

Entscheidung im Fall 1794/2019/OAM, in dem es um die Weigerung der Europäischen Kommission geht, uneingeschränkten Zugang zu Dokumenten zu gewähren, die eine Veranstaltung betreffen, an der Beamte der Kommission sowie ein ehemaliger Referatsleiter der Kommission teilnahmen

Entscheidung

Fall 1794/2019/OAM - Geöffnet am 01/10/2019 - Empfehlung vom 08/07/2020 -

Entscheidung vom 11/12/2020 - Betroffene Institution Europäische Kommission (Missstand in der Verwaltungstätigkeit festgestellt) |

In dem Fall ging es um die Weigerung der Europäischen Kommission, der Öffentlichkeit Zugang zu Namen zu gewähren, die in Dokumenten genannt sind, die eine Firmenveranstaltung betreffen, an der Beamte der Kommission sowie ein ehemaliger Referatsleiter der Kommission teilnahmen. Der Beschwerdeführer, ein Journalist, wünschte Zugang zu den Informationen in den Dokumenten, um zu untersuchen, ob das Verhalten des ehemaligen Referatsleiters der Kommission, der aus dem Beamtenverhältnis ausgeschieden war, um eine Stelle in einem multinationalen Unternehmen anzutreten, mit seinen rechtlichen Verpflichtungen, Lobbyarbeit mit ehemaligen Kollegen zu unterlassen, in Einklang stand.

Der Lösungsvorschlag der Bürgerbeauftragten sah vor, dass die Kommission dem Beschwerdeführer Kopien der von ihm angeforderten Dokumente zukommen lassen sollte, ohne darin den Namen des ehemaligen Referatsleiters der Kommission zu schwärzen. Der Vorschlag der Bürgerbeauftragten wurde von der Kommission mit der Begründung abgelehnt, dass der Beschwerdeführer lediglich abstrakte und allgemeine Ausführungen zu möglichem Fehlverhalten des ehemaligen Bediensteten gemacht habe und dass solche Bedenken es nicht rechtfertigten, die personenbezogenen Daten ihm gegenüber offenzulegen.

Die Bürgerbeauftragte befand, dass die Weigerung der Kommission, die betreffenden Dokumente ohne Schwärzung der betreffenden personenbezogenen Daten offenzulegen, einen Verwaltungsmissstand darstellt. In einer anschließend erteilten Empfehlung an die Kommission wiederholte die Bürgerbeauftragte ihre Ansicht, dass die angeforderten Dokumente ohne Schwärzung des Namens des ehemaligen Referatsleiters offengelegt werden sollten.

Die Bürgerbeauftragte bedauert, dass ihre Empfehlung von der Europäischen Kommission zurückgewiesen wurde. Die Bürgerbeauftragte hat vielfach auf die Schwierigkeiten bei der Durchsetzung der Bedingungen in Bezug auf den „Drehtüreffekt“ bei Beamten hingewiesen. Es



ist unbedingt ein Höchstmaß an Transparenz sicherzustellen, damit Probleme erkannt und behoben werden können. Wenn die Kommission in diesem Fall den vollen Zugang der Öffentlichkeit verweigert, wird dies das Vertrauen der Öffentlichkeit in die Handhabung von „Drehtüreffekten“ durch die Kommission nicht stärken.

Background to the complaint

1. In July 2019, the complainant, a journalist, asked the Commission to receive public access [1] to invitations and other documents related to a corporate event organised by a multinational company in April 2019. This event had been attended by a number of Commission staff members and by a former Commission head of unit.

2. The Commission replied to the complainant in August 2019, granting full access to three documents and partial access to 18 documents, redacting all personal data.

3. The complainant asked the Commission to review its decision by making a so-called 'confirmatory application'. The complainant stated that he was interested in the role played by the former Commission head of unit during that event. The complainant said that the former head of unit had taken up a position in the company hosting the event at issue and that he was investigating a potential conflict of interest of that person. The person had worked on issues of direct relevance to the multinational company when he was an EU civil servant. The complainant wanted to investigate whether the person had violated obligations as a former EU civil servant by engaging with former close Commission colleagues.

4. In September 2019, the Commission confirmed its initial decision, relying in particular on the need to protect the privacy and the integrity of an individual. [2] The Commission considered that the complainant had failed to establish a need as to why the personal data at issue should be transferred to him. The Commission further considered that there was a real and non-hypothetical risk that public disclosure of the personal data would harm the privacy of the persons concerned, who could become subject to *"unsolicited external contacts"*.

5. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman. The Ombudsman inquired into the Commission's refusal to disclose the name of the former head of unit contained in the documents. The Ombudsman's inquiry team inspected the non-redacted versions of the requested documents.

The Ombudsman's proposal for a solution

6. The Ombudsman considered that the conditions for allowing the transmission of personal data from the controller (the Commission) to the recipient (the complainant) were met. [3] In particular, the complainant had demonstrated a need for the transfer of the personal data for a specific purpose that was in the public interest, namely to evaluate whether there was a



possible conflict of interest and whether the Commission had respected its own ethics rules. The Ombudsman also considered that any interest the former head of unit may have in having his name redacted from the documents, could not be described as a 'legitimate interest'. This was because the use of the name in the context of one document related directly to the issue of whether the former head of unit and the Commission in fact respected the restrictions on contacts between them.

7. The Ombudsman therefore proposed that the Commission should provide the complainant with a copy of the requested documents without redacting the name of the former head of unit. [4]

8. The Commission rejected the Ombudsman's proposal for a solution, reiterating that the need put forward by the complainant was generic and arguing that it was its responsibility alone to scrutinise the activities of (former) Commission staff. The Commission also considered that the interests of the former head of unit were legitimate and could be undermined by disclosing his or her personal data. [5]

The Ombudsman's recommendation

9. The Ombudsman noted that the head of unit concerned had formerly occupied a management position at the Commission and had therefore had a certain level of seniority when working for the EU civil service. Thus, given that the person had then taken up a public affairs role in a company active in the same area of responsibilities that he worked in at the Commission, the Ombudsman took the view that the person must accept a certain amount of public scrutiny.

10. The Ombudsman also considered that the complainant had provided sufficient reasons for having the personal data of the former head of unit transferred. The Ombudsman also considered there were no more appropriate or less intrusive means to fulfil the purpose put forward by the complainant.

11. The Ombudsman therefore found that the Commission's persistent refusal to provide public access to the requested documents without redacting the name of the former head of unit constituted maladministration. She thus made the following recommendation: [6]

The Commission should provide the complainant with a copy of the requested documents without redacting the name of the former Commission head of unit. [7]

12. The Commission rejected the Ombudsman's recommendation and maintained its position that it cannot grant access to the name of the person concerned. [8]

13. The Commission reiterated that the evidence provided by the complainant setting out the necessity for having the data transmitted was insufficient to meet the strict legal test provided in the data protection rules [9] . The complainant did not demonstrate how the transmission was



necessary to ensure adequate public scrutiny of the alleged conflict of interest and, more specifically, how this review would remedy the alleged inadequacies of the existing Commission scrutiny mechanism in this specific situation.

14. The Commission argued that, by disclosing the personal data, the former head of unit might risk serious reputational damage, since media scrutiny would draw conclusions only from the respective documents, rather than on the basis of an overall picture. The Commission also considered that the person concerned was not a *public figure* within the meaning employed by existing case law [10] .

15. In his comments on the Commission's reply, the complainant stressed that as a journalist he had a specific watchdog function of ensuring public scrutiny of issues such as conflicts of interest. He made his request as a public watchdog, exercising both his right of access to documents and his right to freedom of expression and information. In denying access to this information, the Commission was “ *creating barriers to the exercise of freedom of expression and information*” .

16. The complainant also underlined that he considered the former Commission head of unit to be a well-known figure in a specific area of policy expertise, having had several public appearances as speaker at industry events. The person's prominence in the specific area of expertise was the reason he had been hired by the private company. In the complainant's view, it was precisely the person's public role that deserved to be scrutinised.

The Ombudsman's assessment after the recommendation

17. The Ombudsman maintains her view that the Commission's refusal to disclose the name of the former head of unit in the documents at issue was maladministration.

18. When staff members leave the EU civil service to take up positions in the private sector, leading to so-called 'revolving door' situations, concerns regarding the inappropriate exploitation of a former public service role often arise. This is a challenge affecting many public administrations. Although such moves can be perceived as a normal part of professional life, they might lead to situations of possible conflicts of interest. Public scrutiny in this area is not only reasonable but also necessary in a democratic society. Allowing for proper public scrutiny increases citizens' trust in and the legitimacy of the public administration. [11]

19. In this case, the complainant provided specific evidence of an event which had been hosted by the former head of unit's new employer and had been attended by the former head of unit and current Commission officials with whom he had worked in his former role. This situation was such as to create at least a perceived conflict of interest and to cast doubt on the effective enforcement of the rules to which EU civil servants are subject.

20. The aim of transmitting the data requested was thus to enable the complainant, and other EU citizens, to verify whether the rules set to avoid conflicts of interest were complied with.



Ultimately, this public scrutiny can help ensure public trust in the EU administration, either by confirming that there was no evidence of a conflict of interest, or by facilitating public engagement with the public administration to help hold it to account.

21. The Ombudsman also considers that disclosure of the personal data at issue could have been in the former head of unit's interest: it could have helped dispel any doubts that had been raised concerning the individual's integrity.

22. If disclosure had shown that those doubts were justified, the former head of unit's interest in non-disclosure is arguably not legitimate.

23. As regards the Commission's concerns that disclosure of the personal data would not have provided the public with the full picture of the situation, it could have chosen to provide the complainant with any additional information that it considers relevant to facilitate his drawing correct conclusions.

24. The Ombudsman has drawn attention, on many occasions, to the difficulties involved in enforcing the conditions attached to officials' revolving doors moves. Assuring the highest level of transparency is fundamental so that problems can be identified and addressed. The Commission's lack of full public disclosure in this case will not help in terms of public confidence in the Commission's management of revolving door situations.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The European Commission's refusal to provide the complainant with a copy of the requested documents without redacting the name of the former Commission head of unit, constituted maladministration.

The complainant and the Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 11/12/2020

[1] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link].



[2] In accordance with Article 4(1)(b) of Regulation 1049/2001.

[3] According to Article 9(1)(b) of Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725> [Link]

[4] Further information on the complaint and the full text of the Ombudsman's proposal for a solution is available at: <https://www.ombudsman.europa.eu/en/solution/en/129972> [Link]

[5] The full text of the Commission's reply to the proposal for a solution is available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/135762> [Link]

[6] In accordance with Article 3(6) of the Statute of the European Ombudsman.

[7] Further information on the complaint and the full text of the Ombudsman's recommendations is available at: <https://www.ombudsman.europa.eu/en/recommendation/en/129973> [Link]

[8] The full text of the Commission's reply to the recommendation is available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/135763> [Link]

[9] Article 9(1)(b) of Regulation 2018/1725

[10] Judgment of the General Court of 15 July 2015 in case T-115/13, *Dennekamp v Parliament*, paragraphs 119-121.

<http://curia.europa.eu/juris/document/document.jsf?text=regulation+1049%252F2001&docid=165829&pageIndex=0> [Link]

[11] See also the Decision of the European Ombudsman in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members, available at: <https://www.ombudsman.europa.eu/en/decision/en/110608> [Link].