

## **Decision in case 2134/2018/FP on the European Commission's refusal to give public access to briefing material used by its President in a meeting with the President of the United States**

Decision

**Case 2134/2018/FP - Opened on 18/12/2018 - Decision on 15/10/2019 - Institution concerned** European Commission ( Maladministration found ) |

The case concerned a refusal by the European Commission to provide the complainant with copies of briefing material ("flash cards") on trade policy used by the President of the European Commission, Mr Juncker, in a meeting with the President of the United States.

In its first response to the complainant, the Commission argued that disclosing the briefing material would undermine international relations. When the complainant challenged that response, the Commission argued that because the "flash cards" were 'short-lived' support material the EU rules on public access to documents did not apply to them. The complainant then turned to the Ombudsman.

After a considerable and unjustified delay, the Commission informed the Ombudsman that it no longer held copies of the "flash cards". It would appear that, at some point in the time during this appeal process, the briefing material, or any copy in the possession of the Commission, was deleted or otherwise destroyed.

The Ombudsman finds that the failure of the Commission to retain in its possession copies of the briefing material after the complainant had exercised his fundamental right of access to documents, but before the appeal process had been completed, was maladministration. This failure also limited the Ombudsman's ability to conduct an inquiry into the Commission's refusal to grant public access to the requested documents.

## **Background to the complaint**

1. On 17 October 2018, the complainant, an EU citizen, asked the European Commission to give him public access to what he referred to as 'flash-cards', which were used by the Commission President, Mr Jean-Claude Juncker, in a meeting on trade policy that took place in Washington in July 2018 with the President of the United States, Mr Donald Trump. The



complainant read about this material in a media article, in which a “ *senior EU official who was in the room during negotiations* ” referred to the material. [1]

2. On 30 October 2018, the Commission rejected the complainant’s request. It stated that granting access to what it described as the ‘briefing material’ used by President Juncker would undermine the protection of the EU public interest concerning international relations. [2] It is implicit in the response that the documents were in the possession of the Commission on 30 October 2018, three months after the meeting.

3. On the same day, the complainant asked the Commission to review its refusal to grant him access to the documents (he sent it a so-called ‘ *confirmatory application* ’). As regards the Commission’s view that the release of the documents would undermine international relations, he stated that the documents must “ *contain [only] general explanations of trade policy rather than any information that would be considered confidential* ”.

4. On 4 December 2018, the Commission replied. It again refused to grant access to the requested documents. However, rather than repeating its view that releasing the documents would undermine international relations, it said that the right of public access did not apply to the documents. It argued that the right of public access applies only to “ *documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union* ”. [3] It stated that the “*flash cards*”(…) *are not ‘documents’ drawn up by the European Commission, nor are they ‘documents’ received by it and in its possession* .” It then stated that the requested documents “*were short-lived ‘support material’ used by President Juncker in his meetings on trade policy with President Trump and, as such, they do not fall within the scope of Regulation 1049/2001* ”. It also informed the complainant that the content of these ‘flash-cards’ was used by President Juncker to make a speech after the meeting. It provided the complainant with links to that speech. [4]

5. The complainant then turned to the Ombudsman. He argued that the Commission had failed to explain properly why it refused to give him public access to the documents. In particular, he stated that the Commission had failed to explain why the documents did not fall under the EU rules on public access to documents. In this regard, he insisted that the documents were in the possession of the Commission.

## The inquiry

6. For the sake of clarity, in this decision the Ombudsman will refer to the documents at issue as the ‘briefing material’, in line with the Commission’s own terminology.

7. The Ombudsman opened an inquiry into how the Commission handled the request for public access.

8. As a first step in her inquiry, in December 2018, the Ombudsman, in line with normal practice in such cases, asked the Commission to provide her with copies of the briefing material.



9. In its reply to the Ombudsman on 9 January 2019, the Commission restated the line that it had taken in its confirmatory decision, namely that the briefing material did not fall under the access to documents rules. It then stated, “ *the Commission cannot be expected to create new flash cards for the purpose of the Ombudsman’s inspection* ”. The Commission did not provide the Ombudsman with copies of the briefing material.

10. On 29 January 2019, the Ombudsman asked the Commission to clarify, by 22 February, who took part in the meeting with President Trump, who drafted the documents, who held the documents and whether they still existed as physical documents or in electronic format.

11. Almost 5 months later, on 25 June 2019, having failed to meet a number of extended deadlines for replying to the Ombudsman, the Commission provided her with a very short response to her questions. It stated that President Juncker’s Cabinet had prepared the briefing material, which had served exclusively as an “ *aide memoire* ” for the Commission President. It said that as “ *short-lived preparatory documents* ”, they were not “ *kept* ” and were no longer in the possession of the Commission.

## The Ombudsman's assessment

12. The Ombudsman recognises that an EU institution does not have a legal obligation to retain copies of every document that comes into its possession [5] . It might well be not only both legal and reasonable, but also good administration for an institution to have in place a policy of actively or automatically deleting documents for which the institution has no foreseeable future need, even as a record of its actions.

13. The Ombudsman notes that the Commission’s initial refusal, dated 30 October 2018, is based on an assessment of the content of the briefing material. It is thus implicit in this initial decision, that the Commission held copies of the documents at that time.

14. For the purposes of this decision, it suffices for the Ombudsman to conclude, on the basis of statements provided by the Commission, that the briefing material was in the possession of the Commission on 30 October 2018. However, at some point in time, between 30 October 2018 and 25 June 2019, probably before 9 January 2019, it ceased to be in the possession of the Commission.

Regulation 1049/2001 applies to “ **all documents held by an institution** , that is to say, documents drawn up or received by it and **in its possession** , in all areas of activity of the European Union”. [6] The fact that the briefing material may have been intended to be used only once, to prepare the President for a specific meeting, is not relevant in terms of the applicability of Regulation 1049/2001, for so long as it continued to be held by the Commission. Regulation 1049/2001 states that “ *in order to ensure that the right of access is fully respected a two-stage administrative procedure should apply, with the additional possibility of court proceeding or complaints to the Ombudsman* ” [7] (emphasis added). The Ombudsman notes



that both the right of public access to documents and the right to complain to the Ombudsman are fundamental rights under the European Charter. [8]

**15.** In the present case, the complainant exercised his fundamental right to request public access to the briefing material **at a point in time when it was still held by the Commission** . When the Commission refused access to the documents, because it considered that disclosing them would undermine international relations, the complainant immediately exercised his right to challenge that decision, by making a confirmatory application. The Commission apparently still held copies of the briefing material when the complainant submitted his confirmatory application to the Commission (on 30 October 2018).

The complainant then exercised his fundamental right of complaint to the Ombudsman. However, it has not been possible for the Ombudsman to inquire into the merits of the original refusal to grant public access to the briefing material, because, sometime after 30 October 2018, the Commission either deleted or destroyed the briefing material.

**16.** The Ombudsman considers that, once an institution receives a request for public access to a document, the document should normally be retained until the issue of public access, including any relevant appeal or complaints process, has been completed. Otherwise, the fundamental right of access to documents could be nullified.

**17.** The Ombudsman thus concludes that Commission, once it received the public access request, should have retained copies of the documents in question, until the confirmatory application procedure and any subsequent complaint to the Ombudsman had been completed. It did not do so. This was maladministration.

**18.** As the Ombudsman has not been able to inspect the briefing material, the Ombudsman is unable to reach any conclusion as to whether its disclosure would have been appropriate or not.

## Conclusion

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

**The Commission's failure to retain copies of the briefing material, after public access to it had been requested, but before the handling of that request and any subsequent review or appeal had been completed, was maladministration.**

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

Emily O'Reilly

European Ombudsman Strasbourg, 15/10/2019



[1] In his request, the complainant stated that the existence and the use of these 'flash-cards' by Mr Juncker was reported by an American magazine in an article "*EU chief used bright, simple 'flash-cards' to explain trade war to Trump*". The article is available here: <https://www.newsweek.com/eu-chief-trump-flash-cards-1044433> [Link] (link checked on 26 September 2019).

[2] This interest is protected by Article 4(1) third indent of Regulation 1049/2001 (see 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: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:en:PDF>)

[3] See Article 2(3) of Regulation 1049/2001.

[4] - Keynote speech 'Transatlantic relations at a crossroads' by President Juncker at the Centre for Strategic and International Studies (CSIS), publicly available here: [http://europa.eu/rapid/press-release\\_SPEECH-18-4690\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4690_en.htm);

- Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, publicly available here: [http://europa.eu/rapid/press-release\\_SPEECH-18-4701\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4701_en.htm);

- Joint U.S.-EU Statement following President Juncker's visit to the White House, publicly available here: [http://europa.eu/rapid/press-release\\_STATEMENT-18-4687\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm).

[5] This is a general rule. However, there are specific procedures where there is a legal obligation to retain certain documents (for example, where the Commission is exercising its powers of investigation in competition law proceedings, it is required to keep records of the evidence it gathers).

[6] Article 3 (a) of Regulation 1049/2001.

[7] Recital 13 of the preamble in Regulation 1049/2001.

[8] Charter of Fundamental Rights of the European Union, Article 42 and 43.