

Proposal of the European Ombudsman for a solution in case 1302/2017/MH on the European Commission's handling of a request for public access to the opinions of its Legal Service concerning the Transparency Register

Solution - 03/12/2018

Case 1302/2017/MH - **Opened on** 04/08/2017 - **Decision on** 12/06/2019 - **Institution concerned** European Commission (Maladministration found) |

Access Info Europe asked the European Commission to give public access to the legal advice it received from its Legal Service in 2006 and 2007 on the introduction of a transparency register and in 2013 on the choice of legal basis for a mandatory transparency register. The Commission gave partial access to these documents. As the complainant was dissatisfied both with the level of access given and with the delay in dealing with the requests, it turned to the European Ombudsman.

The Ombudsman inquired into the issues raised and inspected the requested documents and the Commission's file on the case.

The Ombudsman suggests that, as the factual and legal situation has changed since the drafting of the documents, the reasons for refusal may no longer apply.

The Ombudsman therefore proposes that the Commission grant full access to the requested documents.

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

Background to the complaint

1. The transparency register [2] is a database set up to allow the public to monitor the activities of those who seek to influence the formulation and implementation of policy by EU institutions and the decision-making processes of the EU institutions (commonly referred to as "interest representatives" or "lobbyists"). The transparency register was set up in 2011 by the European Parliament and the Commission by means of an inter-institutional agreement ('IIA') that was revised in 2014 [3] .



2. On 17 May 2016, the complainant, Access Info Europe, made a request to the Commission in accordance with Regulation 1049/2001 [4] for public access to documents concerning legal advice provided to the Commission on the transparency register, including advice on the legal basis for the register and on whether the register could be mandatory.

3. In its reply of 27 July 2016, the Commission identified three documents as falling within the scope of the request:

- Document no 1: Note of the Legal Service to the Secretary General of 12 September 2006 (reference JUR(2006)30417);
- Document no 2: Note of the Legal Service to the Secretariat General of 17 September 2007 (reference JUR(2007)30478);
- Document no 3: Note of the Legal Service to the Head of Cabinet of Vice-President Maroš Šefcovič of 2 October 2013 (reference Ares(2013)3191712).

4. The Commission gave partial access to these documents [5] . Its refusal to give access to the remaining parts of the documents was based on the exceptions laid down in Regulation 1049/2001 concerning the protection of legal advice, the protection of the decision-making process and the protection of personal data.

5. On 18 August 2016, the complainant made a request for review (so-called “confirmatory application”), asking the Commission to reconsider its position. On 15 September 2016, the Commission extended its deadline to reply by 15 working days.

6. On 28 September 2016, the Commission submitted a proposal for a mandatory transparency register by means of an IIA between the European Parliament, the Commission and the Council [6] .

7. On 4 October 2016, the Commission replied to the complainant’s request for review, essentially replicating its reply to the initial application.

8. On 25 July 2017, the complainant turned to the European Ombudsman, complaining about this response.

The inquiry

9. The Ombudsman opened an inquiry into how the Commission had dealt with the complainant’s request for public access to documents, specifically into whether:

- In delaying its reply to the complainant’s initial application, the Commission had not respected the statutory deadlines [7] ;
- In granting only limited access to the documents in reliance on the exceptions relating to (a) the protection of legal advice, and (b) the protection of the decision-making process, the Commission failed to act in accordance with Regulation 1049/2001 and the case-law of the Court of Justice of the EU.



10. The Ombudsman's inquiry team inspected the requested documents and the Commission's file. It drafted a report on the inspection and gave the complainant the opportunity to submit its comments.

11. This proposal for solution deals with the substantive issue of public access (point (2) above). Should the Commission agree to the Ombudsman's proposal for solution, the complaint could be resolved and the case settled.

Arguments presented by the parties

a) The exception relating to legal advice

12. The Commission argued that the documents have a particularly wide scope [8] , since they examine the possible legal basis for a mandatory transparency register, sanctions in cases of non-compliance with the Code of Conduct [9] , procedures for alerts and for the investigation and treatment of complaints. The Commission argued that the legal opinions expressed are particularly sensitive and still relevant, as future discussions could arise about the legal basis for these measures.

13. The Commission further contended that full disclosure of the requested documents would lead to erroneous and premature conclusions as to its rationale for opting for specific solutions in its proposal for a mandatory transparency register. This would compromise its interest in seeking and receiving frank, objective and comprehensive legal advice [10] .

14. The complainant argued that the fullest possible effect must be given to the right of public access to documents of the institutions [11] and that exceptions must be interpreted and applied strictly [12] . The complainant further argued that the Commission had presented mere assertions, which were not substantiated by detailed arguments. In its view, there was no proof of a reasonably foreseeable and not purely hypothetical [13] risk that disclosure of these documents would undermine the protection of legal advice. The fact that a document relates to an interest protected by an exception is not enough in itself to justify the application of the exception [14] .

15. In the complainant's view, the Commission had not provided a detailed statement of reasons as to why this issue is “ *sensitive* ”, as compared to other issues with which the Commission deals. Nor did it state how the disclosure of the opinions would actually undermine the protection of legal advice, or prejudice the Legal Service's capacity to assist the Commission.

b) The exception concerning the protection of the Commission's decision-making process



16. The Commission claimed that disclosure of the withheld parts of the documents would prejudice its internal decision-making process, since it would put into the public domain the legal point of view of its Legal Service before the College of Commissioners had taken a position on it. In addition, it would severely reduce the Commission's capacity to take a decision based on frank internal discussion, free from external influence [15] .

17. The Commission explained that, despite the completion in 2014 of the decision-making process linked to the adoption of the revised IIA on the transparency register, the information contained in the requested documents is still relevant to the ongoing revision of the IIA and the establishment of a new version of the transparency register.

18. The complainant argued that the Commission's decision-making capacity would not be undermined by the disclosure of the requested documents, since the decision-making process on the transparency register had already been open to the public, through a public consultation and at the time, public debate on the issue was ongoing.

19. Moreover, the complainant contended that the Commission had not demonstrated that there was a real, reasonably foreseeable, and not purely hypothetical, risk that disclosure might seriously undermine the Commission's decision-making process. Thus, it had not met the required legal standard for applying the exception.

c) The overriding public interest in disclosure

20. The Commission acknowledged that the transparency register is a public interest initiative. However, it claimed that in this case there are no elements to demonstrate an overriding public interest in full disclosure of the documents. The exceptions therefore still applied, especially because discussions on the topic were continuing.

21. The complainant claimed that there is an overriding public interest in a balanced and informed public debate to facilitate decision-making, obtaining the best possible outcome in the reform of the transparency register, and ensuring accountability of the EU institutions. In the complainant's view, these considerations should be examined in the light of the overwhelming support of stakeholders [16] and the European Ombudsman [17] for a mandatory register. The European Parliament preferred a legally binding transparency register based on Article 352 TFEU [18] . However, the Commission chose an IIA as the more appropriate basis for this, [19] giving rise to an overriding public interest in disclosing the legal advice behind that choice.

The Ombudsman's assessment

1) The exception relating to the protection of legal advice



22. To be able to correctly rely on the exception concerning the protection of legal advice, the contents of the document must actually constitute legal advice, the disclosure of which would undermine the protection of the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice. The risk of this occurring must be reasonably foreseeable and not purely hypothetical [20] . If the Commission is able to rely on the exception, it must still consider whether there is an overriding interest in the public having access to the documents.

23. The Ombudsman inspected the documents in this case and confirmed that they contain legal advice.

24. However, the Ombudsman does not consider that the disclosure of the requested documents would undermine the protection of the Commission's interest in obtaining legal advice for the following reasons. By the time the Commission took a decision on 4 October 2016 on the complainant's request for review (the so-called "confirmatory application"), the Commission had already adopted its 2016 proposal for an IIA on a mandatory transparency register [21] . The Commission's Legal Service created documents no. 1 and no. 2 in 2006 and 2007 respectively (long before a transparency register even existed). These documents dealt with the issue of the legal basis for a transparency register and the measures in case of non-compliance with the Code of Conduct. Therefore, although relevant, these documents could no longer be considered controversial. Several intervening steps had been taken by the Commission and any contentious issues had been the subject of public consultation and debate. Moreover, the Ombudsman is not persuaded by the Commission's argument that the discussion about the possible legal basis for a mandatory register (document no. 3) was still relevant, as the Commission's proposal had addressed the issue.

25. In view of this, the Ombudsman considers that the Commission has not raised compelling arguments to demonstrate that disclosure would undermine the Commission's interest in protecting its legal advice. Hence, the legal advice contained in the requested documents (drafted in 2006, 2007 and 2013) does not appear to meet the high threshold set by the Court of Justice's case-law concerning the protection of legal advice.

26. To conclude, the Ombudsman is not convinced that the Commission's arguments justify the application of the exception relating to the protection of legal advice in this case.

2) The exception concerning the protection of the Commission's decision-making process

27. To be able to apply the exception protecting the Commission's decision-making process, such a process must be ongoing and disclosure must risk seriously undermining that process. There must also be no overriding public interest in disclosure.

28. The Commission itself stated that the decision-making process to which the requested documents related had been finalised. The Ombudsman acknowledges that the ongoing revision of the IIA on a transparency register could amount to a further step in the



decision-making process, broadly interpreted. However, the Ombudsman is not convinced that full disclosure of the documents in this case would reduce its capacity to take unbiased, internal decisions free from external pressure. [22]

29. Thus, the Ombudsman considers that the Commission has not raised sufficient arguments to justify its reliance on the exception concerning the protection of the decision-making process.

3) The overriding public interest in disclosure

30. The Ombudsman finds that the Commission has not met the high threshold set by the Court of Justice for the application of the exceptions to the requested documents. Furthermore, even if the exceptions did apply, the question of an overriding public interest in disclosure must also be addressed.

31. The Ombudsman considers that the nature of an IIA is more akin to a legislative procedure than to an administrative function. As such, greater transparency is required as a matter of principle and there should be full public access to the relevant document.

32. Indeed, the Ombudsman considers that an IIA on a transparency register is a matter of interest to all EU citizens because it promotes transparency as a means of achieving greater EU legitimacy and accountability.

33. The Ombudsman considers that any legal advice on the appropriate legal basis for such a measure is very likely to discuss a number of possible legal bases in relation to the legislative process. The argument that, as a matter of principle, the public should not be aware of the pros and cons of the options considered in the legal assessment of an EU measure carried out for the Commission runs counter to the public's fundamental right to know.

34. In this regard, the Ombudsman notes that EU citizens should be able to follow evolving discussions on draft laws, consistent with the principle of decisions being taken close to citizens. This is particularly pertinent when the subject-matter relates to an instrument intended to promote transparency of the EU decision-making process itself.

35. In the light of these observations, the Ombudsman considers that there is an overriding public interest in the full disclosure of these documents. That interest prevails over the interests that the Commission invoked to justify withholding parts of the documents.

Conclusion leading to a proposal for solution

36. Taking the above analysis into account, the Ombudsman considers that the Commission has not properly justified its decision to withhold full access to the requested documents under the relevant provisions of Regulation 1049/2001.



37. The Ombudsman considers that the Commission should revise its position, as the factual and legal context of this case has evolved significantly since it took its decision. The Ombudsman has welcomed the Commission's commitment to greater transparency on a number of occasions and the need for a transparency register is now widely accepted.

38. Many years have passed since the drafting of these documents. In the meantime, the Commission has made a new proposal for the reform of the transparency register. Consequently, it can be argued that they no longer reflect the current situation.

39. In these circumstances, the Ombudsman considers that, if the Commission were to receive a new application for public access to these documents, the Commission would be very likely, quite rightly, to reconsider its 2016 decision to refuse full access. It is true that the complainant, or an EU citizen, could make a new application for public access to the documents [23] taking stock of recent developments [24] . However, it would be in the interest of efficiency, the culture of service and, ultimately, good administration not to require a repeat of the procedure. The documents should be disclosed in full now.

40. Therefore, the Ombudsman suggests that the Commission now release the documents, in full, without the complainant having to make a new request for public access. This would resolve the complaint. To this end, the Ombudsman makes a proposal for a solution in accordance with Article 3(5) of the Statute of the European Ombudsman.

The proposal for a solution

The Ombudsman proposes that the Commission gives full access to the documents covered by the complainant's request, subject only to the redaction of any personal data.

Emily O'Reilly

European Ombudsman

Strasbourg, 03/12/2018

[1] <https://www.ombudsman.europa.eu/en/legal-basis/statute/en>.

[2] For more information, see <http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en> [Link].

[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.277.01.0011.01.ENG&toc=OJ:L:2014:277:T



[Link]

[4] 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 L 145, 31.5.2001, p. 43–48.

[5] Note of the Legal Service to the Secretary General of 12 September 2006 JUR(2006)30417, the disclosed parts are available at:

<https://www.asktheeu.org/en/request/2959/response/10673/attach/5/JUR%202006%2030417%20Redacted.pdf> [Link]; Note of the Legal Service to the Secretariat General of 17 September 2007

JUR(2007)30478, the disclosed parts are available at:

<https://www.asktheeu.org/en/request/2959/response/10673/attach/6/JUR%202007%2030478%20Redacted.pdf> [Link]; Note of the Legal Service to the Head of Cabinet of the Vice-President Maroš Šefčovič of

2 October 2013 Ares(2013)3191712, the disclosed parts (paragraphs 1-9 and 21) are available at:

<https://www.asktheeu.org/en/request/2959/response/10673/attach/7/Ares%202013%203191712%20Redacted.pdf> [Link].

[6] Proposal for a Inter-institutional Agreement on a mandatory Transparency Register, COM/2016/0627 final, available at

<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0627> [Link].

[7] Article 7 of Regulation 1049/2001.

[8] Referring to Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* , judgment of 1 July 2008, EU:C:2008:374, paragraph 69.

[9]

http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=CODE_OF_

[10] Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* , judgment of 1 July 2008, EU:C:2008:374, paragraph 42.

[11] Recital 4 of Regulation 1049/2001 and *Sweden and Turco v Council* (cited above), paragraph 33.

[12] Case C-280/11 P *Council v Access Info Europe* , judgment of 17 October 2013, EU:C:2013:671, paragraph 30.

[13] Case C-506/08 *Sweden and MyTravel v Commission* , judgment of 21 July 2011, ECLI:EU:C:2011:496, paragraph 76.

[14] Case T-2/03 *Verein für Konsumenteninformation v Commission* , judgment of 13 April 2005, EU:T:2005:125, paragraph 69.



[15] Cases T-424/14 and T-425/14 *ClientEarth v Commission* , judgment of 13 November 2015, EU:T:2015:848, paragraphs 94-97, upheld on appeal.

[16]

https://www.access-info.org/wp-content/uploads/Infographics_EU_citizens_Opinion_Poll_ENGLISH_ONLINE.pdf [Link].

[17] <https://www.ombudsman.europa.eu/en/correspondence/en/67708> [Link].

[18] See page 6 of the following

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581950/EPRS_BRI\(2016\)581950_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581950/EPRS_BRI(2016)581950_EN.pdf) [Link].

[19] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0627> [Link] and https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law_en [Link].

[20] Case T-211/00 *Kuijter v Council* , judgment of 7 February 2002, EU:T:2002:30, paragraph 56.

[21] Adopted on 28 September 2016, available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0627> [Link]

[22] As the General Court has ruled, the external pressure on the Commission's decision-making process must be “ *established with certainty* ” and there must be a “ *reasonably foreseeable risk that the process would be substantially affected* ”. See Case T-51/15 *PAN Europe v Commission* , judgment of 20 September 2016, ECLI:EU:T:2016:519, paragraph 30.

[23] Case C-362/08 P *Internationaler Hilfsfonds eV v Commission* , judgment of 26 January 2010, ECLI:EU:C:2010:40, at paragraph 57.

[24] In December 2017, the Council granted a mandate to begin negotiations with the European Parliament and the Commission on the transparency register. In June 2018, the three institutions expressed their shared ambition to make further progress towards strengthening the register. The European Parliament will likely vote on potential amendments to its own (separate) procedural rules (scheduled for December 2018), which could ensure that MEPs only meet with registered lobbyists. It therefore appears that the next political meeting between Parliament, Council and the Commission on the IIA will take place after the European Parliament votes on its own rules. For updates on the current status of the IIA negotiations, see <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-inter-institutional-agreement-c>