

Decision 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

Decision

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 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 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. She considered that the factual and legal situation had changed since drafting the documents. She therefore proposed that the Commission grant full access to the requested documents, subject only to the redaction of personal data. The Commission rejected that proposal.

The Ombudsman regrets that the Commission did not follow her proposal for solution. She finds that the Commission's continued refusal to grant wider access to the documents constitutes maladministration.

Background to the complaint

1. The complaint concerns the European Commission's refusal to grant the complainant, Access Info Europe, full access to documents concerning the transparency register. The transparency register [1] is a public database to monitor the activities of those who seek to influence the formulation and implementation of policy and the decision-making processes of EU institutions. It was set up by the European Parliament and the Commission under an inter-institutional agreement ('IIA') in 2011 and revised in 2014 [2] . In May 2016, the complainant requested public access to documents [3] concerning legal advice provided to the Commission on the transparency register, including advice on its legal basis and whether it could be mandatory [4] . The Commission extended the statutory deadline to respond to that



request twice and replied after it had expired. In its reply, it partially disclosed three “ *notes of its Legal Service* ” from 2006, 2007 and 2013 [5] , relying on the exceptions protecting legal advice, the decision-making process and personal data. The complainant asked the Commission to review that decision insofar as it related to the exceptions on legal advice and the decision-making process.

2. In autumn 2016, the Commission proposed a mandatory transparency register in the form of an IIA between it, the European Parliament and the Council [6] . It then responded to the complainant’s request for review [7] , essentially replicating its reply to the initial application. Access Info Europe complained to the European Ombudsman about this response, as well as the Commission’s delays on its initial access request.

3. The Ombudsman opened an inquiry into this complaint. Her inquiry team met with the Commission and inspected the opinions of its Legal Service.

4. Since the factual and legal situation had changed since the drafting of the documents, the Ombudsman considered that the reasons for refusal, namely the protection of legal advice and the decision-making process, may no longer apply. She therefore proposed [8] that the Commission grant full access to the opinions of its Legal Service [9] . The proposal for solution did not deal with the Commission’s delays.

5. This decision takes into account the Commission’s opinion on the Ombudsman’s proposal and the information provided by the complainant.

The Ombudsman's proposal for a solution

6. The Ombudsman considered that the Commission had not properly justified its decision to withhold full access to the three opinions from its Legal Service.

7. It had not raised compelling arguments to demonstrate that full disclosure would undermine its interest in protecting its legal advice. By the time the Commission took a decision on the complainant’s request for review, it had already held a public consultation on and adopted its 2016 proposal for an IIA on a mandatory transparency register. This meant that the information withheld from the 2006 and 2007 documents could no longer be considered controversial and the information from 2013, no longer relevant.

8. Concerning the exception protecting the decision-making process, the Ombudsman was not convinced by the Commission’s argument that full disclosure would reduce its capacity to take unbiased, internal decisions, free from external pressure. This was because the decision-making process to which the documents related had been finalised.

9. For the Ombudsman, even if the Commission had relied correctly on the exceptions, there would still be an overriding public interest in disclosure. The Ombudsman considered an IIA to be “*more akin to a legislative procedure than an administrative function*”. Therefore, greater



transparency was required as a matter of principle because EU citizens should be able to follow evolving discussions on draft laws, particularly when their subject-matter concerns an instrument intended to promote transparency in the EU's decision-making process.

10. The Ombudsman concluded that the passage of time and significant developments since the Commission's 2016 review decision meant that it would likely re-consider its decision, in reply to a new request for access. She therefore made the following proposal for solution to the Commission:

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.

11. In reply, the Commission stated that its decision at the time was factually and legally correct [10] and that “ *subsequent events may not affect that assessment* ”. It re-iterated its view that its 2016 review decision was justified because the information withheld from the documents was still relevant to “ *further interinstitutional discussions* ”. Its reasons for withholding parts of the documents “ *were unrelated to the adoption of the 2016 proposal* ”. It pointed out that the complainant could nonetheless submit a new request in light of current circumstances.

12. Concerning the nature of an IIA, the Commission argued that an IIA is different from a legislative procedure [11] because an IIA can only bind the institutions concerned. It also maintained that there was no overriding public interest in disclosure.

The Ombudsman's assessment after the proposal for a solution

13. The Ombudsman regrets that the Commission did not follow her proposal to give the complainant wider access to the three opinions of its Legal Service.

14. The Ombudsman maintains her view that the Commission failed to properly justify its decision to withhold parts of these documents.

15. The Ombudsman is disappointed that the Commission continues to rely on the argument that its decision was factually and legally correct at the time. The Ombudsman finds the Commission's position very formalistic and not in the interests of administrative efficiency. By the time the Commission took its decision on access, it had already made its proposal on an IIA on a mandatory transparency register. The fact that the three institutions will further discuss this is irrelevant.

16. The Ombudsman stresses that EU institutions must conduct their work as openly as possible. [12] Even if, from a strict legal point of view [13] , an IIA is not adopted under the legislative procedure, the Ombudsman considers transparency to be equally important in any decision-making process involving the adoption of an IIA, especially when it concerns a mandatory *transparency* register. The Ombudsman finds it somewhat ironic that the



Commission has failed to be as open and forthcoming as possible about the very measure aimed at promoting transparency as a means to achieve greater EU legitimacy and accountability.

17. However, given the Commission's steadfast rejection of the arguments for reviewing its refusal of the request for public access in the light of changed circumstances, the Ombudsman considers that a formal recommendation to disclose the opinions of the Legal Service at this stage would serve no useful purpose. This is in spite of the fact that she considers the continued refusal to grant public access constitutes maladministration. She notes that it remains open to the complainant to make a fresh request for public access for the same documents, in the light of the changed circumstances since the original request was made three years ago. Indeed the Commission itself has pointed out that it would consider such a request and assess it in light of the currently prevailing legal and factual circumstances.

18. Concerning the Commission's delays in replying to the initial request for access, the Ombudsman finds that the Commission breached the procedural requirements imposed on EU institutions. [14] It exceeded the statutory time-limit for replying to the complainant and failed to provide it with detailed reasons for the 'exceptional case' to extend the deadline. The Ombudsman has recently taken issue with the Commission's delays in another case [15] and is monitoring the situation. She therefore takes the view that a formal finding of maladministration would not serve any useful purpose in this particular case.

Conclusion

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

The European Commission's continued refusal to grant wider access to the documents constitutes maladministration.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 12/06/2019

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



[2]

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]

[3] Under 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: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> [Link].

[4] https://www.asktheeu.org/en/request/legal_advice_on_lobby_register [Link]

[5] The partially disclosed documents are available at:

<https://www.asktheeu.org/en/request/2959/response/10673/attach/5/JUR%202006%2030417%20Redacted.pdf>
[Link];

<https://www.asktheeu.org/en/request/2959/response/10673/attach/6/JUR%202007%2030478%20Redacted.pdf>
[Link];

<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:

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

[7] Available at:

<https://www.asktheeu.org/en/request/2959/response/11358/attach/html/4/2016%202791%20C%202016%206494%>
[Link]

[8] <https://www.ombudsman.europa.eu/en/solution/en/115001> [Link]

[9] Subject only to the redaction of any personal data.

[10] Pointing to paragraph 63 of the judgment of the European Court of Justice of 11 May 2017, *Kingdom of Sweden v European Commission*, C-562/14:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=356885508833494B536EA4C760E15969?text=&docid=84636>
[Link]

[11] For a description of the legislative procedure, see

https://ec.europa.eu/info/law/law-making-process/types-eu-law_en [Link]

[12] Article 15 of the Treaty on the Functioning of the European Union.

[13] Paragraph 69 of the judgment of the General Court of 22 March 2011, *Access Info Europe v Council of European Union*, Case T-233/09:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=84636&pageIndex=0&doclang=EN&mode=lst&dir=>
[Link]

[14] Contrary to Article 7(1) and (3) of Regulation 1049/2001.



[15] The European Ombudsman's decision on Complaint 1686/2017/THH:
<https://www.ombudsman.europa.eu/it/decision/en/98786> [Link]