



Decision in case 1219/2020/MIG on how the European Council dealt with a request for public access to mobile phone based messages supposedly sent by its then President to heads of state and government

Decision

Case 1219/2020/MIG - Opened on 26/10/2020 - Decision on 26/10/2020 - Institution concerned European Council (No maladministration found) |

The case concerned a request for public access to text messages sent in 2018 by the then President of the European Council to heads of state and government. The European Council said that it did not hold such text messages. The complainants expressed doubts that no documents falling within the scope of their request for access were in the possession of the European Council.

The Ombudsman noted that there is a legal presumption that the European Council does not hold the relevant documents, and that this presumption had not been rebutted by the arguments and evidence put forward by the complainants. As such, she found no maladministration in this particular case.

Having said that, the complaint raises important issues, notably the need for adequate record-keeping when it comes to instant messages. It is clear that text and instant messaging is increasingly used for professional communication, including communication of substantive information. In light of their duty to draw up and retain documentation pertaining to their activities, EU institutions should reflect this reality in their respective rules on the registration of documents, ensuring that relevant communication is properly recorded.

Background to the complaint

1. In November 2019, the complainants made a request [1] for public access to documents to the European Council, asking for

“[a]ll text messages (i.e., SMS messages) and other mobile-phone based text communications (e.g., WhatsApp, Telegram, iMessage, Facebook Chat, Snapchat, Slack, Facebook and Twitter “direct messages”, Signal Messenger, Wire, etc.) sent by - or on behalf of - Council President Donald Tusk in exchange with EU and foreign heads of state or heads of government in 2018.”

2. The European Council said that it did not hold any documents matching the description in the complainants’ access request.

3. The complainants asked the European Council to review its decision to refuse access.



4. The European Council then examined again whether it was holding relevant documents and confirmed that it could not identify any.

5. Dissatisfied with the European Council's reply, the complainants turned to the European Ombudsman in July 2020.

Arguments put forward

by the European Council

6. The European Council acknowledged that text messages and other mobile-phone-based communication could qualify as a 'document' in the meaning of the EU's rules [2] on public access to documents. However, it said, two conditions must be met:

7. First, the content of the message at issue must concern a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.

8. Second, to constitute a document, a content must have a minimum degree of stability and formality, meaning that it must not be short-lived but substantive. If this is the case, it argued, the message at issue would need "*to be exchanged, registered, saved and eventually archived*".

9. The European Council said that, taking the above considerations into account, it had examined whether it was holding documents that fall within the scope of the complainants' request, but could not identify any.

10. The European Council added that it was not its practice to exchange significant information about matters falling within its sphere of responsibility via instant messages of its President.

by the complainants

11. The complainants argued that any text message exchanged between the President of the European Council and heads of state or government concerned - at the very least - the activities (if not the policies and/or decisions) of the European Council.

12. While the complainants contested the argument that a document must not be "short-lived", they argued that if text messages exchanged between the President and heads of state or government contained significant information pertaining to his institutional role, the European Council would hold the relevant documents.

13. The complainants also claimed that it was public knowledge that text messages on policy matters are exchanged between European leaders. To prove this, the complainants referred to three online articles about (i) text messages exchanged between the European



Commission President and the British Prime Minister [3] , (ii) a text message sent by someone participating in a meeting of the Council of the EU [4] , and (iii) a text message sent by the Dutch Prime Minister to the President of the European Council [5] .

14. The complainants therefore expressed doubts that no instant messages sent by the President of the European Council to heads of state or government in 2018 were held by the European Council. They considered that the European Council must have failed either to conduct a thorough search of its records or properly to retain relevant text messages.

The Ombudsman's assessment

15. The right of public access to documents applies only to documents in the possession of the institution concerned. [6]

16. In this case, the European Council refused to give public access on the grounds that it does not hold any documents that would fall within the scope of the complainants' request.

17. According to settled case-law, if the institution concerned asserts that it does not hold specific documents, there is a legal presumption that this statement is true and accurate. [7] Whilst this presumption may be rebutted by relevant and consistent evidence that the requested documents exist and are held by the institution concerned, it is for the applicant to provide such evidence. [8] This evidence must go well beyond a mere belief or suspicion that the documents should be held by the institution. The presumption of legality cannot be rebutted by an assertion that the alleged lack of documents runs contrary to good administrative practice. [9]

18. The complainants challenged the presumption of legality by claiming that such exchanges between European leaders generally take place, which they based on information published in three online articles.

19. However, a general reference to that reality is not sufficient to challenge the European Council's statement that it was not holding relevant documents in this case. The European Council's statement holds true even if communication as described in the complainants' access request had taken place, but was not registered at the time.

20. The Ombudsman therefore does not consider that the evidence put forward by the complainants is sufficient to call into question the European Council's statement that it does not hold the messages sought by them. Thus, the legal presumption, established by EU case-law, holds. The European Council also stated that it examined its records twice, and there is no reason to doubt that it has indeed conducted a thorough search. That the European Council's search did not lead to relevant results is not in itself sufficient to cast any doubt on this.

21. Having said that, the complaint raises important issues, notably regarding text and instant messages. While the EU's rules on public access to documents were drawn up more



than two decades ago, the notion of 'document' under those rules covers "*any content whatever its medium* (...)." [10] Thus, text and instant messages are clearly covered under these rules.

22. It is also clear that text and instant messaging is increasingly used for professional communication, including communication of substantive information, also by the EU administration. However, if the content of these messages is not retained and held by the institution, it will never be possible for the public to access this content.

23. Thus, while the Ombudsman finds that there was no maladministration by the European Council in this case, she believes that the EU institutions should make every effort to reflect the reality of modern communications, and the increased use of text and instant messaging, in their document management rules and practices. This reflects their duty to draw up and retain documentation pertaining to their activities [11] . They should do so, as far as possible and in a non-arbitrary and predictable manner.

Conclusion

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

There was no maladministration by the European Council in denying public access based on the ground that it does not hold relevant documents.

That having been said, the EU institutions should make every effort to reflect the reality of modern communications, and the increased use of text and instant messaging, in their document management rules and practices.

The complainants and the European Council will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 26/10/2020

[1] 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> , applicable to the European Council pursuant to Article 10(2) of its Rules of Procedure:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009D0882> .

[2] Regulation 1049/2001.

[3]

<https://finance.yahoo.com/news/may-calls-eu-leaders-cross-party-talks-break-brexit-impasse-142426594>

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[4]

<https://www.theguardian.com/politics/2019/mar/22/it-was-not-clear-if-she-had-a-plan-at-all-how-mays-n>

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[5] <https://apnews.com/420b699b2dae44808f148699781d642a> .

[6] In accordance with Article 2(3) of Regulation 1049/2001.

[7] See, for example, judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v European Commission*, T-468/16, paragraph 35:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=201394&pageIndex=0&doclang=DE&>

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[8] *Ibid*, paragraphs 36 f.

[9] Order of the Court of Justice of 30 January 2019, C-440/18 P, *Vereine Deutsche Sprache v European Commission* , paragraphs 23f:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=210527&pageIndex=0&doclang=FR&>

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[10] Article 3(a) of Regulation 1049/2001 [emphasis added].

[11] Judgment of the Court of First Instance of 26 April 2007 in case T-264/04, *WWF European Policy Programme v Council* , paragraph 61:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=61308&pageIndex=0&doclang=en&>

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