

Proposal of the European Ombudsman for a solution in case 652/2020/MIG on the European Commission's refusal of public access to correspondence with the United Kingdom government concerning the nomination of a candidate for Commissioner

Solution - 10/06/2020

Case 652/2020/MIG - Opened on 23/04/2020 - Decision on 28/09/2020 - Institution concerned European Commission (Solution achieved) |

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

Background to the complaint

1. In July 2019, following the European elections, the European Commission asked the governments of the EU Member States, including the United Kingdom (UK), to suggest candidates for appointment as EU Commissioner. [\[2\]](#) [\[Link\]](#)
2. As the UK did not nominate a candidate, the Commission sent two more letters to the UK on 6 and 12 November 2019 reiterating the request and recalling the UK's obligations under the EU Treaty to put forward a candidate.
3. By a letter dated 13 November 2019, the UK indicated its refusal to nominate a candidate. The UK authorities considered that they were not in a position to suggest a candidate for the post of EU Commissioner, given that a general election had been called. [\[3\]](#) [\[Link\]](#)
4. On 14 November 2019, the Commission launched infringement proceedings against the UK for breaching its EU Treaty obligations by not suggesting a candidate for the post of EU Commissioner, and formally notified the UK of its action. [\[4\]](#) [\[Link\]](#) The UK was given the opportunity to submit its observations by 22 November 2019 but did not reply.
5. On 17 and 26 November 2019 respectively, the complainant requested public access [\[5\]](#) to the correspondence exchanged between the Commission and the UK.
6. On 10 December 2019, the Commission denied the complainant access on the ground that disclosure would undermine the ongoing infringement procedure against the UK.



7. On 11 December 2019, the complainant asked the Commission to review its decision (he made a so-called ‘confirmatory application’).

8. On 4 February 2020, the Commission confirmed its initial decision to deny access to the four letters in their entirety.

9. Dissatisfied with the Commission’s refusal of public access, the complainant turned to the Ombudsman on 13 April 2020.

The inquiry

10. The Ombudsman opened an inquiry into the complainant’s position that the Commission was not justified in refusing public access to the four letters it exchanged with the UK authorities in November 2019. She invited the Commission to provide further comments on the complaint (in addition to those already given to the complainant) but received none. In the course of the inquiry, the Ombudsman’s inquiry team inspected the documents at issue in the complainant’s request for public access.

Arguments put forward

11. The Commission stated that the letters at issue related to an infringement procedure against the UK that was still ongoing. Disclosure of the documents, it argued, would negatively affect the dialogue with the UK in that context, which requires a climate of trust, and would change the strictly bilateral nature of the infringement procedure.

12. In its confirmatory decision, the Commission repeated that the infringement procedure against the UK was still ongoing and that it had not yet taken a decision on the follow-up. The Commission therefore took the view that a general presumption of non-disclosure applied and that disclosure of the letters “*would essentially deprive the [UK] authorities from their lawful expectation of sincere cooperation on the part of the [Commission]*”, which includes a guarantee of confidentiality.

13. The complainant considered that there was a public interest in knowing how the UK responded to the Commission’s request to suggest a candidate for EU Commissioner. He also said that he was seeking access to the letters in question for the purpose of a possible judicial review in the UK.

14. The Commission argued that the complainant had put forward very general considerations that did not demonstrate an overriding public interest in disclosure, and that personal interests could not be taken into account. It concluded that the public interest in this case was better served by not disclosing the requested letters, thus ensuring a serene conclusion of its infringement investigation.



15. In his complaint to the Ombudsman, the complainant stated that he understood that the EU had not proceeded with the infringement procedure. Given that the UK had left the EU in the meantime, the issue of appointing a Commissioner was also no longer of practical relevance. Thus, the complainant questioned whether the release of the letters would indeed prejudice the dialogue between the Commission and the UK concerning the infringement procedure.

The Ombudsman's assessment

16. As a general rule, when they receive a request for public access to documents, EU institutions have to assess, on a document by document basis, whether the requested documents can be (fully or partially) released. That assessment must be specific and individual in nature, relating to the content of each document. [6]

17. In this case, the Commission invoked a 'general presumption' that public access to the requested letters - as a set of documents - would undermine the purpose of its investigations into the UK's alleged infringement of EU law. As a result, the Commission concluded that access to the letters could not be granted.

18. The Ombudsman notes that the EU Courts have indeed established that a general presumption of non-disclosure may apply to documents concerning infringement investigations. The aim of that exemption is to protect the *purpose* of the infringement proceedings, that is, to induce the Member State concerned to comply with EU law, thus bringing the infringement to an end. [7] [\[Link\]](#) That general presumption may be rebutted, for example, if it can be demonstrated that a document is not covered by the general presumption or if there is an overriding public interest in the release of a document. [8] [\[Link\]](#)

19. It is clear from the short deadline, which the Commission gave the UK to provide its views when opening the infringement procedure and which it justified with the fact that "*the next Commission must enter into offices as soon as possible*", that the purpose of that investigation was to induce the UK, urgently, to nominate a candidate for Commissioner.

20. The Ombudsman notes that the UK did not respond to the Commission's invitation to comment, nor did it nominate a candidate. Consequently, the new Commission took office despite the lack of a British candidate for EU Commissioner in December 2019.

21. The UK left the European Union on 31 January 2020. As of that date, it was no longer entitled to nominate a Commissioner.

22. The confirmatory decision was issued on 4 February 2020.

23. In light of that timeline, the Ombudsman considers that the general presumption that disclosure of any of the four requested letters would jeopardise the purpose of the infringement investigation is rebutted. The purpose of that investigation could no longer be attained by the



time the Commission adopted its final decision on the complainant's requests for public access. By then, the requirement for the UK to nominate a candidate for EU Commissioner was no longer applicable. It follows that the *purpose* of the infringement proceedings could not then be undermined.

24. The Ombudsman also takes the view that the release of the exchange of correspondence to which the complainant is seeking access is a matter of public interest, given the subject matter and the continuing public interest in the withdrawal process and its consequences.

25. The Ombudsman thus proposes that the Commission should grant the widest possible public access to the four letters at issue. The Ombudsman considers that the letters could be released in their entirety without risking the kind of harm which the exception seeks to prevent.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that the Commission should release the four letters at issue taking into account the changed circumstances.

Emily O'Reilly

European Ombudsman Strasbourg, 10/06/2020

[1] [Link] 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] [Link] The letter of the Commission's President-elect Ursula von der Leyen to the Prime Minister of the UK dated 19 July 2019 was released to the complainant with redactions of personal data only following a request for public access (GestDem 2019/5274).

[3] [Link] See the Commission's press release of 14 November 2019, available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_6286 [Link].

[4] [Link] Ibid.

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



[6] [Link] Judgment of the Court of First Instance of 13 April 2005, *Verein für Konsumenteninformation v Commission* , T-2/03, paragraphs 69 ff, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=60314&pageIndex=0&doclang=EN&mode=lst&dir=> [Link].

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

[8] [Link] Judgment of the European Court of Justice of 14 November 2013, *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=> [Link].