

Recommendation of the European Ombudsman in case 1794/2019/EWM on the European Commission's refusal to provide full access to documents relating to an event attended by Commission officials and by a former Commission head of unit

Recommendation

Case 1794/2019/OAM - **Opened on** 01/10/2019 - **Recommendation on** 08/07/2020 - **Decision on** 11/12/2020 - **Institution concerned** European Commission (Maladministration found) |

The complainant sought public access to documents related to a corporate event attended by European Commission officials. He stated that he needed the documents to investigate whether a former European Commission Head of Unit, who had left the EU civil service to take up a position in a multinational company, acted in accordance with his legal obligations not to lobby former colleagues.

The European Commission refused to grant access to the names contained in the documents. It argued that the complainant had only provided abstract and general references to possible wrongdoings by a former staff member and that such concerns cannot justify the transmission of the personal data to him.

The Ombudsman inquired into the issue and found that the complainant had provided sufficient justification of the need to have the personal data transferred to him. Specifically, he needed the information to check if the former official had engaged in prohibited lobbying activities. The Ombudsman also considered that, given the circumstance of the case, the former EU civil servant must accept a certain degree of public scrutiny of his professional activities after his move to the private sector.

The Ombudsman therefore concluded that the Commission's refusal to disclose the former staff member's name in the documents constituted maladministration.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint



1. This inquiry concerned the extent to which data protection rules can be used to prevent the disclosure of documents that would enable the public to scrutinise potential conflicts of interest of former staff members of the EU institutions in “revolving door” situations.

2. A revolving door move is a situation in which a staff member leaves the EU civil service to take up a position externally, for example in the private sector. Revolving door moves may give rise to 1) the risk of a conflict with the legitimate interests of the Commission; 2) the risk that confidential information may be disclosed or misused; or 3) the risk that former staff members may use their close personal contacts and friendships with ex-colleagues to lobby. [2]

3. The complainant, a journalist, asked the European Commission to give him public access to invitations to Commission officials and all other documents relating to a corporate event organised by a multinational company in April 2019. The complainant stated that he wished to use the requested documents to investigate a potential conflict of interest. He stated that a former Commission head of unit had left the EU civil service [3] to take up a position as Director of Public Affairs of a multinational company in autumn 2018. The complainant noted that the person concerned had, while he was an EU civil servant, worked on issues of direct relevance to the multinational company. [4] Both the former head of unit, and his former colleagues from the Commission, attended the corporate event.

4. When the former official left the Commission, the Commission approved the move subject to compliance with a number of specific conditions aimed at preventing conflicts of interest. [5] This included in particular, the **prohibition to engage in any activity or role which involves lobbying** or advocacy vis-à-vis staff of the Commission and which could lead to the existence or possibility of a conflict with the legitimate interests of the Institution. [6] In this context, the concept of lobbying includes, amongst other things, “ *organising events, meetings, promotional activities, conferences or social events, invitations to which have been sent to [...] officials or other staff of the EU institutions* ” [7] . Further, the former head of unit was requested not **to deal in any way with files and matters directly linked to his work at the Commission and not to participate in meetings or have contacts of professional nature with his former Directorate General or service for a period of one year** . [8]

5. The Commission provided a number of documents to the complainant. However, it redacted personal data from the majority of those documents. This included the names of Commission staff and of external participants, including the name of the former Commission head of unit. The Commission considered that the complainant failed to substantiate any necessity as to why that personal data should be transferred to him. It stated that the reference to the existence of a possible conflict of interest does not constitute evidence that there was a need to transfer the personal data to the complainant. The Commission further considered that there was a real and non-hypothetical risk that public disclosure of the personal data in the documents would harm the privacy of the persons concerned, who could become subject to ‘unsolicited external contacts’.

6. Dissatisfied with the Commission’s refusal to disclose the personal data of the former head of unit concerned and any other information relevant to the question of a possible conflict of



interest, the complainant turned to the Ombudsman. The Ombudsman's inquiry focussed on the Commission's refusal to disclose the name of the former head of unit in the documents. The Ombudsman's inquiry team inspected the non-redacted versions of the requested documents.

The Ombudsman's proposal for a solution

7. In her solution proposal, the Ombudsman considered that the conditions for the transmission of the personal data of the former Commission head of unit in line with EU privacy rules were fulfilled. [9] She noted that the complainant had demonstrated the need for the transfer for a specific purpose in the public interest. She explained that disclosing the personal data of the former Commission head of unit will allow the complainant to evaluate whether there was a possible conflict of interest.

8. In line with EU privacy rules, the Ombudsman then assessed whether the disclosure of the former head of unit's name to the complainant might prejudice his legitimate interests. The Ombudsman considered that in the present circumstances any interest that the former head of unit may have in his name being redacted from the document could not be described as a 'legitimate interest' given that the use of his name in the context of that document relates directly to the issue of whether the former head of unit and the Commission in fact respected the restrictions on contacts between him and the Commission.

9. Based on the above assessment, the Ombudsman proposed that the European Commission provide the complainant with a copy of the requested document without redacting the name of the former head of unit.

10. The Ombudsman regrets that the Commission did not accept her proposal.

11. In its reply, the Commission first pointed out that according to case law of the EU's General Court [10], a general reference to the purpose of a journalistic investigation does not show the necessity of a transmission of personal data. According to the Commission, abstract and general references to possible wrongdoings cannot justify the need for the transmission of the personal data, let alone its proportionality. In the Commission's view, the scrutiny of the activities of former Commission staff or staff on leave on personal grounds falls in the remit of the respective Appointing Authority. The Commission also cited the General Court's finding that "*no automatic priority can be conferred on the objective of transparency over the right to protection of personal data*" [11].

12. The Commission further considered that the interests of all data subjects remain legitimate and that the disclosure of personal data in these circumstances could undermine the legitimate interests of the staff member concerned by creating a non-proportionate interference with the right to privacy and integrity [12]. [13]

13. The complainant noted that he had given specific reasons why the release in this case is necessary for a specific purpose in the public interest, namely the potential conflict of interest



between the former head of unit's current role and his status vis-à-vis the Commission. The complainant further pointed out that scrutiny of the former head of unit's public role in this matter is a matter chiefly of institutional transparency about lobbying, as his inquiry is not concerned about the former head of unit as a private person, but about his role as official-turned-lobbyist.

The Ombudsman's assessment after the proposal for a solution

14. The Ombudsman considers that the judgment by the EU's General Court that the Commission cited in the reply rejecting the Ombudsman's solution proposal [14] **supports** her conclusion that the complainant has demonstrated that it is necessary to have the personal data of the former head of unit transferred for a specific purpose in the public interest.

15. The General Court concluded that abstract and general references cannot justify the need for the transfer of the personal data. [15] Such abstract and general references include for instance the objective of enabling the public to verify the appropriateness of certain expenses [16] , the wish to institute public debate [17] and the objective to guarantee the public right to information and transparency [18] .

16. The Ombudsman disagrees with the Commission's conclusion that the complainant has, in this case, provided only abstract and general references. On the contrary, the Ombudsman considers that the complainant has provided specific reasons for the need to have the personal data of the former head of unit transferred, in line with the case law of the General Court [19] .

17. The complainant has demonstrated that he wishes to verify whether the former Commission official respects the conditions the Commission set itself with regard to the former head of unit's contacts with the Commission. He has provided specific evidence of an event which was attended by the former head of unit, and current officials who had worked with that person when he was still at the Commission. The Ombudsman considers that the complainant has thus established the necessity for access to the personal data he has requested.

18. The Ombudsman also considers that there is no more appropriate and less intrusive means to verify whether the rules set to avoid conflicts of interest of this specific former head of unit are effectively complied with. This objective therefore passes the proportionality test set out by the General Court [20] .

19. The Commission has put forward no specific legitimate interest of the former official which would justify not disclosing his name.

20. The Ombudsman considers that an EU official at a certain level of seniority, such as a Head of Unit, must accept that he or she will be subject to certain amount of public scrutiny, after leaving the EU civil service to take up a public affairs role in a private sector company which is active in an area related to his or her responsibilities as a public official. Such a move might well have the effect of undermining the independence of the EU civil service if the former official is involved in



directly or indirectly lobbying his or her former colleagues. Revolving door moves ultimately risk undermining the legitimacy of the EU as a whole.

21. Regarding the Commission's argument that it alone is competent for scrutinising a former staff member's professional activities (the Commission is implying that it is not the public's role to do this), the Ombudsman emphasises that the way an institution deals with revolving door moves, including the enforcement of its own rules must itself be subject to public scrutiny. [21] If specific doubts are raised, and substantiated, as to how the Commission has undertaken its role, this will be relevant in determining whether there is a need to disclose the name of the former official and whether the disclosure of the name is proportionate.

22. The Ombudsman concludes that, having weighed the public interest in this case with the right to privacy and integrity of the data subject concerned, and having reviewed the names mentioned in the documents at issue, the transfer of the personal data has to be considered necessary and proportionate.

23. In light of the above, the Ombudsman finds that the Commission's refusal to provide public access to the requested documents without redacting the name of the former head of unit constituted maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the European Commission:

The European Commission should provide the complainant with a copy of the requested documents without redacting the name of the former Commission head of unit.

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by **8 October 2020**.

Emily O'Reilly

European Ombudsman

Strasbourg, 08/07/2020

[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): <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31994D0262>.



[2] See also the Decision of the European Ombudsman in her strategic inquiry OI/3/2017/NF on how the European Commission manages ‘revolving doors’ situations of its staff members, para. 2, available at <https://www.ombudsman.europa.eu/en/decision/en/110608> [Link].

[3] The staff member concerned took a leave on personal grounds in accordance with Article 40 of the Staff Regulations, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20160101&from=en> [Link].

[4] See an article by the complainant to which he referred in his confirmatory application, available at <https://netzpolitik.org/2019/drehtuereffekte-wie-ein-beamter-der-eu-kommission-zum-lobbyisten-wird/> [Link].

[5] Some of those conditions follow directly from the EU Staff Regulations, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20160101&from=en> [Link], in particular its Article 40, some follow from the Commission decision of 16 December 2013 on outside activities and assignments, available at <https://ec.europa.eu/transparency/regdoc/rep/3/2013/EN/3-2013-9037-EN-F1-1.PDF> [Link]. and others were specifically imposed on the former staff member concerned.

[6] Article 40 of the Staff Regulations.

[7] See point 7 of the Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, which mentions “ *organising events, meetings, promotional activities, conferences or social events, invitations to which have been sent to Members and their assistants, officials or other staff of the EU institutions* ”: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0919(01)&from=en) [Link].

[8] See the answer given by Commissioner Oettinger on behalf of the Commission to a question by a Member of the European Parliament: https://www.europarl.europa.eu/doceo/document/E-8-2018-004301-ASW_EN.html [Link].

[9] According to Article 9(1)(b) of Regulation 2018/1725 (available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1725> [Link]), personal data shall only be transmitted, if

(a) the recipient establishes that it is **necessary** to have the data transmitted **for a specific purpose in the public interest** and

(b) the controller (here the Commission),



i) where there is **any reason to assume that the data subject's legitimate interests might be prejudiced** ,

(ii) establishes that it is **proportionate** to transmit the personal data for that specific purpose **after having demonstrably weighed the various competing interests** .

[10] Cases T-639/15 to 666/15 and T-94/16, Psara and Others v European Parliament, paragraphs 79 and 84, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=206663&pageIndex=0&doclang=EN&mode=lst&dir=&id=&adv=&app=&fulltext=&part=&orig=1> [Link].

[11] Idem, paragraph 91.

[12] See Article 4(1)(b) of Regulation 1049/2001.

[13] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's proposal for a solution available at: <https://www.ombudsman.europa.eu/en/solution/en/129972> [Link].

[14] Judgment of 25 September 2018 in Cases T-639/15 to 666/15 and T-94/16, Psara and Others v European Parliament.

[15] Cases T-639/15 to 666/15 and T-94/16, Psara and Others v European Parliament, paragraphs 74, 75, 84.

[16] Paragraph 73.

[17] Paragraph 90.

[18] Paragraph 73.

[19] See in this respect Cases T-639/15 to 666/15 and T-94/16, Psara and Others v European Parliament, paragraph 94.

[20] Idem, paragraph 72.

[21] On the importance of public scrutiny in such cases, see also the Decision of the European Ombudsman in her strategic inquiry OI/3/2017/NF on how the European Commission manages 'revolving doors' situations of its staff members, para. 52, 53 and conclusion, available at <https://www.ombudsman.europa.eu/en/decision/en/110608> [Link].