



OMBUDSMAN

SINT MAARTEN

FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Complainant: Marketplace vendors (30), represented by spokesperson Mrs. Ingrid Grell-Davis

Date complaint filed: 12 October 2017

Complaint no.: 2017/12OctGM_1

Minister of Tourism Economic Affairs, Traffic and Telecommunication

Department: Economic Licenses & Public Transportation

Summary of Complaint:

On 12 October 2017 thirty (30) Marketplace vendors, represented by Mrs. Ingrid Grell-Davis (Complainants), informed the Ombudsman that they were negatively affected by the decision of the Minister of Tourism Economic Affairs, Traffic and Telecommunication (Minister TEATT) to breakdown and remove all Kiosks in Philipsburg. Complainants alledge that they were not consulted, nor informed on the matter, nor could their concerns be properly addressed by representatives of the Department of Economic Affairs, Mr. Wilson and Mr. Marlin.

Conclusion:

The core task of the Ombudsman is the investigation of *Propriety* applied by government bodies and government agencies in their relationship and dealings with the public. The scope of *Propriety* goes beyond the law; it reflects the norms expected from government in executing the laws, policies and established procedures. Government is expected to be open and clear, respectful, involved and result oriented, honest and trustworthy.

The main question for consideration in evaluating the Complaint filed is:

Did the Minister of TEATT observe propriety in the decision and execution to remove and relocate the Marketplace kiosks without informing the affected Vendors?

By letter dated 5 October 2017 the Minister of TEATT (further also referred to as the 'Minister') informed the Department Head of VROMI that a report from the inspection department indicates that 27 of the 29 booths of the Marketplace are damaged and some 6 damaged beyond repair. Considering that the structures allegedly posed a threat to the



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surrounding area, should another storm pass the island, the department was requested to temporarily remove the Kiosks until a suitable replacement is found.

In the Daily Herald Newspaper, dated 12 October 2017, it was reported that the kiosks of Philipsburg Marketplace are being knocked down “*due to unsanitary unsafe and deplorable conditions following Hurricane Irma*”, according to Tourism and Economic Affairs Minister Melissa Arrindell-Doncher. “*Most of the kiosks are beyond repair. (.....) while parts of the kiosks were also removed by persons to use as construction material elsewhere. Rodents had also become a problem*”, said the Minister. The Ministry is “*discussing a plan for the area as well as relocating of vendors.*”

Responding to queries from the Ombudsman, the Minister of TEATT mentioned that a report dated November 16, 2016 established that the market was already in need of repair prior to the passing of Hurricanes Irma and Maria. The damages sustained post Hurricanes Irma and Maria greatly exacerbated these conditions; the decision to remove the kiosks came due to the fact that all vending stalls were damaged.

The Ombudsman however established that according to the report from the Marktmeester Mr. Martin Wilson, dated 16 November 2016, only five light poles and some tiles were damaged, while some bricks needed to be reset and water retainers for the palm trees needed to be replaced. No repairs were needed for the kiosks. The damage assessments by Mr. Marlin and Mr. Wilson after the Hurricanes, dated respectively 27 September 2017 and 24 October 2017, showed that 3 of the 27 kiosks were destroyed beyond repair, 4 suffered structural damage and 20 lightly damaged, but could be repaired. As such the facts provided in the instructions to the Head of the Public Works department, Mr. Buncamper/the Ministry of VROMI by letter of 5 October 2017, were not covered by the above mentioned reports.

Considering propriety, the Ombudsman observed that actions taken by government should be carried by facts and logic, communicated to the citizen. Proper reasons, motives and grounds should be provided and explained to the citizens affected by decisions made by government, as well as proportionality observed. A public body cannot act on the basis of its own discretion nor can it act randomly; every decision and action of a public body has to be properly motivated. A public body has to properly motivate its decision in regard to a request submitted, but also in regard to change in legislation, decrees and or policies.

Notwithstanding the intention of the Minister to relocate the vendors, and as subsequently reported in the media, in order to provide the tourists an upgraded Marketplace experience, no tangible considerations regarding the impact of the decision on the livelihood of the vendors were presented by the Minister in responding to the questions posed by the Ombudsman. Neither was a tangible plan of approach presented to materialize the relocation of the vendors and safeguard their livelihood, nor such discussed with the vendors. On the



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contrary, relocation dates and information provided to the vendors after the intervention of the Ombudsman were not met.

Considering :

- that the statement made by the Minister of TEATT in The Daily Herald Newspaper of 12 October 2017 (unsanitary, unsafe and deplorable conditions and rodents) and the facts reported in the letter dated 5 October 2017 to Mr. Buncamper, Head of Public Works Department (structures pose a threat to the surrounding area), are not covered by the report of the Marktmeester Mr. Marlin and Mr. Wilson, conducted respectively on 16 November 2016, 27 September 2017 and 24 October 2017;
- that the impact of the decision on the livelihood of the Market Vendors, and no area for relocation was in place at the time of the decision, nor has such been identified properly before 5 November 2017 as promised to the vendors;
- that timely communication with the vendors, whose interests are at the core of the pertinent decision, has not been observed;

The Ombudsman concludes that propriety has not been observed and has been violated in the decision-making process to remove the Philipsburg Marketplace Kiosks and by the letter of instruction to VROMI, dated 5 October 2017. The decision of the Minister lacks proper reason, motives and grounds. The standard of *Reason* is applicable.

The Ombudsman further observes that based on the standard of *Active and Adequate Information provision* administrative bodies are expected to act in the interest of managing the affairs of the citizens. Administrative bodies are required to actively and upon request provide adequate information to the public. Providing adequate information can clear the air between public bodies and the citizens. In general an individual is more willing to accept a situation when there is an explanation, or the outcome of a request is motivated. To ensure a high level of credibility in public bodies, transparency is essential. Being open and clear in providing adequate information regarding plans and actions of the government, that affect the interest of the citizen is a requirement for enhancing the credibility of public bodies. That administrative bodies are required to actively and upon request provide adequate information to the public, entails on the one hand the duty to provide citizens with information upon request, as well as the duty to inform the citizen on its own initiative about proceedings that have a direct effect on them. Proper information creates legal certainty for all.

Considering that the decision taken by the Minister of TEATT to remove the structures would effect the livelihood of the Marketplace vendors, the Complainants should have been informed promptly by way of a meeting with the Department, when it was clear that the alleged letter dated 3 October 2017 would/could not reach the Market vendors before the removal of the structures. A meeting was held with the Ministry of Economic Affairs and the



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Market vendors after the intervention of the Ombudsman, and more than two weeks after structures were already (being) removed. As such the *standard of Active and adequate information provision* is applicable in this case.

The Market vendors filed a complaint with the Ombudsman because they were not consulted, nor informed of the matter prior to taking said decision, nor could their concerns be properly addressed by the Department of Economic Affairs, when so requested. Conflicting information shared with the vendors compounded the matter.

The Minister alleged that the income of the vendors has not been disrupted by the removal of the huts, but by the damage the island sustained through the Hurricanes; she stated that the absence or lack of tourist activity has an impact on the vendors ability to generate income from tourism. The Minister concluded, that the presence or not of the kiosks is not a deterrent to vendors seeking to generate income, and compared same to others in the tourism industry.

Pursuant to the "*Landsverordening Openbare straathandel*", the Minister TEATT designates the place for keeping markets and issues the licenses to persons to sell merchandise on these locations. As such it behooved the Minister to carefully weigh the impact of the decision taken against the interests of the vendors. The standard of *reasonableness and proportionality* requires that the negative consequences of an action to achieve a certain goal may not be disproportionate to the interests of the citizen, or group of persons. Considering the reports provided before and after the onslaught of the Hurricanes, the state of the kiosks could have possibly allowed quick repair and restoration, hence the decision maybe to only temporarily remove them. The considerations presented by the Minister in response to the investigation of the Ombudsman do not establish however that proportionality has been observed in the decision to (temporarily) remove and not restore the kiosks. In this light the Ombudsman observes that the standard of *proportionality* requires that the measure that interferes the least with the interest of the citizen should be employed.

Judgment:

- The complaint as filed is founded.
- The standards of *Reason, Active and adequate information provision*, and *Reasonableness and proportionality* have been violated.

Government is expected to be open and clear when handling the affairs of the people. More so when swift decision-making and actions are required. Though the Minister of TEATT stated that the Ministry is working diligently on a comprehensive recovery plan i.e. resumption of commercial flights, cruise ships as soon as possible to aid in the economic recovery of the island and its residents, and would provide same to the Ombudsman, to date



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of this Final Report the pertinent plan, nor the status of the vendors have been communicated to the Ombudsman.

Considering the investigation and findings as stated in the PFR, the Ombudsman recommends as follows.

Recommendation:

- Ensure that at all times proper reasons, motives and grounds be observed, provided and explained to the citizen in general, and the complainants in particular in all pending decisions.
- Inform complainants in writing about the steps taken and the action plan regarding the relocation of the Marketplace structures, with copy to the Ombudsman.

- o I agree with the recommendation(s)
- o I do not agree with the recommendation(s) (please explain by submitting a written reaction no later than **15 December 2017**).

The Ombudsman requests a status report on the recommendation(s) within three (3) months from the date of this letter, however **not later than 15 March 2018**.

Elucidation

For the *Investigation* procedure and *Findings* parties are referred to the PFR, which is considered part of, and included in this Final Report.

Legal Basis:

Pursuant to article 19 section 1 of the **National Ordinance Ombudsman (AB 2010, GT no. 20)**, the Ombudsman is authorized to request from government bodies, civil servants, the Complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation.

The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 section 4).

Standard(s) of Proper Conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are: *Reason, Active and adequate information provision, and Reasonableness and proportionality*.



Reason

Actions taken by government should be carried by facts and logic communicated to the citizen. Proper reasons, motives and grounds should be provided and explained to the citizen with all decisions made by government.

A public body cannot act on the basis of its own discretion nor can it act randomly, as such every decision and action of a public body has to be properly motivated.

A public body has to motivate its decision in regard to a request submitted, however also in regard to change in legislation and decrees. Motivation is considered to be proper when the following elements can be found in the reasoning:

- Relevant rules and regulations;
- Relevant facts and interest;
- Well thought out, thorough and sound reasoning.

Proper motivation is required in individual cases. A standard motivation is in general not sufficient to be used in a specific case.

Active and adequate information provision

In the interest of managing the affairs of the citizens administrative bodies are required to actively and upon request provide adequate information to the public. This implies among others the obligation to answer letters from citizens, sending an acknowledgement of receipt, and an interim notice in case the handling of a request takes longer than anticipated.

Providing adequate information can clear the air between public bodies and the citizens. In general an individual is more willing to accept a situation when there is an explanation, or the outcome of a request is motivated. To ensure a high level of credibility in public bodies, transparency is essential. Being open and clear in providing adequate information regarding plans and actions of the government, that affect the interest of the citizen is a requirement for enhancing the credibility of public bodies.

That administrative bodies are required to actively and upon request provide adequate information to the public, entails on the one hand the duty to provide citizens with information upon request. As well as the duty to inform the citizen on its own initiative about proceedings that have a direct effect on them. Proper information provision creates legal certainty for all.

Reasonableness and proportionality

An administrative body is obliged to weigh interests in reaching a decision and to observe the principle of proportionality. This requires that the negative consequences of an action to achieve a certain goal may not be disproportionate to the interest of the citizen.

A public body is required to conduct a thorough and adequate investigation into the relevant facts and circumstances; adequate information should be gathered. Subsequently, the acquired facts have to be weighed against the interests of the citizen; the outcome may not be unreasonable.



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The standard of proportionality provides that the consequences of a decision made, or action taken by a public body have to be proportional to the goal it is meant to serve. A public body is to employ the measure that interferes the least with the interest of the citizen (subsidiarity principle). And the goal has to justify the means used (proportionality). When coming to a decision the public body has to be well aware of its impact.

The standard of proportionality furthermore entails that when taking a decision a public body has to prevent a group of citizens being more heavily affected than others who are in the same position.

Philipsburg, 7 December 2017

Dr. R. (Nilda) J.A. Arduin
Ombudsman

