

## **Decision on how the European Commission dealt with a request for public access to emails from its representatives based in Greece concerning the migration situation in two hotspots (case 211/2022/TM)**

Decision

**Case 211/2022/TM - Opened on 11/02/2022 - Decision on 28/06/2022 - Institution concerned** European Commission ( No further inquiries justified ) |

The complainant sought access from the European Commission to emails from its representatives based in Greece concerning the migration situation in two hotspots. Based on these emails and other information, the Commission draws up 'daily reports' and 'migration management reports'. In reply to the complainant's request, the Commission provided wide access to the daily reports and the migration management reports but failed to identify the emails from its representatives on the ground as falling within the scope of the request.

During the inquiry, the Commission clarified that it did not consider the emails in question to constitute 'documents' within the meaning of the EU legislation on public access to documents. Neither did the Commission consider the emails to fulfil the criteria for recording in its document management system. The Commission also confirmed that the emails requested by the complainant no longer exist, as they were deleted in line with the applicable retention policy.

As the emails requested by the complainant were 'documents' within the meaning of the EU legislation on public access to documents, the Commission should have identified and assessed whether public access could be granted to the documents that still existed at the time of the access request. The fact that the Commission did not do so constituted maladministration.

As the Commission informed the Ombudsman that the documents in question no longer exist, a recommendation asking the Commission to now identify and assess them would not serve any useful purpose and further inquiries into the matter are not justified.

The Ombudsman calls on the Commission to identify and assess all documents falling within the scope of any future request in accordance with the EU legislation on access to documents and in light of her findings in this case.



## Background to the complaint

1. To facilitate the coordination between the EU and frontline Member States at the EU external borders in response to increased migratory pressure, the European Commission has put in place what are referred to as 'hotspots'. 'Hotspots' are facilities set up at the EU's external border in Greece and Italy for the initial reception, identification and registration of asylum seekers and other migrants coming to the EU by sea.

2. Commission representatives, who are EU staff members, are on the ground in the hotspots. They regularly provide the Commission with updates on the situation on site. These updates are sent in the form of emails. Based on these updates and other information, the Commission drafts daily reports and migration management reports, which are subsequently registered in its document management system.

3. In June 2021, the complainant, who is a researcher on migration issues, asked the Commission for public access [1], *inter alia*, to *"the technical and detailed reports produced by the EU Commission representatives on the [Greek] islands"* received during the month of January for the years 2018 to 2021.

4. In July 2021, the Commission replied that it had *"identified Daily Reports which consolidate the reports of all EU Commission representatives on hotspot islands and give more concise information on the policy developments than the technical and detailed reports produced by the EU Commission representative on the islands."* The Commission identified 38 documents. It gave wide access to 16 daily reports, redacting only limited personal data [2], and full access to the remaining documents - the migration management reports.

5. The complainant was dissatisfied that the Commission decided to exclude from the scope of his request the *"technical and detailed reports"* from the Commission representatives in the hotspots. He therefore asked the Commission to review its decision and to consider *"the complete range of any 'technical and detailed reports' it holds"* with a view to full disclosure (by making a 'confirmatory application').

6. Following the review, the Commission explained that, according to its document management rules, a document is registered in its internal records management system if it (i) contains important information, which is not short-lived, and/or (ii) may require an action or follow-up by the Commission. The Commission said that the reports sought by the complainant, sent in the form of emails, were *"short lived"* and of *"very technical nature"*. All the information from such reports that was *"important and noteworthy"* was consolidated in the daily reports and migration management reports, which were registered and disclosed to the complainant. The Commission concluded that *"given that the European Commission does not hold any other documents falling within the scope of your application, it is not in a position to fulfil your request"*.

7. In January 2022, the complainant turned to the Ombudsman.



## The inquiry

8. The Ombudsman opened an inquiry into the Commission's refusal to provide public access to the emails in question, that is, the " *technical and detailed reports* " from European Commission representatives in the Greek hotspots for the period indicated in the complainant's access request.

9. In the course of the inquiry, the Ombudsman inquiry team met with representatives from the Commission to obtain further information on the case. The inquiry team drew up a meeting report which it shared with the complainant and, subsequently, received the complainant's comments on that report. The Ombudsman inquiry team also reviewed a sample of more recent emails from the Commission representatives in the Greek hotspots and the corresponding migration management reports for the month of February 2022.

## Arguments presented to the Ombudsman

10. In the meeting with the Ombudsman inquiry team, the Commission representatives explained that the **Commission** did not identify the emails requested by the complainant as falling within the scope of the access request, as it did not consider these emails to be 'documents' within the meaning of the EU legislation on public access to documents (Regulation 1049/2001). Furthermore, the Commission did not consider these emails to meet the Commission's criteria for recording documents in its document management system.

11. Rather, the Commission considered the emails in question to be short-lived in nature, with the information contained therein constituting 'raw material' that still requires verification and crosschecking. The daily reports and the migration management reports that were disclosed to the complainant are consolidated, verified and cross-checked versions of the information contained in the emails. The emails also contain trivial information. Considering the content of the Migration Management Reports, the information contained in the emails has no added value for the public.

12. The Commission representatives further clarified that, as the requested emails do not meet the Commission's criteria for registration in its document management system, they were automatically deleted at the expiry of the retention period (six months).

13. **The complainant** argued that the emails are 'documents' within the meaning of Regulation 1049/2001 [3] . He considers that the emails constitute regular updates on the situation in the hotspots in Greece and a "*structured, formalised means of communication and information exchange*" between the Commission representatives in the hotspots and the headquarters. The complainant thus challenged the Commission's assessment that they contain trivial information.

14. The complainant furthermore considered the argument that some of the information in the



emails may need verification and cross-checking not convincing. This would mean that a large number of documents (e.g. draft and preparatory documents, minutes of meetings) would fall outside the scope of Regulation 1049/2001, thus unduly limiting the right of public access to documents. Moreover, the complainant took the view that applicants *“have the capacity to ascertain that some of the information in the emails was, at the time of writing - incomplete, provisional or even factually incorrect.”*

**15.** The complainant also took the view that, by their very nature, it is most likely that the emails in question would require a follow-up by the Commission. He considers that the fact that they serve as a basis of the consolidated daily reports and migration management reports supports this view. The complainant added that, as the emails pertain to an important issue of public interest, they should *“constitute an integral part of the institutional record [...]”*.

## The Ombudsman's assessment

**16.** Regulation 1049/2001 applies to all documents held by an EU institution, that is, *“documents drawn up or received by it and in its possession, in all areas of activity of the European Union ”* [4] . According to that Regulation, a document is *“any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility”* [5] .

**17.** The wording of Regulation 1049/2001 makes it clear that, for a document to fall under its scope, it is irrelevant whether it has been registered in the institution's document management system. What matters is the document's content and whether or not it relates to the *“policies, activities and decisions”* for which the institution is responsible.

**18.** Whether the document is subsequently registered in the document management system of the institution concerned is, as a matter of law, not relevant for the purpose of the definition of a 'document' under the Regulation. Registering a document is a *consequence* of the existence of a document and not a *pre-requisite* for its existence.

**19.** The Ombudsman notes that her inquiry team could not review the emails in question, as the Commission confirmed that they no longer exist. The inquiry team reviewed, however, a sample of more recent emails from the Commission representatives on the islands in the Greek hotspots, and the corresponding migration management reports, for the month of February 2022.

**20.** Based on the review of these more recent emails (which the Ombudsman understands to contain content comparable to that of the requested emails) and the Commission's description of the emails' content in its confirmatory decision and in the meeting with the Ombudsman inquiry team, it is reasonable to assume that the content of the requested emails related to the *“policies, activities and decisions”* for which the Commission is responsible. The Ombudsman therefore takes the view that the emails in question were 'documents' within the meaning of



Regulation 1049/2001. As a consequence, the Commission should have, in line with that Regulation, identified and assessed any such emails in its possession provided they fell within the temporal scope of the access request.

**21.** However, Regulation 1049/2001 does not apply to documents that are *no longer* in the possession of an institution, for example because they have been deleted. The access request related to emails received during the month of January for the years 2018 to 2021.

**22.** The Commission has a document retention policy whereby documents that are not permanently registered are automatically deleted from email accounts after six months. That means that, at the time of the initial application, the retention period for the emails received during the month of January for the years 2018 to 2020 had already expired. The retention period for the emails received during the month of January 2021 expired in August 2021.

**23.** EU case-law has recognised that the EU institutions have a duty to draw up and retain documentation pertaining to their activities, and to do so as far as possible and in a non-arbitrary and predictable manner [6] .

**24.** The Ombudsman has stated that, as a general rule, an EU institution, body, office or agency should not delete a document that is subject to a request for public access until the process of challenging a refusal to grant access is completed. Having the document at hand allows a proper review to be carried out of the refusal, including by the European Ombudsman and/or the Court of Justice of the EU.

**25.** In this case, this was not done. If the Commission had identified the documents soon after the initial request for access was made, it would have been able to examine whether public access could be granted to the emails dating from January 2021. It could also have ensured that the emails were not deleted until the process of challenging a refusal to grant access was completed. The fact that the Commission did not do so constituted maladministration.

**26.** As the documents in question no longer exist, a recommendation asking the Commission to now identify and assess the requested emails would not serve any useful purpose and any further inquiries into the matter are not justified.

**27.** The Ombudsman notes that, in his comments on the meeting report, the complainant expressed his wish to have access to the emails from the Commission representatives in the hotspots for the last six months. The complainant may thus make a new request to the Commission to that effect. The Ombudsman calls on the Commission to identify and assess all the documents falling within the scope of such a potential new request in accordance with Regulation 1049/2001 and in light of her findings above.

## Conclusion

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



**As the emails requested by the complainant were ‘documents’ within the meaning of Regulation 1049/2001, the Commission should have identified and assessed whether public access could be granted to the documents dating from January 2021. The fact that the Commission did not do so constituted maladministration.**

**As the Commission informed the Ombudsman that the documents in question no longer exist, a recommendation asking the Commission to now identify and assess them would not serve any useful purpose and further inquiries into the matter are not justified.**

**The Ombudsman calls on the Commission to identify and assess all documents falling within the scope of any future request in accordance with Regulation 1049/2001 and in light of her findings in this case.**

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

Emily O'Reilly

European Ombudsman

Strasbourg, 28/06/2022

[1] Under Regulation 1049/2001 regarding 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].

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

[3] To support his view, the complainant referred to the Ombudsman’s decision in case 1050/2018/DL: <https://www.ombudsman.europa.eu/en/decision/en/127386> [Link]

[4] Article 2(3) of Regulation 1049/2001.

[5] Article 3(a) of Regulation 1049/2001.

[6] See judgment of the Court of First Instance of 26 April 2007, *WWF v Council of the EU* , paragraph 61:



<https://curia.europa.eu/juris/document/document.jsf?text=&docid=61308&pageIndex=0&doclang=en&mode=lst&dir=>  
[Link].