

Decision in case 195/2017/JAP on the European Commission's refusal to grant access to legal opinions on the proposal for a Regulation on the establishment of the European Public Prosecutor's Office

Decision

Case 195/2017/JAP - Opened on 03/03/2017 - Recommendation on 13/02/2019 - Decision on 04/09/2019 - Institution concerned European Commission (Maladministration found) |

The case concerned the refusal of the European Commission to grant public access to “legal opinions” on the legislative proposal for a Regulation on the establishment of the European Public Prosecutor's Office (EPPO).

The Ombudsman found that the Commission should have granted public access to some parts of the documents, which it had withheld. She therefore recommended specific further disclosures. In addition, the Ombudsman encouraged the Commission to reconsider, in the light of subsequent developments, the need to continue to deny public access to other parts of the documents which it continues to withhold.

The Commission rejected the Ombudsman's recommendation, maintaining that its assessment, as set out in the confirmatory decision, “was legally and factually correct at the point in time when it was taken”.

In light of the above, the Ombudsman decided to close the case, confirming her findings of maladministration.

Background to the complaint

1. The complainant, a researcher at a Finnish university, asked the Commission to give him public access to the opinions issued by the Commission's Legal Service on the Commission's legislative file relating to the creation of a European Public Prosecutor's Office (EPPO). Initially, the Commission told him that there were no written documents relevant to his request. After forming a better understanding of the complainant's request, it then identified ten relevant documents.

2. The Commission granted full access to one of the documents, very wide access to two further



documents, and partial access to another document. Referring to the applicable rules [1] , it withheld the remaining six documents arguing that their disclosure would (i) undermine the protection of legal advice and (ii) seriously undermine the Commission's decision-making process. It noted that the negotiations on the subject were still ongoing.

3. The complainant contested the initial decision, arguing in particular that there was an overriding public interest in disclosure because the matter of the EPPO was so relevant to the public.

4. In response, while the Commission granted further partial access to four of the documents and to one additional document, which was created after the initial reply, it continued to refuse to give any access to the remaining documents. Dissatisfied with this turn of events, the complainant turned to the European Ombudsman. He contested the Commission's decision to withhold the documents and considered that its document management system was not fit for the purpose of dealing with requests for access to documents.

5. The Ombudsman opened an inquiry into the complaint and her inquiry team carried out an inspection of the Commission's file.

The issue of refusal of access to the documents

The Ombudsman's recommendation

6. Having assessed the inspected documents and the Commission's reasons for withholding them, the Ombudsman followed a strict test for the disclosure of legislative documents, based on the principle that the legislative process should be as close to citizens as possible, requiring a high degree of transparency.

7. Although the Ombudsman considered the Commission's refusal to grant further partial access to some of the documents justified, and there was no overriding public interest at the time of the confirmatory decision that would justify their disclosure, she disagreed with the Commission's arguments for withholding all or parts of five documents.

8. She therefore recommended [2] that the Commission grant further partial access to three documents and full access to two other documents. She also encouraged the Commission to take account of relevant developments [3] since its confirmatory decision.

9. The Commission rejected the Ombudsman's recommendation, maintaining that its assessment, as set out in the confirmatory decision , *"was legally and factually correct at the point in time when it was taken"*. It also noted that it was open to the complainant to make a new request for access to documents.

10. The complainant, in comments to the Ombudsman, expressed his disappointment with the



Commission's response. He considered that the Commission “ *remains constantly steadfast in their opposition to applying the law correctly and to furthering openness in the EU* ”.

The Ombudsman's assessment after the recommendation

11. The Ombudsman regrets that the Commission did not follow her recommendation to grant further public access to the documents in question.

12. The Ombudsman maintains her view that the Commission should have granted access to the documents as she recommended. She is disappointed by the Commission's simplistic statement that its confirmatory decision was factually and legally correct at the time when it was taken. Even if that were the case, the Commission could still grant further access, if it became appropriate at a later stage.

13. The Ombudsman notes with concern that the Commission did not apply the appropriate higher standard of transparency necessary for the legislative file on the creation of the EPPO. She is disappointed that the Commission has failed to be more transparent and open, particularly in a case such as this, which touches upon novel and complex legal issues. She is also disappointed that the Commission continues to rely on the legal correctness at the time of a decision, taken nearly three years ago, even though the negotiation process referred to in the documents has concluded. Moreover, the EPPO has now been set up through enhanced cooperation [4] , even though it is not yet fully operational.

14. The Ombudsman considers that the public interest in the establishment of the EPPO, taking into account the relevant legal and factual developments, would be properly served by greater transparency and the further disclosures she has recommended. Regrettably, the Commission continues to withhold the relevant documents. Therefore, the Ombudsman confirms her finding of maladministration.

The issue of identification of the relevant documents

15. In her recommendation, the Ombudsman found that the Commission's staff made commendable efforts to help the complainant identify the documents to which he was seeking public access. They provided him with an additional document after the initial reply, meeting his interests and those of transparency and good administration generally. The Ombudsman also concluded that the time needed to complete this task, in the particular circumstances of the case, was justified in this case.

16. The complainant expressed his disappointment that the Ombudsman had not inquired further into the Commission's document management system, which he says is inadequate to facilitate a swift handling of requests for public access. He therefore called on the Ombudsman to open an inquiry on her own initiative into the wider document management issue. The Ombudsman notes the complainant's concerns and may return to this overarching issue in the future.



Conclusion

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

The Ombudsman is not satisfied with the Commission's reply to her recommendation. In view of the Commission's continued refusal to grant further access to the documents sought, the Ombudsman upholds her finding of maladministration.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 04/09/2019

[1] 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 (2001) L 145, p. 43, available here:

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

[2] Recommendation of the European Ombudsman in case 195/2017/JAP on the European Commission's refusal to grant access to legal opinions on the proposal for a Regulation on the establishment of the European Public Prosecutor's Office, available here:

<https://www.ombudsman.europa.eu/en/recommendation/en/109961> [Link]

[3] The passage of time and the legislative developments concerning the new EU data protection rules and the enhanced cooperation choice for the EPPO.

[4] Council Regulation 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283 , 31.10.2017, p. 1, available here: <https://eur-lex.europa.eu/eli/reg/2017/1939/oj> [Link]