

Decision on 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 (case 1316/2021/MIG)

Decision

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) |

The case concerned a request for public access to text messages between the Commission President and the CEO of a pharmaceutical company on the purchase of COVID-19 vaccines. The complainant referred to an article in the New York Times which referred to such text messages. The Commission said it did not hold the text messages.

The Ombudsman's inquiry showed that the Commission had asked its President's private office (cabinet) to search only for documents that fulfil the Commission's recording criteria. As the Commission does not register text messages, the search did not yield any results. Thus, the Commission had not attempted to identify any text messages beyond what had been registered in its record management system, and it had therefore not even assessed whether any such text messages should be disclosed.

The Ombudsman considered that this constituted maladministration. She recommended that the Commission ask its President's private office to search again for the text messages, making it clear that the search should not be limited to documents that fulfil its recording criteria . If any text messages were identified, the Commission should then assess whether the complainant can be granted public access to them in line with EU law.

In reply, the Commission did not inform the Ombudsman whether it had carried out that search for unregistered text messages. The Commission did not give any reasons for not conducting such a search.

Against that background, the Ombudsman confirmed her finding of maladministration.

Background



1. In April 2021, the New York Times reported [1] that the Commission President and the chief executive (CEO) of a pharmaceutical company had exchanged text messages and calls related to the procurement of COVID-19 vaccines.
2. EU procurement is a highly regulated area of EU activity, often involving large sums of public money [2] . In general, there is a high level of transparency in this area.
3. In May 2021, the complainant, a journalist, asked the Commission for public access [3] to the text messages and other documents related to the exchanges about the procurement mentioned in that article.
4. The Commission identified three documents as falling within the scope of the complainant's request to which it gave wide access. However, the Commission did not identify any text messages.
5. The complainant asked the Commission to review its decision (by making a 'confirmatory application'), questioning that no text messages had been identified.
6. In July 2021, the Commission responded to the complainant, repeating that it does not hold any additional documents.
7. Dissatisfied, the complainant turned to the Ombudsman who opened an inquiry into the complainant's concern that the Commission had failed to identify and disclose the text messages to which he was seeking access.
8. In the course of the inquiry, the Ombudsman inquiry team met with representatives of the Commission to obtain further information on the case. A report on this meeting [4] was shared with the complainant who then provided his comments. The Ombudsman inquiry team also reviewed documents detailing how the Commission had handled the public access request.
9. The inquiry showed that, in dealing with the request for public access, the Commission had not made a full search for the text messages requested but had limited its search to *registered* text messages. The inquiry also showed that the Commission's policy is, de facto, not to register text messages. Thus, the manner in which the Commission dealt with the request was clearly inadequate. The Commission did not verify whether it actually had the text messages. In spite of the news report that such messages do exist, the Commission limited its search to *registered* messages, which it must have known, given its policy on registration, would produce the result that there were no text messages.
10. Against that background, the Ombudsman held that there was maladministration in how the Commission had dealt with the request and made a recommendation to the Commission to redress that instance of maladministration. [5]



The Ombudsman's recommendation

11. The Ombudsman made the following **recommendation** [6] to the Commission:

The Commission should ask the President's cabinet to search again for relevant text messages, making it clear that the search should not be limited to registered documents or documents that fulfil its recording criteria.

If the reported text messages exist and are identified, the Commission should assess whether public access can be granted to them in line with Regulation 1049/2001.

12. In reply, the Commission did not inform the Ombudsman whether it had carried out the search she had recommended. The Commission accepted that text messages are documents within the meaning of Regulation 1049/2001. However, the Commission said that in dealing with the request, it had followed its established practice, which is that it searches for registered documents (that is, documents fulfilling its recording criteria) *only*.

13. In his comments on the Commission's reply, the complainant pointed out that it was still unclear whether the text messages in question (still) existed.

The Ombudsman's assessment after the recommendation

14. The Commission should deal with requests for public access to documents in accordance with the law, that is Regulation 1049/2001, and principles of good administration. The Commission must endeavour to be responsive, forthcoming and citizen-friendly.

15. This case is not about the general issue of whether text messages should be registered or not. The issue of the EU institutions' registering of text and instant messages is the subject matter of the **Ombudsman's strategic initiative, SI/4/2021 [7]**. The Ombudsman is encouraged that, in its response to this inquiry, the Commission has stated its intention to issue **further guidance on modern communication tools such as text and instant messages**. The Ombudsman trusts that the Commission will draw on the good practice guidelines resulting from her strategic initiative.

16. The issue in this case is how the Commission dealt with the request for public access to documents.

17. There is no doubt that **text messages** (whose content relates to the policies, activities and decisions falling within the institution's sphere of responsibility) **are considered EU documents by Regulation 1049/2001**. The Ombudsman welcomes the fact that the Commission has now acknowledged this in its reply to her recommendation. [8]

18. Despite this acknowledgement, the Commission excludes, in practice, text messages from the scope of Regulation 1049/2001.



19. As the Ombudsman noted in her recommendation, whether text messages are registered in the document management system of the institution concerned is legally not relevant for the purpose of the definition of a 'document' under Regulation 1049/2001.

20. In this case, it followed from a reputable newspaper, that text messages had been exchanged by the Commission President about COVID-19 vaccine procurement, *"a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"* [9] . These text messages must have been held by the Commission for some time [10] .

21. Despite this, one year on and after an Ombudsman recommendation, the Commission still has not advanced any reasons that would prevent it from conducting a full search for the text messages.

22. Against this background, the Ombudsman upholds her finding of maladministration.

Conclusion

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

The Commission should have searched for the documents requested, including those not registered. The Commission's failure to do so is maladministration.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 12/07/2022

[1] Available at:

<https://www.nytimes.com/2021/04/28/world/europe/european-union-pfizer-von-der-leyen-coronavirus-vaccine.html> [Link]. For example, the article said:

"For a month, Ms. von der Leyen had been exchanging texts and calls with (...) the chief executive (...). And as they spoke, two things became clear: '[the company]' might have more doses it could



offer the bloc — many more. And the European Union would be thrilled to have them. That personal diplomacy played a big role in a deal, to be finalized this week, in which the European Union will lock in 1.8 billion doses (...)."

[2] <https://ted.europa.eu/TED/search/canReport.do> [Link]

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link].

The access request was made via *AskTheEU.org* and is available at:

https://www.asktheeu.org/en/request/exchange_between_president_von_d [Link].

[4] The meeting report is available at:

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/150175> [Link].

[5] The present inquiry did not concern the Commission's policy as to what documents, including text messages, should be registered or not. The inquiry concerns how the Commission dealt with a request for access to documents that it can easily verify whether it holds or not.

[6] The full text of the recommendation is available at:

<https://www.ombudsman.europa.eu/en/recommendation/en/151678> [Link].

[7] <https://www.ombudsman.europa.eu/en/case/en/59322> [Link].

[8] Previously, the Commission had stated otherwise in a response to a Parliamentary Question

https://www.europarl.europa.eu/doceo/document/P-9-2021-005139-ASW_EN.html [Link].

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

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