



Proposal of the European Ombudsman for a solution in case 552/2018/MIG on the European Commission's refusal of public access to documents concerning the German Network Enforcement Act

Solution - 12/03/2019

Case 552/2018/MIG - **Opened on** 22/03/2018 - **Recommendation on** 11/06/2019 - **Decision on** 20/11/2019 - **Institution concerned** European Commission (Maladministration found) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]
Background to the complaint

1. The inquiry relates to public access to documents held by the Commission.
2. On 28 July 2017, the complainant, a Member of the European Parliament, requested the European Commission to give her public access to its internal and inter-service communications regarding or in connection with a new German law, the Network Enforcement Act [2] , and the notification of that law to the Commission. The Network Enforcement Act is aimed at combating agitation and fake news on social networks.
3. On 14 September 2017, the Commission informed the complainant that it had **thus far identified 18 documents** . Twelve of these documents were, it said, already publicly available. It gave her partial access to the remaining six documents (for data protection reasons, it redacted names of persons from the documents [3]).
4. The complainant sought a review of this decision by making a so-called confirmatory application. The basis of her request for review was that **the Commission must have other relevant documents** .
5. On 13 December 2017, the Commission informed the complainant that it had identified **another 14 documents** . It gave three of these documents to the complainant without making any redactions. Seven documents were released in redacted form. Four documents were not released to the complainant.
6. Regarding the seven redacted documents, the Commission invoked the exception for the protection of personal data in all of them. Regarding two of these documents, the Commission argued that some of the other redacted parts fell outside the scope of the complainant's access request. Regarding four of the redacted documents and the four documents that were withheld in full from the complainant, the Commission invoked the



exception for the protection of its decision-making processes [4] .

7. On 20 December 2017, the complainant requested a review of the non-disclosure decision in respect of these further documents (she made a so-called 'confirmatory application'). She also stated that "*[she was] led to believe that more information at the Commission exists*".

8. When the complainant did not receive a response in good time, she turned to the Ombudsman, on 16 March 2018.

The inquiry

9. The Ombudsman opened an inquiry into the complaint. She obtained from the Commission unredacted copies of the documents identified by the Commission as falling within the scope of the complainant's request. The Commission promised that it would provide a response to the complainant's confirmatory application (a so-called 'confirmatory decision').

10. On 23 March 2018, the complainant provided the Ombudsman with a list of **six e-mails** that, in her view, should also have been disclosed to her. Upon request, the Commission sent copies of these e-mails to the Ombudsman. The Commission indicated that it had already made public the redacted versions of five of these e-mails in response to a different request for public access. The Commission further indicated that it would consider all six documents in its confirmatory decision.

11. On 14 June 2018, the Commission adopted a confirmatory decision granting the complainant (wider) partial access to several documents that had been identified previously and partial access to **three newly identified documents** . The Commission stated that it could not release a fourth document that had been flagged by the complainant on 23 March 2018 (see paragraph 10 above).

12. Regarding the redactions, the Commission repeated its view that they were necessary to protect the privacy and the integrity of the individual and to protect its decision-making processes. In addition, it argued that certain redactions were needed to protect legal advice [5] .

13. Concerning the scope of the confirmatory decision, the Commission explained that the complainant's request was understood to cover **only** documents concerning Germany's notification and drawn up or received by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).

14. As the Ombudsman considered that the Commission may have interpreted the complainant's access request too narrowly, she asked the Commission to provide her with a copy of the confirmatory decision it had taken relating to another request for public access to the six e-mails referred to in paragraph 10 above.

15. The Commission then sent that decision to the Ombudsman.
Failure to provide access to documents



Arguments presented to the Ombudsman

16. In support of its view that disclosure would seriously undermine its decision-making processes, the Commission stated that it was planning to carry out an **impact assessment** to identify possible measures to improve further the effectiveness of the fight against illegal content online. As the requested documents were relevant to that impact assessment, the premature disclosure of the documents would expose the Commission to undue external pressure.

17. As regards the protection of legal advice, the Commission stated that the documents contain purely internal legal opinions in matters of a sensitive nature and informal exchanges of staff that are based on a preliminary legal assessment of the draft act and on legal advice on how to monitor the national implementation closely. These considerations remain relevant for the preparation of the Commission's **impact assessment**. Disclosure of the documents could create unjustified and disproportionate reactions, which would render the provision of frank, objective and comprehensive legal advice more difficult.

The Ombudsman's assessment

18. The Ombudsman considers that the majority of the redactions made by the Commission appear to be inappropriate in the light of recent EU case-law [6]. In particular, the documents in question relate to an impact assessment that might lead to the adoption of a legislative initiative by the Commission. According to the EU court, the level of transparency required for such documents is increased. Thus, rather than shielding the discussion from external influencing factors, the Commission should release the respective parts of the documents to allow the public to express their view and to actively participate in EU law-making. The Ombudsman takes the view that involving the public would enhance both the quality of the Commission's decision-making process and its outcome, and the Commission's credibility. The preliminary nature of the assessment contained in the documents at issue does not alter this conclusion.

19. Moreover, having analysed the Commission's confirmatory decision taken in relation to the five e-mails (see paragraph 10 above), the Ombudsman notes that the exceptions applied in that case might no longer legitimately applied in this case.

The scope of the access request

Arguments presented to the Ombudsman

20. The complainant maintains that the Commission was withholding documents that fell within the scope of her access request by choosing to limit the scope of her request to documents concerning Germany's notification only and sent to or received from DG GROW.

21. The Commission argued that it had correctly interpreted the scope of the complainant's request for access for the following reasons: (i) the complainant had addressed her request to DG GROW, (ii) Germany had submitted its notification on the draft law to DG GROW, which



is the department responsible for such notifications, and (iii) the positions of other DGs had been collected by DG GROW.

The Ombudsman's assessment

22. In her initial request for access, the complainant was clear that she was seeking access to documents **held by the Commission** and containing information on both, the draft law **and** Germany's notification of that draft law to the Commission. The Commission was thus wrong to conclude that the scope of the request encompassed only documents that were drawn up or received **by DG GROW** and that concern **Germany's notification only** .

23. Having analysed the documents flagged by the complainant (see paragraph 10 above), the Ombudsman takes the view that the Commission's interpretation of the complainant's request resulted in the exclusion of at least five e-mails, which the Ombudsman considers fall within the scope of the request.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the Commission should conduct a fresh assessment of the complainant's request for access on the basis of the scope as intended by the complainant and understood by the Ombudsman. This will include documents concerning the draft law and Germany's notification of that law to the Commission held *anywhere* in the Commission.

Regarding those documents already identified that have not or have only partially been released to the complainant, the Commission should re-consider its decision not to disclose all or parts of the documents on the basis of the exceptions for the protection of legal advice and its decision-making processes in the light of recent case law.

The Commission is invited to inform the Ombudsman by **Friday, 12 April 2019** of any action it has taken in relation to the above solution proposal.

Emily O'Reilly

European Ombudsman Strasbourg, 12/03/2019

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] In German the "Netzwerkdurchsetzungsgesetz".



[3] In accordance with Article 4(1)(b) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> .

[4] In accordance with Article 4(3) paragraph 2 of Regulation 1049/2001.

[5] In accordance with Article 4(2), second indent, of Regulation 1049/2001.

[6] Judgment of the Court of 4 September 2018, *ClientEarth v Commission* , C-57/16 P.