

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

Recommendation

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) |

The case concerned a refusal by the Commission, in 2017, to give a Member of the European Parliament public access to Commission documents regarding a new German social media law. The complainant considered that the Commission had failed to identify all the documents falling within the scope of her request. Regarding those documents it did identify, she considered that the Commission had wrongly redacted the documents.

The Ombudsman found that the Commission had failed to identify all the documents falling within the scope of the complainant's request. She also found that the redactions made by the Commission were excessive. She thus proposed that the Commission reassess the scope of the request and reconsider its decision to (partially) deny access to the identified documents.

The Commission did not follow this solution proposal. As the Ombudsman considers the Commission's handling of the complainant's access request to constitute maladministration, she makes a corresponding recommendation and expresses her concern at the inordinate length of time the Commission has taken in dealing with this matter.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. In July 2017, the complainant, a German MEP, requested the European Commission to give her public access to its internal communications regarding a new German law, the Network Enforcement Act [2] , and Germany's notification of that law to the Commission.

2. The Commission gave the complainant partial access to six documents, redacting only the personal data contained in them. The complainant considered, however, that the Commission had failed to identify all the relevant documents in its possession. As a consequence, the



Commission checked its archives again and identified 18 additional documents. It granted partial access to 13 of these documents. It justified the redactions by referring to the need to protect its decision-making processes [3] and the need to protect legal advice [4]. Five documents identified by the Commission were not disclosed to the complainant.

3. The complainant turned to the Ombudsman. She complained about the failure to identify all the relevant documents and the excessive redactions made by the Commission.

4. The Ombudsman opened an inquiry. She inspected the documents that had not been disclosed to the complainant and the documents that had only been partially disclosed to the complainant. The Ombudsman also inspected six further documents which the complainant had identified as falling within the scope of her request.

5. Having reviewed these six documents, the Ombudsman found that the Commission's reading of the complainant's access request was overly restrictive; she concluded that the Commission had failed to identify at least five documents.

6. In light of recent EU case law [5], the Ombudsman also found that the Commission had failed to give the complainant sufficiently broad access. Specifically, 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 disclosure of [such] documents is likely to increase the transparency and openness of the legislative process as a whole, (...), and thus, enhance the democratic nature of the European Union (...)"*, which is why the level of transparency required for such documents is increased. [6]

The Ombudsman's assessment

7. Based on her findings, the Ombudsman proposed that the Commission conduct a fresh assessment of the complainant's request for access. [7]

8. The Commission has not replied to the Ombudsman's proposal for a solution within the deadline set by the Ombudsman, which has been extended once. This is particularly disappointing, given that the complainant made her request almost two years ago.

9. The Ombudsman maintains her view that the Commission narrowed significantly the complainant's request for public access by misinterpreting its scope.

10. In light of the above, the Ombudsman finds that the Commission's persistent misinterpretation of the scope of the access request and its restrictive application of the exceptions for the protection of its decision-making processes and of legal advice constituted maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.



Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

The Commission should, taking into account recent EU case law, grant the complainant the broadest possible access to the documents already identified and to all documents that can reasonably be considered as falling within the scope of the complainant's request for public access.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion **by Wednesday, 11 September 2019** .

Emily O'Reilly

European Ombudsman

Strasbourg, 11/06/2019

[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". This law is aimed at combating agitation and fake news on social networks.

[3] In accordance with Article 4(3) paragraph 2 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> [Link].

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

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

[6] Ibid, paragraphs 91 ff.

[7] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's proposal for a solution available at: <https://www.ombudsman.europa.eu/en/solution/en/114788> [Link].