

Proposal of the European Ombudsman for a solution in case 1959/2018/MIG on the EEAS's refusal to grant full public access to documents concerning the Global Tech Panel

Solution - 02/07/2019

Case 1959/2018/MIG - **Opened on** 22/11/2018 - **Decision on** 18/11/2019 - **Institution concerned** European External Action Service (Solution achieved) |

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

Background to the complaint

1. The High Representative of the Union for Foreign Affairs and Security Policy launched the Global Tech Panel, which is “ *a forum for the open discussion and practical development of innovative solutions* ” that “ *brings together leaders from the tech industry, the world of investment, and civil society* ”. The Panel’s aim is to “ *foster new types of cooperation between diplomacy and technology to address challenges and threats but also to make innovation for good in an increasingly more complex and connected world* ”. [2] It held its first meeting on 6 June 2018, which was set to discuss “ *a range of global issues, ranging from new security threats and the weaponization of digital technologies, to harnessing connectivity for development and addressing concrete challenges of digital exclusion* ”. [3] The second meeting was held on 25 September 2018 concerning the “ *pilot digital ecosystem project in North Africa* ”. [4]

2. On 12 September 2018, the complainant filed a request with the European External Action Service (EEAS) for public access to “ *all documents, including but not limited to notes, presentations, minutes, emails, member lists and attendance lists, related to the panel with tech leaders from different backgrounds and expertise which has been set up and held a first meeting in Brussels in June, as referred to by VP Mogherini in her speech in the European Parliament on Tuesday 11 September 2018* ”. [5]

3. On 5 October 2018, the complainant received a response from the EEAS that no minutes nor reports of the meetings of the Panel have been drawn up. The EEAS referred the complainant to its website for more information.



4. On 9 October 2018, the complainant filed a request for review, a so-called “ *confirmatory application* ”, and clarified that he wished to receive public access to “ *all written records of the Global Tech Panel meetings* ”, “ *no matter whether they are labelled as minutes or something else* ”.

5. On 31 October 2018, the EEAS confirmed that no minutes or reports from the meetings were drawn up and granted partial disclosure to two invitation letters for the meetings held on 6 June and 25 September 2018, as well as to two follow-up letters sent after the meetings on 6 June and 25 September 2018. Full access was refused due to the protection of personal data of individuals, the protection of the commercial interests and intellectual property of a natural or legal person, the protection of the decision making process and the protection of the public interest as regards financial and economic policy. [6] Subsequently, when meeting with the Ombudsman’s inquiry team, the EEAS elaborated its refusal further, relying in addition on the protection of public security, the protection of defence and military matters, and the protection of international relations. [7]

The inquiry

6. The Ombudsman opened an inquiry into the EEAS’s refusal to grant full public access to documents concerning the Global Tech Panel.

7. In the course of the inquiry, the Ombudsman considered the documentation provided by the complainant and inspected the relevant documents, namely, the four letters, which the EEAS partially disclosed to the complainant (see paragraph 5 above), and an additional document, which the EEAS identified during the meeting with the Ombudsman’s inquiry team (see paragraph 13 below).

Arguments presented to the Ombudsman

The EEAS’s arguments

8. The EEAS explained that the Panel’s members are leaders in the technology industry, investment world, academia and civil society. According to the EEAS, the purpose of the Panel’s discussions is to inform the High Representative on “ *certain complex situations and challenges that the world is facing due to global digitalization* ”. In order to ensure an environment conducive to the participants being willing to share their views freely, the EEAS argued that participation in the Panel’s meetings had been premised on unconditional confidentiality. As a result, the meetings take place *in camera* and under Chatham House rules. [8] In the light of this, the EEAS explained that no minutes or reports have been drawn up during the Panel’s meetings.

9. The EEAS explained that the Global Tech Panel is “ *an informal advisory body convened* ”



personally by the High Representative, and not an expert group in the sense of the "Commission expert groups" set up according to the Commission Decision C(2016) 3301 of 30 May 2016 of the European Commission establishing horizontal rules on the creation and operation of Commission expert groups", which means that the obligations upon Commission expert groups to keep records of meetings does not apply to the Panel.

10. Although no minutes and reports have been drawn up, the EEAS clarified that the Panel's Secretariat prepares initial and follow-up letters, which the EEAS identified and partially disclosed. It noted that the letters, which are drawn up after the meetings, present the issues which have been discussed and which the High Representative considers to be a basis from which the discussions can move forward at the next meeting.

11. The EEAS argued that public disclosure of the sections of the letters which reveal the personal opinions of the participants could not be released as to do so would breach the confidentiality rule under which the meetings take place and the participants participate. It also argued that disclosure of these personal views could affect the commercial interests of the companies or entities that the individuals represent in their professional capacity. The EEAS stated that this would also undermine the decision-making process of the EEAS since it might result in some members being uncomfortable participating in the Panel's work; and this would, in turn, undermine the Panel's capacity to make recommendations. Therefore, in order to protect the commercial interests of the members of the Panel [9] and the Panel's decision-making process [10], the EEAS argued that these parts of the letters should be redacted.

12. The EEAS also argued that the letters contain the names of the individual members of the Panel, public disclosure of which would undermine the protection of those individuals' personal data. [11]

13. Additionally, the EEAS argued that some parts of the letters mention third countries as examples of places offering technological opportunities. In this regard, since the Panel's members exchanged views informally and the issues are still to be discussed with the governments of the countries in question, the EEAS considered that the disclosure of this information could undermine the protection of international relations. [12] In the course of the inquiry, the EEAS informed the Ombudsman that a further document had been drawn up by Panel members and presented to the Panel. This document related to a potential future piece of work. The EEAS considered that, since the document originates from third parties, it does not constitute a minute, note, report or record of the Panel's meetings and therefore falls outside the scope of the complainant's request. The EEAS also stressed that disclosure of this document would undermine international relations. The EEAS confirmed that no other documents were drawn up.

14. During the meeting with the Ombudsman's inquiry team, the EEAS explained that some of the redactions sought to protect the public interest as regards defence and military matters; release of these sections would undermine the public interest in this area. As a result, the EEAS had applied the relevant exemption for public disclosure. [13]



15. Also at this meeting, the EEAS explained that some parts of the letters contained information relating to the date and location of future meetings, information which could not be made publicly available due to the safety and security of the members of the Panel. [14]

16. The EEAS acknowledged the public interest in the Panel's meetings and stressed that it endeavoured to make available "*a maximum*" of material and information on the Panel's dedicated website. It had invited the complainant to contact the Panel's secretariat and offered that he could meet them to receive more information. During the meeting with the Ombudsman's inquiry team, the EEAS informed the Ombudsman's representatives that journalists have been invited to talk to the members of the Panel after the meetings and that several Panel participants were interviewed.

The complainant's arguments

17. The complainant questioned whether the EEAS was acting in accordance with the principles of good administration when it "*promised*" the Panel's participants that their discussions would be fully confidential. The complainant considered the practice of not recording the meetings to be contrary to the principles of transparency and good governance. He argued that the Panel acts as an advisory body, which influences the development of EU policies, and that therefore it should draw up minutes or records of its meetings. [15] The complainant emphasised that the Panel has stated that it is taking concrete actions, for example a "*pilot project to link tech leaders, educators and governments to help build a digital generation in Tunisia*" [16], and that the High Representative may form proposals or actions based on the Panel's discussion. The complainant also questioned how these actions can be taken if no records of the meetings are made. In addition, the complainant claimed that the statement made on the Panel's website that the Panel will feed into the EU Strategy on Artificial Intelligence, which the Commission will put forward in November, is the implicit confirmation that the Panel is contributing to EU policy. [17]

18. The complainant expressed scepticism that no minutes or reports of the Panel's meetings have been drawn up. He argued that the fact that the meetings are held *in camera* does not mean that minutes and reports cannot be drawn up. Furthermore, he considered that, if minutes and reports have been drawn up, the EEAS should acknowledge their existence. The fact that the High Representative has sent follow-up letters, indicates, in the complainant's view, that "*some kind of notes*" must have been taken during the meetings. The complainant doubted that redacting the invitation letters was justified since they were drawn up before the meetings and thus do not express personal views.

19. The complainant considered that the Panel does not disclose sufficient information on its website and in its publications. He argued that disclosure of the Panel's minutes and reports would strengthen public trust in the EEAS's work.

The Ombudsman's assessment



20. Firstly, the Ombudsman notes the documents in question are not part of the EU legislative process, which under EU law, are accorded a higher level of transparency. In addition, they are not documents which feed directly into the EU legislative process.

21. The Ombudsman however also notes that no EU institution can assure participants in meetings of “unconditional confidentiality” of any documents drawn up as part of, or following, the meeting, as the public right of access to EU documents must be governed by Regulation 1049/2001 and the relevant case law.

22. During the course of the inquiry, the Ombudsman’s inquiry team established that, other than two invitations and two follow-up letters, no minutes or records of the Panel’s meetings have been produced. The complainant calls into question the fact that no minutes were produced and implies that this practice gives rise to a lack of transparency.

23. The Ombudsman understands these concerns. It appears that the EEAS staff member, present in the meetings to provide administrative support, reflected the discussions in the meeting in the follow-up letters of the EEAS to the participants. The content of these letters is, in substance, the account of the discussions that took place in the meetings. In the absence of formal minutes or notes, the key issue for the purposes of this inquiry is therefore whether the EEAS should make public the content of these letters. The additional document identified does not constitute a record of any meeting, but does fall within the broad scope of the complainant’s request (and therefore this inquiry.) It is considered separately, below.

24. The Ombudsman welcomes the fact that **substantial partial access to the letters has already been granted**. The complainant has asked the Ombudsman to review the appropriateness of the redactions.

25. The Ombudsman welcomes the efforts towards transparency which the EEAS is taking in publishing regularly on its website information about the Panel’s meetings, which reliably describes the content of the discussions. In addition, the Ombudsman welcomes the invitation by the Panel’s Secretariat to journalists to ask questions of the members of the Panel. She considers that while this contributes to the transparency of the Panel’s work, it does not replace its obligations under Regulation 1049/2001.

26. The Ombudsman acknowledges, as a point of principle, that the documents at issue contain some personal views of the Panel’s members which, if disclosed, could realistically result in the undermining of the members’ commercial interests. The Ombudsman also accepts that a policy of releasing such information could have the consequence that members would be reluctant to engage in the Panel’s meetings; and the Panel’s decision-making process would thereby be undermined. No arguments have been advanced regarding any possible overriding public interest in disclosure and the Ombudsman has not identified any, keeping in mind these are not legislative documents. The Ombudsman thus finds the EEAS decision to redact these parts of the documents as justified and in line with Regulation 1049/2001. [18]



27. However, the Ombudsman considers that the EEAS has applied the exceptions for the protection of commercial interests, and for the protection of the decision-making process too broadly. She notes that certain redactions relate only to opinions and views expressed by the High Representative. The Ombudsman notes that the EEAS has stressed that the High Representative's views and reflections have been disclosed without redaction. The Ombudsman therefore proposes that the EEAS should grant public access to statements which, on that basis, should already have been disclosed. The Ombudsman attaches to this Solution Proposal an Annex setting out the sections of the relevant documents to which she proposes public access should be granted.

28. As regards the information relating to third countries contained in the letters, the Ombudsman notes that the EEAS did not inform the complainant of the reasons for non-disclosure of this information when refusing full public access to the letters. Nevertheless, the EEAS did explain to the Ombudsman's inquiry team the reasons behind these redactions. The Ombudsman considers that it is appropriate for her to give a view on the reasons for these redactions, namely that they contain **detailed sensitive points which are yet to be discussed with the third countries concerned**. It is reasonably foreseeable that the public disclosure of this information would undermine the protection of international relations. [19] The same applies to the additional document that contains considerations on a potential piece of work. The Ombudsman also considers that no meaningful partial access could be given to this document.

29. Likewise, the Ombudsman considers that the EEAS was justified in redacting the names of Panel members only where they were associated with information which was itself exempt from disclosure or where there was no necessity for the disclosure of personal information. [20]

30. The EEAS also explained to the Ombudsman's inquiry team that redacting some content was necessary to protect defence and military matters. [21] This explanation was not provided to the complainant when he sought access. The Ombudsman agrees that these redactions are reasonable. The relevant exceptions cannot be overridden by any public interest in disclosure.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the European External Action Service should further grant increased partial access to two invitation letters and two follow-up letters concerning the meetings of the Global Tech Panel held on 6 June and 25 September 2018, redacting information only as necessary, in line with the principles explained above and as set out in the Annex to this Solution Proposal.

The European External Action Service is invited to inform the Ombudsman by **Friday, 2 August 2019** of any action it has taken in relation to the above solution proposal.

Emily O'Reilly



European Ombudsman

Strasbourg, 02/07/2019

[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] European External Action Service's website, About the Global Tech Panel, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/50886/about-global-tech-panel_en [Link].

[3] European External Action Service's website, Global Tech Panel: Mogherini starts debate with tech leaders, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/45483/global-tech-panel-mogherini-starts-debate-tech_en [Link].

[4] European External Action Service's website, EU and tech leaders set to pilot digital ecosystem project in North Africa, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/50727/eu-and-tech-leaders-set-pilot-digital-ecosystem_en [Link].

[5] In accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[6] Articles 4(1)(a) fourth indent; 4(1)(b); 4(2) first indent; and 4(3) first subparagraph of Regulation 2019/2001.

[7] Article 4(1)(a) first, second and third indents of Regulation 1049/2001.

[8] More information on the Chatham House Rule is available at: <https://www.chathamhouse.org/chatham-house-rule> [Link].

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

[10] In accordance with Article 4(3) first subparagraph of Regulation 1049/2001.

[11] In accordance with Article 4(1)(b) of Regulation 1049/2001.

[12] As set out in Article 4(1)(a) third indent of Regulation 1049/2001.



[13] As set out in Article 4(1)(a) second indent of Regulation 1049/2001.

[14] In line with Article 4(1)(a) first indent of Regulation 1049/2001.

[15] In accordance with the European Ombudsman's Decision in case 811/2017/EA on the transparency of "advisory bodies" that influence the development of EU policy, available at: <https://www.ombudsman.europa.eu/en/decision/en/103874> [Link].

[16] European External Action Service's website, EU and tech leaders set to pilot digital ecosystem project in North Africa, available at: <https://eeas.europa.eu/headquarters/headquarters-homepage/50727/eu-and-tech-leaders-set-pilot-digital-ecosystem> [Link].

[17] European External Action Service's website, About the Global Tech Panel, available at: https://eeas.europa.eu/topics/sanctions-policy/50886/about-global-tech-panel_en [Link].

[18] Specifically, Articles 4(2) first indent and 4(3) first paragraph of the Regulation.

[19] As set out in Article 4(1)(a) third indent of Regulation 1049/2001.

[20] Under Article 9(1)(b) of Regulation 2018/1725.

[21] As set out in Article 4(1)(a) second indent of Regulation 1049/2001.