumed that applicants for jobs in the public sector are not covered by the provisions of the Public Administration Act. The Ombudsman disagreed with the municipality's interpretation and referred to the fact that it is an established presumption that applicants for jobs in the public sector are covered by the provisions of the Public Administration Act. Section 32 A of the Public Administration Act would therefore also apply in this case. As an explanation for its procedure, the municipality had also referred to the existence of a general strategy aimed at motivating public bodies to implement digital administration which is far more economical. The Ombudsman was of the opinion, however, that this did not provide legal grounds for the municipality's procedure either, seeing as the strategy had not led to legislation allowing the municipality to require e-mail communication. The Ombudsman concluded that the municipality's decision to disregard applications for employment in the municipality out of account, if they were not sent by e-mail was illegal.

The Ombudsman also initiated an investigation into a case which during the summer of 2010 revealed that several hundred applicants who were qualified for admission to the university – and who had applied via optagelse.dk (the university's digital enrollment form) – had been refused.[16] The grounds for the refusals were that the applicants' diplomas had not arrived along with the applications. The Ombudsman asked the then Ministry of Science, Technology and Development, now Ministry of Science, Innovation and Higher Education to explain what guidance the applicants had received, and whether the applicants had received an acknowledgement of due receipt showing whether the diploma was attached or not. The Ministry informed the Ombudsman that the Ministry had settled the matter in such a way that applicants who were qualified for admission, but whose application through optagelse.dk had been refused due to a missing diploma, had all been offered admission with commencement of study by 1. September 2010. On that basis the Ombudsman decided to withdraw from the case.

[16] File No. 2010-3100-7120, referred to in two publications of respectively 10 August 2010 and 6 July 2011(in Danish) at www.ombudsmanden.dk

Problems in a wider perspective

The Ombudsman may on his own initiative decide to carry out systematic investigations of a larger number of cases on a specific topic; these investigations are the so-called own-initiative projects. The focus of these investigations has been specifically directed at recurring errors and general problems. The Ombudsman has carried out two own-initiative projects on, respectively, 90 national service cases[17] and 75 fine cases[18] on subject matters which are to a large degree administered by big IT systems. Both investigations demonstrated that there were problems in living up to the basic requirements of administrative law, and showed that the central IT system was the cause of these problems.

With regard to the national service cases the Ombudsman thus noted that the authorities had neglected their duty to give guidance, the duty to take notes, the duty pursuant to the Act on Processing of Personal Data to notify registered persons, in some cases the duty to elucidate the case, the duty to give grounds and the duty to provide satisfactory appeal guidance. The reason for e.g. the lack of adequate grounds was that those standard letters (forms) which the IT system provided did not contain such adequate grounds.

The own-initiative project concerning the fine cases showed up problems on 3 levels. *Firstly*, the Ombudsman could *demonstrate* that the police had ignored some basic rules of administrative law: the duty to take notes, the provisions according to the Act on Processing of Personal Data on notification, the provisions pursuant to the Public Administration Act on the giving of grounds (in a relatively minor number of cases) and on appeal guidance, the rules on the keeping of documents and authentic letter copies and the signature requirement. The problems on the latter two levels were caused in particular by interaction between the following factors: Most applications for payment by instalment, payment respite and remission of fines were given verbally (by means of a personal appearance or a telephone call to the police), and notes and other documentation on the application and the elucidation of the case were at best scanty. *Secondly*, the material which the investigated cases did contain thus could not provide the background to *document* that some (other) basic rules of administrative law had been observed: The rules on representation and party consultation procedure, case elucidation and giving of grounds (for the majority of the cases). As an example, you cannot know if grounds have to be given for a decision when it is impossible to see whether the decision grants an application in full or not. Last but not least, *thirdly*, it had not been possible to *verify* if the statutory authority requirements according to administrative law had been observed in the investigated cases. The badly documented cases thus made it impossible to see what the statutory authority

[17] Annual Report of the Parliamentary Ombudsman 2003 (in Danish), p. 735.
[18] Annual Report of the Parliamentary Ombudsman 2004 (in Danish), p. 569.

had been for the individual decisions and which criteria had been used, whether the practice had been consistent or whether there might be a question of unlawful discrimination, etc.

Development of new IT systems by the authorities

The Ombudsman has been in dialogue with the authorities concerning the system development for the Customs and Tax Administration's Central Debt Collection System (EFI).

In 2005 the Ombudsman was made aware that the authorities intended to create a new, central IT-based debt collection system in connection with the concentration of debt collection in a central recovery body. The Ombudsman therefore wrote to the Ministry of Taxation[19], asking the Ministry to state how the Ministry intended to ensure that the system would be set up to comply with the requirements in administrative law. The Ombudsman pointed out that he had noted on several occasions that basic administrative law requirements are neglected in connection with mass administration through IT systems.

Over the following years the Ombudsman then received regular updates from the Customs and Tax Administration and the Ministry of Taxation but it would take almost 9 years before the Ombudsman received a statement with descriptive information on how the administrative law requirements would be observed in the IT system. At that time the system was partly in operation.

On the current basis the Ombudsman did not find any grounds for taking further action, as a final assessment of the system's ability to adequately support compliance with administrative law requirements would have to be based on the processing of actual cases.

The Ombudsman stated, however, that he considered it to be unsatisfactory that an adequate description of the way in which administrative law requirements would be observed in the new system was first provided after the system had been partly put into operation.

In addition, the Ombudsman considered it to be very regrettable that the Ministry of Taxation had to report that no continuous documentation, etc. of the system's ability to comply with administrative law requirements seems to have been made during the development of the system.

Furthermore, the Ombudsman made a number of general comments on the prerequisites for sound and appropriate planning of the work involved in developing new IT systems for the public sector.

[19]Case No. 2014-24, published at www.ombudsmanden.dk