

Letter from the European Ombudsman to the European Commission on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity

Correspondence - 30/06/2021

Case SI/4/2021/MIG - Opened on 30/06/2021 - Decision on 13/07/2022 - Institutions concerned European Parliament | Council of the European Union | European Commission | European Central Bank | European Border and Coast Guard Agency | European Chemicals Agency | European Food Safety Authority | European Medicines Agency |

Dear President,

I am writing to you, and at the same time to other EU institutions, bodies and agencies, to seek your cooperation on an important, yet potentially overlooked issue: the recording of text and instant messages.

The EU administration, like any other public administration, is increasingly using means of modern electronic communication in its daily work. The COVID-19 crisis, and the related teleworking arrangements, have further increased their use.

The EU administration should make every effort to reflect the reality of modern communication in its document management rules and practices. While it is neither feasible nor desirable for staff members to record all text and instant messages sent or received in their professional capacity, the EU administration is required by EU law to draw up and retain documentation pertaining to its activities, as far as possible and in a non-arbitrary and predictable manner. [1] The decision to record a certain piece of information in the administration's document management system should, according to EU law, not be dependent on the medium - be it a letter, an email, a text or instant message - but on its content. [2]

As European Ombudsman, I am committed to promoting the highest possible standards of administration across the EU civil service. Recording information fulfils the important function of facilitating its exchange, providing evidence of action taken, meeting institutions' legal obligations and preserving their memory. It is also a precondition for the EU administration to meet its transparency obligations, in particular by facilitating public access to documents and implementing the principle of accountability of public actions.



The recording of text and instant messages, and their disclosure, has recently been the subject of debate in several EU Member States. [3] The issue was also brought to my attention, in October 2020, [4] when the European Council said that it does not hold any mobile phone based messages sent by its then President to heads of state and government in 2018, in reply to a request for public access.

I therefore consider it timely to start a discussion on adequate record-keeping rules and practices, when it comes to electronic communication such as text and instant messaging, at the level of the EU administration.

As an initial step, I would like to gather information on the rules and practices on the recording of text and instant messages across the EU administration. To this end, I would appreciate if the Commission could reply to the questions set out in the Annex to this letter. By gathering this information, I hope to be able to identify good practices, which may guide the EU administration in dealing with this important issue in the future.

I would be grateful to receive the Commission's reply to my questions by **15 November 2021**. Should the Commission require any further information or clarifications on this initiative, please contact the responsible inquiries officer, Ms Tanja Ehnert.

Thank you in advance for your cooperation on this important matter.

Yours sincerely,

Emily O'Reilly

European Ombudsman

Strasbourg, 30/06/2021

Annex

1) On the applicable rules:

- Does the Commission's record management decision cover text and instant messages, sent or received through professional and/or personal devices?
- Does the Commission's record management decision set out criteria/principles for the recording of text and instant messages?
- Does the Commission's record management decision set out how text and instant messages should be recorded by staff members?

Please provide us with the relevant provisions of your record management decision.



2) On the implementation of the applicable rules:

- How is the record management decision, as regards text and instant messaging, implemented? For example, has the Commission issued relevant guidelines to staff or does it provide training on this matter to staff?
- In practice, has the Commission recorded text and instant messages? If so, could the Commission please provide examples?
- Has the Commission already received requests for public access to text and/or instant messages, under Regulation 1049/2001, or has the Commission identified text and/or instant messages as falling within the scope of an access to documents request? If so, could the Commission please give examples?
- When receiving public access requests which cover, explicitly or implicitly, text and/or instant messages, how does the Commission search for relevant 'documents'? Has the Commission put mechanisms in place (for instance, guidelines or instructions) to assist staff in searching for such 'documents'?

Please provide us with the relevant documents.

The same letter has been sent to the following institutions and agencies:

- the Council
- the European Parliament
- the European Chemicals Agency
- the European Food Safety Authority
- the European Medicines Agency
- European Border and Coast Guard Agency
- the European Central Bank

[1] Judgment of the Court of First Instance of 26 April 2007 in [case T-264/04 \[Link\]](#), WWF European Policy Programme v Council, para. 61:
<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62004TJ0264> [Link]

[2] In line with the definition of 'document' in Article 3(a) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:
<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32001R1049>.



[3] For example, in the Netherlands (Raad van Staat Uitspraak [201800258/1/A3 \[Link\]](#), 20 March 2019), in Germany (Berlin Administrative Court (VG) 2 K 163/18, 26 August 2020) and in Ireland (Irish Information Commissioner, case number: 180450, 15 May 2019).

[4] 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, 26 October 2020:
<https://www.ombudsman.europa.eu/en/decision/en/134237>.