

## Decision in case 787/2020/DL on how the European Commission handled requests for public access to decisions it took on other public access requests

Decision

**Case 787/2020/DL - Opened on 04/06/2020 - Decision on 06/04/2021 - Institution concerned** European Commission ( No further inquiries justified ) |

The complainant, a postdoctoral researcher, asked the European Commission to disclose its final decisions on public access requests taken between 2014 and 2018.

The so-called 'confirmatory decisions' requested by the complainant amounted to a very large number of documents. As the EU rules on access to documents allow for certain limits to be set, the Commission contacted the complainant with a view to limiting the scope of his requests. In the absence of an agreement, the Commission decided to limit the scope unilaterally. As the complainant considered that the Commission had not dealt with his requests in line with the applicable rules, he complained to the Ombudsman.

In the course of the inquiry, the Commission granted the complainant access to all the confirmatory decisions it had taken in 2019. This was in response to further requests he had submitted. The Ombudsman took the view there was no longer a need to pursue the case, since the complainant had received a large dataset of confirmatory decisions for the purpose of his research. The fact that these decisions concerned a different period did not alter this assessment. She therefore decided to close the case. However, she urged the Commission to step up its processing of future similar requests.

The Ombudsman also concurrently adopted a decision on the case brought by this complainant regarding proactive publication of confirmatory decisions. The Ombudsman is confident that the suggestions made in that case can help avoid the issues encountered in this one.

## Background to the complaint

1. The fundamental right of access to documents is set out in the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights. [1]
2. The EU's rules on public access to documents (Regulation 1049/2001) [2] stipulate that, if an



individual wishes to obtain access to a document held by an EU institution, he or she may request public access. [3] The institution should promptly take a decision on this request ('initial decision'), either granting access to the document(s) requested, or invoking one of the exceptions [4] set out in Regulation 1049/2001 to justify withholding (full) access. Where access is withheld, the applicant can request the institution to review its initial decision. The institution must then take a final decision on the request, a so-called 'confirmatory decision' [5] .

3. The complainant, a postdoctoral researcher, sought access to a large number of confirmatory decisions, to allow him to draw general conclusions on how the Commission implements Regulation 1049/2001. In December 2019, he submitted five access to documents requests to the Commission, asking for access to all confirmatory decisions adopted between 2014 and 2018.

4. The Commission informed the complainant that, since the requests concerned a very large number of documents, it was not in a position to examine the documents within the time limits set out in Regulation 1049/2001 [6] . The Commission sought to find a 'fair solution' [7] and asked the complainant to limit the scope of his requests in such a way that would enable it to process the request within the statutory time limits.

5. The complainant did not agree to reduce the scope of his request. The Commission and the complainant held a subsequent exchange on how to reduce the scope, which the Commission claimed covered at least 1 269 confirmatory decisions and would take over 3 800 working days to process. Despite a proposal by the complainant to reduce the scope to the confirmatory decisions adopted in 2018 (288 in total), they could not reach agreement.

6. In January 2020, the Commission issued its initial decision, in which it unilaterally restricted the scope of the complainant's requests to 30 confirmatory decisions adopted in 2018, excluding annexes. The Commission granted wide partial access to 28 decisions, redacting only the personal data (such as the names and contact details of the applicants), and access to parts of the two other decisions, redacting personal data [8] and commercially sensitive information [9] (details about clients of law firms).

7. In February 2020, the complainant made a confirmatory application and asked the Commission to review its initial decision. He reiterated his earlier proposal, namely that the Commission review all 288 confirmatory decisions adopted in 2018, excluding annexes.

8. After various extensions of the deadline, the Commission adopted its final decision in April 2020, confirming its initial findings.

9. Dissatisfied with the Commission's decision, the complainant turned to the Ombudsman in May 2020.

## The inquiry



**10.** The Ombudsman opened an inquiry into how the Commission handled the complainant's requests for access.

**11.** In the course of the inquiry, the Ombudsman received further explanations from the Commission and, subsequently, the complainant's comments.

## Arguments presented to the Ombudsman

### Arguments by the complainant

**12.** The complainant considered that the Commission's decision to deal with his five separate requests as one single request is contrary to Regulation 1049/2001. He chose to submit separate requests so that they would be more manageable to deal with. He also took issue with the Commission's decision to limit the scope of his requests to 30 decisions, and contended it should be feasible to process a higher number of decisions.

**13.** The complainant considered exaggerated the Commission's estimate of 3 800 working days. He said that confirmatory decisions are drafted in a highly formulaic manner and that sensitive data could easily be redacted without a detailed review being necessary.

**14.** The complainant referred to the Council of the EU, which he argued is able to deal with such requests .

**15.** The complainant was also dissatisfied with the time taken by the Commission to deal with his requests, which exceeded the time limits set out in Regulation 1049/2001. In addition, he disagreed that the period for finding a 'fair solution' should be included in the deadline to respond. He considered that the deadline to reply should be calculated only from when clarity on the scope is reached. This was the Commission's approach to one of his other requests.

**16.** Finally, the complainant said that, in response to a similar access to documents request in 2013 [10] , the Commission had agreed to disclose the requested documents in smaller batches over a longer period. He was not offered such a solution in this case.

### Arguments by the Commission

**17.** The Commission referred to EU case law [11] to explain how it estimated the workload needed to process the complainant's requests. It said that dealing with an access request entails numerous tasks [12] , and that it had to deal with a high number of other requests simultaneously [13] .

**18.** The Commission insisted that assessing confirmatory decisions in light of potential disclosure requires a detailed review, as they may contain confidential information throughout,



such as personal data, business information and quotations from third parties. The Commission made the preliminary estimation of 3 800 working days to deal with the requests based on past experience.

**19.** In light of the above, the Commission took the view that the complainant's initial requests, which concerned 1 269 documents and related annexes, could not be examined within the statutory time limits. [14] Processing the complainant's requests (even based on his proposal to reduce the scope to decisions adopted in 2018 only) would have required disproportionate effort and undermined its ability to deal with other public access requests.

**20.** The Commission stated that, with a view to safeguarding the interests of good administration, it felt obliged to balance the applicant's interest in access (his stated purpose of academic research) against the workload resulting from processing his requests. Consequently, it unilaterally reduced the scope of his requests to 30 confirmatory decisions in 2018, excluding their annexes. The Commission argued that this was in line with the applicable case law. [15]

## The Ombudsman's assessment

**21.** The Ombudsman's view is that it is reasonable for an institution to group together as one request a number of access requests submitted by one applicant close in time and relating to a large number of documents. Doing so prevents applicants from *"easily circumvent [ing] the rules that provide for exceptions in cases where access to a very long document or to a very large number of documents is requested, by splitting such requests into several smaller requests"*. [16]

**22.** Since, in this case, the complainant simultaneously submitted five access to documents requests, all concerning Commission confirmatory decisions, the Ombudsman finds that it was reasonable for the Commission to consider them as one request.

**23.** According to EU case law [17], institutions may, in particular when requests concern a high volume of documents or in which the number of passages to be redacted would involve an inappropriate administrative burden, reduce their scope. [18]

**24.** In this case, the Commission set out in detail why it considered processing the five requests would constitute a disproportionate administrative burden. It elaborated on the number of documents, the tasks that processing the requests would entail, what reviewing confirmatory decisions entails and previous experience in dealing with similar requests.

**25.** While taking the view that the Commission's estimate of 3 800 working days was excessive, the Ombudsman considered it reasonable for the Commission to conclude that it could not review the request within the time limits set out in Regulation 1049/2001. She further notes that the case law does not allow institutions to alter the strict time limits under Regulation 1049/2001 (15+15 working days). As such, in principle, the case law does not foresee the possibility for institutions to disclose the documents over a longer period of time, for example in batches of



documents.

**26.** At the same time, the Ombudsman understands that the complainant had a legitimate interest in obtaining access to a large sample of confirmatory decisions for the stated purpose of his research into the Commission's implementation of Regulation 1049/2001.

**27.** Therefore, having carefully examined the arguments put forward in this case, the Ombudsman made a judgment call on what was a reasonable balance between the Commission's workload to deal with these requests and the complainant's interest in receiving access. Consequently, she had intended to propose a solution to the Commission to deal with an increased amount of confirmatory decisions to facilitate the complainant's research on the implementation of Regulation 1049/2001.

**28.** However, during the course of the inquiry, the complainant made a series of access requests to the Commission. Each request covered 30 confirmatory decisions. Based on these requests, the Commission granted him access to all its confirmatory decisions for 2019.

**29.** The Ombudsman therefore considers that the complainant has achieved what she intended to achieve with her solution proposal: ensuring a large dataset of confirmatory decisions for the purpose of his research, albeit for a different period. It should be recalled that the complainant himself had put forward a proposal at the outset to reduce the scope of his requests to the confirmatory decisions adopted in 2018 (288 in total). Having now obtained all confirmatory decisions adopted in 2019 (296), the Ombudsman is of the view that a fair solution has been found.

**30.** Asking the Commission to examine additional documents in the context of this inquiry would no longer strike a fair balance between the administrative burden imposed on the Commission and the complainant's stated interest. Instead of availing itself of the option to refuse access, the Commission adopted a practical approach by dealing with the complainant's requests when submitted consecutively, thereby ensuring that it has the resources available to deal with the many public access requests that it receives from other applicants. This goes some way towards ensuring fair treatment of all applicants, whilst respecting the time limits set out in Regulation 1049/2001 for dealing with access requests. [19]

**31.** In light of the above, the Ombudsman no longer deems it necessary to make a solution proposal.

**32.** Regarding the complainant's argument that the Commission was wrong to register his request before an agreement had been reached on the scope, the Ombudsman's view generally is that the deadline for processing an access request should commence only after the scope of the request is agreed upon [20]. In this case, the Commission registered the complainant's request on the same day it was received.

**33.** The Ombudsman regrets that the Commission failed to respect the time limits under Regulation 1049/2001 for dealing with the request both at initial and confirmatory stages. She



therefore again urges the Commission to deal with requests for public access to documents within the applicable deadlines, and to take whatever steps are necessary to prevent similar delays in future.

**34.** Going forward, the Ombudsman notes that the complainant continues submitting access to documents requests, limited to 30 documents per request, to obtain an even larger sample of decisions. The complainant is of the view that it should be feasible for the Commission to deal with at least 50 decisions per access request (compared to the 30 it is processing now).

**35.** The Ombudsman also takes the view that having already dealt with all confirmatory decisions from 2019, the Commission must by now have a very clear idea of where efficiency gains can be made. The Ombudsman therefore urges the Commission to step up its processing of his requests to facilitate his research work.

**36.** The Ombudsman is concurrently adopting a decision on a case brought by this complainant regarding proactive publication of confirmatory decisions. The Ombudsman is confident that the suggestions made in that case can help avoid the issues encountered in this one. [21]

## Conclusion

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

**Since the Commission has provided the complainant with access to all confirmatory decisions from 2019, no further inquiries are justified.**

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

Emily O'Reilly European Ombudsman

Strasbourg, 06/04/2021

[1] Article 15 TFEU and Article 42 of the Charter of Fundamental Rights.

[2] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:  
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049> [Link].

[3] Article 6 of Regulation 1049/2001.

[4] Set out in Article 4 of Regulation 1049/2001.



[5] Article 8(1) of Regulation 1049/2001.

[6] In accordance with Article 7 of Regulation 1049/2001, an institution should deal with an initial request for access within 15 working days from registration of the application. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

[7] Article 6(3) of Regulation 1049/2001 stipulates that, “[i]n the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution”.

[8] In accordance with Article 4(1)(b) of Regulation 1049/2001.

[9] In accordance with Article 4(2), first indent, of Regulation 1049/2001.

[10] Reference GestDem 2013/2132.

[11] According to the Judgment of the Court of Justice of 2 October 2014, *Guido Strack v Commission*, C-127/13, para 27 (hereafter: “*Strack v Commission*”), “the amount of time it takes to handle an application for access depends on the volume of documents to which access is sought or the number of pages to be examined by the institution”.

[12] Such as the preliminary assessment of the content of the documents in light of the exceptions of Regulation 1049/2001, the redactions of the relevant parts falling under exceptions, the preparation and finalisation of the draft replies, and the formal approvals and final checks.

[13] The Commission said that while it was examining the complainant’s requests, it was also handling 16 initial and 79 confirmatory applications, including five other applications submitted by the complainant, extending to more than 1600 documents.

[14] Article 7 of Regulation 1049/2001.

[15] *Strack v Commission*, paras 26-28.

[16] Decision in case 1608/2017/MIG on the European Medicines Agency’s handling of multiple requests for public access to documents made by a single applicant and its extension of deadlines, paragraph 28, available at:  
<https://www.ombudsman.europa.eu/en/decision/en/111254> [Link].

[17] *Strack v Commission*, paras 27-28.

[18] This is the ‘principle of proportionality’, according to which institutions may balance the



applicant's interest for access against the workload resulting from processing the application, in order to safeguard the interests of good administration.

[19] See also the reasoning in the Ombudsman decision in case 1608/2017/MIG, paragraphs 28-30, (footnote 16).

[20] Articles 6(2) and (3) read in conjunction with Article 7 of Regulation 1049/2001.

[21] Decision in case 763/2020/DL on the European Commission's failure to make public proactively all 'confirmatory decisions' it takes following requests for review in public access to documents cases, available at:

<https://www.ombudsman.europa.eu/en/opening-summary/en/128650> [Link].