

Report on the meeting of the European Ombudsman's inquiry team with the European Commission

Correspondence - 08/12/2021

Case 1316/2021/MIG - **Opened on** 16/09/2021 - **Recommendation on** 26/01/2022 - **Decision on** 12/07/2022 - **Institution concerned** European Commission (Maladministration found) |

Case title : The European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID-19 vaccine

Date : Tuesday, 05 October 2021

Remote meeting (Webex)

Present

European Commission (Secretariat-General)

Director (Transparency, Efficiency & Resources)

Deputy Head of Unit (Transparency, Document Management and Access to Documents)

Deputy Head of Unit (Health, Education and Culture)

Policy Officer - Team Leader Records Management and Archives

Legal and Policy Officer - Access to Documents

Senior Expert - Coordinator for inter-institutional relations - relations with the European Ombudsman

European Ombudsman (Directorate of Inquiries)

Ms HICKEY Rosita, Director of Inquiries



Mr DYRBERG Peter, Inquiries and Process Expert

Ms KING Jennifer, Legal Expert

Ms GEHRING Michaela, Inquiries Officer

Ms EHNERT Tanja, Inquiries Officer

Purpose of the meeting

The purpose of the meeting was for the Ombudsman's inquiry team to obtain further information on the case, specifically (i) on the Commission's policy on keeping records of text messages (hereinafter also referred to simply as 'texts') and how this policy is implemented in practice, and (ii) whether, and if so how and where, the Commission searched for possible text messages falling under the complainant's request.

Introduction and procedural information

The Ombudsman's inquiry team introduced themselves, thanked the Commission representatives for meeting with them and set out the purpose of the meeting. They outlined the legal framework that applies to meetings held by the Ombudsman, in particular, that the Ombudsman would not disclose any information identified by the Commission as confidential, neither to the complainant nor to any other person outside the Ombudsman's Office, without the Commission's prior consent. [1]

The inquiry team explained that they would draw up a draft report on the meeting to be sent to the Commission to ensure that it was factually accurate and complete. The meeting report would then be finalised, included in the file and provided to the complainant. No confidential information would be included in the report or otherwise provided to the complainant or any third party.

Information provided by the Commission

On the Commission's policy on keeping records

The Commission representatives explained that the Commission's rules on keeping records are set out in its 'Decision on records management and archives' [2] as well as in its 'Guidelines on document registration' [3] .

Article 7(1) of the Decision contains the following definition of documents that have to be



recorded in the Commission's document management system:

"Documents shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments."

while the Guidelines set out the following detailed criteria for registration :

"(...) If the answer to all of the following questions is 'yes', then the document needs to be registered in Ares and/or the relevant corporate document management system.

1. Is the document related to the policies, activities or decisions falling within the institution's sphere of responsibility?

2. Is the information contained in the document important and not short-lived?

This question requires subtle judgement taking into account the content and context of the document concerned.

- A document that requires action or follow-up by the European Commission or one of its departments, or involves the responsibility of the institution, is important and not short-lived.

Likewise, a document that may later be needed as proof in accordance with the rules and regulations applicable to the underlying 'business process' is considered important and not short-lived;

- In contrast, information is considered to be unimportant and short-lived if not keeping it would have no negative administrative or legal effect for the European Commission.

3. Is the document drawn up or received by the European Commission?

- A document is considered 'drawn up' only if it is 'stable', i.e. if it has been approved as ready for transmission by the person who is empowered to take responsibility for its content in accordance with the rules and regulations applying to the underlying 'business process';

- This person does not have to be the person charged with the practical task of drafting or typing but rather the person or administrative entity responsible for the content in accordance with the procedural requirements and internal rules of the European Commission for the business process concerned;

- A document is considered as 'received' if it has been intentionally delivered to the European Commission by the (external) sender."

The Commission representatives considered that texts and similar messages are short-lived and ephemeral with the result that they do not fulfil the above-mentioned criteria for recording them in the Commission's document management system. However, the Commission representatives stated that the relevant aspect for determining whether information is recorded is not its medium but its content. Therefore, if the content of a text were such as to reflect a Commission decision or commit the Commission in any way, it would have to be recorded like other documents, for example, by recording the information in the form of a note on the relevant file.



To date, the Commission has not recorded any text messages in its document management system. This is logical given that texts are usually short-lived in nature and are not used in the Commission's formal decision-making and they do not commit the institution.

As texts are not considered as fulfilling the criteria for registration, the Commission does not have a technical mechanism for this purpose. In contrast, there is a mechanism for e-mails that can be recorded in the Commission's document management system fairly easily, by clicking on one button (if they meet the three criteria set out in the Guidelines as above). Given that they are not registered, texts are subsequently not covered by the Commission's retention schedule.

To ensure awareness amongst staff of what has to be registered, the Commission provides regular training on document management at all levels, including for Desk Officers, Heads of Unit and Cabinet members. Whilst this training is based on the Commission's Guidelines, the handling of texts and instant messages is not specifically mentioned during the training. Because text messages are not registered, participants do not receive instructions as to how a text should be recorded. However, the available guidance at the Commission points out that if the information contained in a text were considered to be important, long lasting and to meet the registration criteria set out above, it should be captured and kept as a record in a different format, such as for example a note to the file.

In addition, each Directorate-General (DG) has an ethics and transparency expert who receives regular targeted training on record keeping. These experts meet on a monthly basis to discuss developments in the area. They, in turn, train their colleagues within the DG and serve as contact point in case of questions.

As regards the Commissioners' Cabinets, each of them has a Document Management Officer (DMO) who receives training on document management at the beginning of each new term. It is then for the Cabinets to set up their processes to ensure compliance with the Commission's rules on record keeping.

In terms of identifying documents that need to be recorded, the Commission representatives said that it is the responsibility of each author/recipient of a document to make an assessment and decide whether it meets the criteria.

Concerning requests for public access to documents, the Commission representatives explained that at the initial stage of handling, the request is assigned to the competent service, from which the documents (might) originate, taking into account the subject matter of the request. The relevant DG and the Cabinet [4] (if the request relates to Cabinet documents) then conduct an initial search for possible documents. If no documents exist and the applicant raises doubts about that (by making a 'confirmatory application'), unit C1 'Transparency, Document Management & Access to Documents' of the SG contacts the relevant DG concerned again and asks that they search again. In case the DG confirms that no additional documents exist, unit C1 'Transparency, Document Management & Access to Documents' requires a signed note from the Director-General, confirming this statement.



Concerning the use of professional smartphones, the Commission representatives said that the Commission has a policy on who is eligible to be provided with a smartphone, which includes all management, that is, all deputy-heads of unit and above. However, the Commission also has a “bring your own smartphone” approach, which means that staff can install relevant software on their personal smartphones to be able to access their Commission e-mail accounts. In this case, the obligations of the staff are set in the Private Mobile Device – User’s Charter. The Commission representatives said that they would check whether this policy is laid down in writing and, if relevant documents exist, to provide the Ombudsman with a copy.

On the case at hand

As regards the complainant’s access request, the Commission representatives explained that, after the initial request was received, the unit within the Secretariat-General (SG) dealing with the request consulted the President’s Cabinet. The Cabinet identified three documents as falling within the scope of the request. Unit E.4 ‘Health, Education & Culture’ of the SG responsible for handling the request at the initial stage then assessed these three documents and decided to grant the complainant wide partial access.

When the complainant made a confirmatory application arguing that there should be additional documents, namely texts, unit C1 ‘Transparency, Document Management & Access to Documents’ of the SG, in line with the internal procedure, consulted the President’s Cabinet again. The President’s Cabinet confirmed that no additional documents that fulfil the recording criteria exist. The SG then took this assessment into account when replying to the complainant.

The exchanges with the President’s Cabinet were registered on the access file and will be shared with the Ombudsman.

Conclusion of the meeting

The inquiry team thanked the Commission representatives for their time and for the explanations provided, and the meeting ended.

Following the meeting, the Commission provided the Ombudsman with copies of the following documents that it indicated to be confidential:

- Exchanges with the President’s Cabinet on the complainant’s access request,
- Private Mobile Device - User’s Charter
- Corporate Mobile Device - User’s Charter, and
- Two documents concerning the Commission’s IT equipment allocation policy.

Brussels, 8 December 2021



Rosita Hickey Michaela Gehring

Director of Inquiries Inquiries Officer

[1] Article 4.8 of the European Ombudsman's Implementing Provisions.

[2] Commission Decision of 6.7.2020 on records management and archives, available at: https://ec.europa.eu/info/sites/default/files/c_2020_4482_en.pdf [Link].

[3] The Commission confirmed that this document can be shared with the complainant. It will be annexed to this report.

[4] It is important to underline that Cabinets do not reply to access to documents requests directly. Requests, which concern documents originating from the Cabinets, are dealt with by the relevant DGs/services servicing the respective Commissioner (including the President and the Vice-Presidents of the Commission). According to the Commission's administrative practice, documents are typically identified by the Cabinets and the replies are prepared by the relevant service, after having consulted the Cabinet concerned regarding the potential disclosure.