

Closing note on the strategic initiative on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity (SI/4/2021/MIG)

Correspondence - 13/07/2022

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 |

The EU administration is increasingly using means of modern electronic communication in its daily work. This reality should be reflected in the EU administration's document management rules and practices.

Against this background, this strategic initiative aimed at starting a discussion on adequate record-keeping rules and practices, when it comes to electronic communication such as text and instant messaging. To this end, the Ombudsman gathered information from across the EU administration. She also looked at rules and practices at national and international level.

Based on the information gathered, the Ombudsman makes practical recommendations that could guide the EU administration's practices going forward

Background

- 1.** The EU administration, like any other public administration, uses means of modern electronic communication in its daily work. The COVID-19 crisis, and the related teleworking arrangements, have further increased their use.
- 2.** The EU administration should reflect the reality of modern communication in its document management rules and practices.
- 3.** It is fair to assume that it is not practically feasible for staff members to record all text



and instant messages sent or received in their professional capacity. However, whether to record or not a certain piece of information in the administration's document management system should not be dependent on the medium – be it a letter, an email, a text or instant message – but on its content.

4. 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. [1]

5. The recording of text and instant messages, and their disclosure, has in recent years been the subject of debate in several EU Member States. [2] The issue has also been brought to the Ombudsman's attention. [3]

6. The Ombudsman therefore considered 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.

7. To this end, the Ombudsman gathered information on the rules and practices on the recording of text and instant messages from across the EU administration. [4] The Ombudsman also looked at relevant rules and practices that have been developed at national and international level. [5]

The Ombudsman's findings

8. All eight EU institutions, bodies, offices and agencies (IBAOs) the Ombudsman contacted stated that text and instant messages are, in principle, covered by the general definition of document set out in their respective record management decisions. Two of the IBAOs had more specific rules in place.

9. None of the IBAOs provided to their staff specific guidance (or training) on the recording of text and instant messages. One IBAO indicated that it would evaluate the need for such guidance (or training) in the context of an upcoming review of its record management decision.

10. Two IBAOs had already experience with the recording of text and instant messages in their respective document management system. One of these IBAOs had disclosed instant messages upon receipt of a request for public access to documents.

11. Some IBAOs said that their staff dealing with requests for public access to documents under Regulation 1049/2001 do not merely search their document management system for registered documents to identify documents to which public access is sought. Rather, they also contact all relevant departments/staff that might be holding relevant documents covered by the access request.

Practical recommendations

Based on the information gathered, the Ombudsman identified good practices, which may



guide the EU administration in dealing with this issue in the future. These are reflected in the 'practical recommendations' below:

IBAOs should:

- **Take into account, in document management rules and practices, the ever-increasing use of text and instant messaging. Concretely, this implies that the decision to record a certain piece of information in the administration's document management system should not be dependent on the medium - be it a letter, an email, a text or instant message - but on its content.**
- **Put in place technological solutions to enable the easy recording of text and instant messages in document management systems. In the meantime, provide for alternative ways of recording such messages.**
- **Issue clear guidance to staff on how text and instant messages that meet the criteria on document recording should be extracted, transferred and recorded. All staff using electronic devices for work should be able to understand how to extract and transfer text and instant messages from messaging apps or platforms to the relevant document management system.**
- **Raise awareness among staff about the need to ensure that text and instant messages meeting the recording criteria are extracted, transferred and recorded regularly and routinely. In addition to standard internal communication messages, this could be done by offering training to existing staff members and as part of induction programmes for new staff members, for example.**
- **Make sure that the retention periods for text and instant messages held on electronic devices used for work are in line with the retention policy.**
- **Have a process in place to ensure that, when a staff member leaves, any documents the staff member holds, including any text and instant messages that meet the recording criteria, are recorded.**
- **Recognise that work-related text and instant messages are 'documents' within the meaning of Regulation 1049/2001 on public access to documents.**
- **When dealing with requests for public access to documents that could cover text and instant messages, consider all locations where such messages might be stored, including electronic devices used by staff, and assist staff potentially holding such messages in their searches, for example by giving instructions.**
- **Ensure that their standard search tool allows for the identification of text and instant messages (as such) once they have been registered in their document management system.**

On this basis, the Ombudsman concludes this strategic initiative.

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Strasbourg, 13/07/2022

[1] Judgment of the Court of First Instance of 26 April 2007, *WWF European Policy Programme v Council*, T-264/04, paragraph 61: ... *In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities* . <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62004TJ0264>

[2] For example, in the Netherlands (Raad van Staat Uitspraak 201800258/1/A3, 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).

[3] <https://www.ombudsman.europa.eu/en/decision/en/134237> (case 1219/2020/MIG) and <https://www.ombudsman.europa.eu/en/recommendation/en/151678> (case 1316/2021/MIG).

[4] In the context of this strategic initiative, the Ombudsman contacted eight EU institutions, bodies, offices and agencies, namely the European Commission, the European Parliament, the Council of the EU, the European Central Bank (ECB), the European Chemicals Agency (ECHA), the European Food Safety Authority (EFSA), the European Medicines Agency (EMA) and the European Border and Coast Guard Agency (Frontex).

[5] See, for example, the Council of Europe Convention on Access to Official Documents (CETS No. 205): <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=205> .