

Decision in case 1632/2018/THH on the European Commission's refusal to grant access to documents relating to infringement proceedings against the United Kingdom for the improper implementation of the EU Data Protection Directive 95/46/EC

Decision

Case 1632/2018/THH - **Opened on** 21/09/2018 - **Decision on** 01/07/2019 - **Institution concerned** European Commission (Maladministration found) |

The case concerned access to documents held by the European Commission relating to an infringement procedure regarding the United Kingdom's compliance with EU data protection rules.

In the course of the inquiry, the Ombudsman established that, of the ten issues originally raised with the United Kingdom, nine had been resolved. As a result, the general presumption under EU law against disclosure no longer applied to the documents relating to those resolved issues. The Ombudsman therefore proposed that the Commission reassess the complainant's request for public access based on an individual assessment of all the withheld documents.

The Commission did not accept the Ombudsman's proposal for a solution. The Commission stated it had correctly applied the relevant exception and therefore saw no reason to reconsider its position.

The Ombudsman finds the decision of the Commission not to reconsider its position concerning disclosure of the documents constitutes maladministration.

Background to the complaint

1. This complaint concerns a request for public access to documents held by the European Commission relating to an infringement procedure, opened in 2004, regarding the United Kingdom's compliance with EU data protection rules.

2. In 2018, the complainant, a UK citizen with a special interest in data protection issues, requested access to any documents that relate to the infringement procedure the Commission had opened against the UK in July 2004 ("infringement procedure 2004/2099"). The



Commission had opened this procedure as it had, at that time, various concerns regarding whether the UK's Data Protection Act 1998 properly implemented Directive 95/46/EC (the "Data Protection Directive"). [1]

3. The Commission refused to grant public access to the requested documents. It argued that there is a legal presumption that disclosure of documents related to an on-going infringement procedure would undermine the protection of the purpose of the investigations. [2]

4. Dissatisfied, the complainant turned to the European Ombudsman on 18 September 2018.

5. The Ombudsman opened an inquiry into the complaint that the Commission had wrongfully refused public disclosure of the requested documents related to infringement procedure 2004/2099.

The Ombudsman's proposal for a solution

6. In the course of her inquiry, the Ombudsman made a proposal for a solution, addressed to the Commission. [3]

7. With regard to the Commission's argument that disclosure of the requested documents would undermine the protection of the purpose of the investigations, the Ombudsman accepts that the Court has recognised a general presumption that requests for public access to documents relating to an infringement procedure can be refused during the pre-litigation stage of the infringement procedure. The rationale behind this presumption is the need to protect the purpose of the investigations. [4]

8. The Ombudsman notes, however, that this general presumption may be rebutted. [5]

9. In the light of information provided to her inquiry team, the Ombudsman accepts that infringement procedure 2014/2099 is still formally ongoing.

10. However, of the ten issues originally identified in the infringement procedure as breaches of EU law, nine were resolved. The infringement procedure had not yet been formally closed only because one specific issue remained unresolved. The Ombudsman noted that there was no intrinsic link between this remaining issue and the nine resolved issues.

11. In her assessment of the Commission's arguments, the Ombudsman took into consideration the fact that the aim of the relevant exception is to protect the purpose of investigations. [6] The purpose of infringement proceedings is to achieve compliance with EU law by the Member State concerned. [7] Recognising that this had been achieved in nine of the ten issues of initial concern, the Ombudsman considered that the general presumption that disclosure of *any* part of the infringement file would undermine the protection of the purpose of the infringement was rebutted. Revealing the documents relating to the nine resolved issues could no longer be *presumed* to undermine the purpose of any investigation into the unresolved issue.



12. On the basis of this analysis, the Ombudsman proposed to the Commission that it should reassess the complainant's request for public access based on an individual assessment of the relevant documents.

The responses of the Commission and the complainant to the Ombudsman's proposal for a solution

13. The Commission has rejected the Ombudsman's proposal. It asserts that the infringement procedure that forms the subject of the complainant's request is ongoing and that there have been no relevant changes in the legal and/or factual circumstances since the confirmatory decisions were taken warranting wider access.

14. The Commission maintains that all documents regarding this procedure continue to be protected on the basis of the general presumption that their disclosure would undermine the protection of the purpose of investigations. .

15. The Commission says that a requirement to assess the documents individually, once one or several grievances were dropped in the course of the investigation, would deprive the general presumption of non-disclosure of its proper effect. According to the Commission, *any* disclosure, even partial, would undermine the ongoing engagement with the United Kingdom's authorities, for which a climate of mutual trust is necessary.

16. As regards the fact that the Data Protection Directive has been replaced by the new General Data Protection Regulation as of May 2018, the Commission stated that it has been monitoring member states' compliance with the new legislation. As new issues regarding the UK's compliance with the GDPR may arise, and may be connected with the issues arising in the ongoing infringement procedure, the Commission contended that a climate of mutual trust must be preserved.

17. In his reply to the Ombudsman's proposal and the Commission's response, the complainant expressed his disappointment with the Commission's decision not to disclose any of the documents. He agreed with the Ombudsman's conclusions regarding disclosure. He added, in addition, that besides the disclosure of the documents relating to the nine issues which have been resolved, the Commission should also consider publishing information about the issues of compliance in regard to the tenth unresolved grievance in the infringement procedure, even if the actual document could not be disclosed.

The Ombudsman's assessment after the proposal for a solution

18. The Ombudsman proposed that, in the interests of transparency and accountability, the Commission should reconsider granting access to those documents that related to the issues



already resolved in the (formally still ongoing) infringement procedure. The Commission refused to do so. The Ombudsman regrets that the European Commission has not accepted her proposal for a solution.

19. The Ombudsman does not accept the Commission's argument that an individual reassessment of the documents concerned would deprive the general presumption of non-disclosure of its proper effect when nine out of ten issues are resolved. It is only through an individual assessment that the Commission could show that 1) there is an intrinsic link between the open issue and any of the nine closed issues and 2) that the intrinsic link between the issues is such that disclosure of the parts of the documents relating to the closed issues would undermine the on-going dialogue regarding the one open issue.

20. It is not evident to the Ombudsman that there is any such intrinsic link and the Commission has not put forward any argument to support the view that there is any such intrinsic link.

21. The Ombudsman is disappointed that the Commission takes such a formalistic and unhelpful stance in this case. Such an approach clearly places unnecessary obstacles in the path of citizens wishing to exercise their fundamental right of public access to documents. Similarly, it undermines the trust of citizens in the work of the EU institutions.

22. Given the Commission's insistence on maintaining its position, the Ombudsman considers that a formal recommendation to the Commission to reconsider its position at this stage would serve no useful purpose.

23. The Ombudsman therefore finds that the Commission's refusal to reassess the complainant's request for public access based on an individual assessment of the relevant documents constitutes maladministration.

Conclusion

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

The refusal of the European Commission to reassess the complainant's request for public access based on an individual assessment of the relevant documents constitutes maladministration.

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

Emily O'Reilly

European Ombudsman



Strasbourg, 01/07/2019

[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, page 31

[2] In accordance with Article 4(2), third indent, of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[3] The full text of the proposal for a solution is available at: <https://www.ombudsman.europa.eu/en/solution/en/115388> [Link]

[4] This was recalled recently by the European Court of Justice in its judgment of 4 September 2018 in *ClientEarth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660 at paragraph 81, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=2F2B0FB575711A33F0F0C3C4CADAC5B0?text=&docid=144492&pageIndex=0&doclang=EN&mode=lst&dir=asc> [Link]

[5] Judgment of the European Court of Justice of 14 November 2013 in *LPN and Finland v Commission*, joined Cases C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738 at paragraphs 66 and 67, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144492&pageIndex=0&doclang=EN&mode=lst&dir=asc> [Link]

[6] Article 4(2) third indent of Regulation (EC) No 1049/2001

[7] Judgment of the Court of First Instance of 12 September 2007 in *API v Commission*, case T-36/04, ECLI:EU:T:2017:258 at paragraph 133, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=62795&pageIndex=0&doclang=EN&mode=lst&dir=asc> [Link]