



## Request for a reply from the European Ombudsman to the European Commission in case 1050/2018/EA concerning the European Commission's refusal to grant public access to a specific staff member's e-mails relating to a legislative proposal

Correspondence - 10/10/2018

**Case 1050/2018/DL - Opened on 10/10/2018 - Decision on 29/04/2020 - Institution concerned** European Commission ( Maladministration found ) |

Mr Jean- Claude Juncker

President

European Commission

Strasbourg, 10/10/2018

Complaint 1050/2018/EA

**Subject:** The European Commission's refusal to grant public access to a specific staff member's e-mails relating to a legislative proposal

Dear Mr President,

On 7 June 2018, I received a complaint against the European Commission, complaint 1050/2018/EA. The complaint concerns the Commission's refusal to grant public access under Regulation 1049/2001 [1] to a specific staff member's e-mails relating to a legislative proposal. I have decided to open an inquiry into this complaint.

I note that the Commission has said that it is not in a position to handle the complainant's request due to privacy concerns and data protection rules. The Commission has said that, as



the request concerned the e-mails of a specifically identified Commission staff member, the list and content thereof constitute that person's personal data within the meaning of Regulation 45/2001. [2] The Commission says that there are no grounds for lawful processing of the personal data of the staff member.

The Commission's reply to the confirmatory application seems to conflate what are two quite separate aspects of processing personal data in the context of this request for public access to documents. First, there is the processing by the Commission in extracting the documents from the staff member's e-mail account, for the purpose of handling the request. Second, there is the processing in the act of disclosure, which might follow after consideration of the request.

At this stage, it is the first aspect, which appears to be the basis for the Commission saying it is not going to process the application for public access, which I want to address. The question of potential disclosure is a separate issue, to which I may wish to return at a later stage of the inquiry.

I note that the Commission told the complainant that staff e-mails can only be considered as "documents" under Regulation 1049/2001 if they are "*not short-lived*" and "*contain important information requiring an action or follow-up by the Commission*". It is not clear to me whether these criteria are provided for in the internal rules of the Commission, and I would be grateful if the Commission could clarify this issue. I note, in any event, that these criteria do not appear in the definition of a "document", as set out in Article 3 (a) of Regulation 1049/2001.

Furthermore, the Commission argued that access to the electronic correspondence of staff members held in their individual Commission e-mail accounts or other IT systems is lawful under Regulation 45/2001 only in cases linked to security or investigation procedures.

I note that under Article 5 of Regulation 45/2001, processing of personal data by EU institutions is lawful, among other cases, when:

- it is necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis thereof (Article 5a)
- the data subject has unambiguously given his or her consent (Article 5d)

It is therefore my understanding that access to a Commission staff member's e-mails could be regarded as necessary for the Commission's handling of requests for public access to EU documents on the basis of Regulation 1049/2001 and the Treaty. [3] In these circumstances, the consent of the staff member would not be required. However, in my view, it goes without saying that any such procedure should take place in the context of the appropriate safeguards set out for this purpose by the institution and following proper communication to staff members.

I would be grateful if the Commission could provide me with details of its policy, practice and



relevant communications to staff on such matters.

I would be grateful to receive the Commission's reply to my views and comments above by 23 November 2018.

Please note that I am likely to send your reply and related enclosures to the complainant for comments. If you wish to submit documents or information that you consider to be confidential, and which should not be disclosed to the complainant, please include them in a separate annex marked 'Confidential'. Please feel free to contact the case handler beforehand, Ms Elpida Apostolidou, tel: +32 (0)2 284 18 76.

Yours sincerely,

Emily O'Reilly European Ombudsman

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[2] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p.1.

[3] Article 15 (3) TFEU on the right of public access to EU documents.