Decision of the European Ombudsman closing the inquiry into complaint 2232/2011/(RA)FOR against The European Commission

Decision
Case 2232/2011/FOR - **Opened on** 02/12/2011 - **Decision on** 21/05/2014 - **Institution concerned** European Commission (Friendly solution) |

The case concerned the European Commission's handling of requests for public access to documents relating to the Commission's proposal for a new regulation on the Common Fisheries Policy.

The Ombudsman inquired into the issue and found that the Commission was not entitled to deny the complainant, a German academic working in the area of transparency of EU public bodies, public access to the documents. She thus made a proposal for a friendly solution calling on the Commission to disclose the documents. The Commission agreed to the Ombudsman's proposal and released the documents. The Ombudsman then closed the inquiry.

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The background
1. This complaint concerns the European Commission's refusal to grant the complainant - who is a German academic - full public access to documents relating to the Commission's proposal for a new regulation on the Common Fisheries Policy.

2. The complainant particularly wanted access to the draft versions of the proposal that were used for inter-service consultations within the Commission. He also wanted access to all proposals for amendments submitted by the Commission's Directorate General Internal Market and Services, Directorate General Environment and Directorate General Health and Consumers. These documents were:

(1) Preliminary version of the Proposal for a Regulation of the European Parliament and of

the Council on the Common Fisheries Policy as submitted to the inter-service consultation launched on 7 April 2011;

(2) Note of DG Environment dated 2 May 2011 submitted in the inter-service consultation (Ares(2011)441958);

(3) Note of DG Health and Consumers dated 1 May 2011 submitted in the inter-service consultation (Ares(2011)510574);

(4) Preliminary version of the Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy — incorporating the comments of the services (document COM(2011)425/1).

3. While the Commission granted the complainant partial access to the documents, it insisted that it could not disclose the full versions without undermining its decision-making process.

4. After examining the arguments of the Commission and the complainant, the Ombudsman decided to direct an inquiry towards the Commission concerning its refusal to give full access to the documents [1] .
Allegation of failure to deal with the complainant's requests for public access to documents appropriately

The Ombudsman's friendly solution proposal

5. When proposing the friendly solution, the Ombudsman took into account the arguments and opinions put forward by the parties (see the link attached to footnote 1 for details thereof).

6. The Ombudsman first noted that this case concerns the Commission as it fulfils one of its primary Treaty tasks, namely, the proposal of Union legislative acts, in accordance with Article 17(2) TEU and Article 289(1) TFEU. In fulfilling this, along with its other tasks, the Commission is under an obligation to *"promote the general interest of the Union"* [2] .

7. Recital 6 in the preamble to Regulation 1049/2001 states that wider access must be granted to documents in cases where the institutions are acting in their legislative capacity while at the same time preserving the effectiveness of the institutions' decision-making process. Article 12 of Regulation 1049/2001 emphasises the special importance of providing access to documents drawn up *"in the course of procedures for the adoption of acts"* which are legally binding in or for the Member States, by stating that, subject to the rules on exception to access, such documents be made directly accessible to the public in electronic form or through a register.

8. The duty to be as transparent as possible in relation to legislative procedures applies, in the first place, to the Council and to the Parliament. Article 15(2) TFEU states that *"the European Parliament shall meet in public, as shall the Council when considering and voting on a*

draft legislative act." Further, the fifth paragraph of Article 15(3) TFEU states that *"the European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures"* .

9. The Court of Justice of the EU has underscored the importance of transparency as far as the work of the legislator is concerned [3] . The views of Advocate-General Cruz Villalón in *Council v Access Info Europe* , provide a clear and convincing perspective on the importance of this case law. He states that *"'Legislating' is, by definition, a law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'. Otherwise, it would not be possible to ascribe to 'law' the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict. In a representative democracy, and this term must apply to the EU, it must be possible for citizens to find out about the legislative procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate."* [4] The Advocate General further stated that *"[w]hile, in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law, in the legislative procedure it serves the purpose of legitimising the law itself and with it the legal order as a whole."* [5]

10. The Council and the Parliament, as co-legislators, have an enhanced obligation to be transparent in relation to documents they hold relating to the legislative process. While the Commission is not a co-legislator, it nonetheless plays an important role in the legislative process, as it has the exclusive right to propose legislation and also plays a role in conciliating the possibly divergent positions of the co-legislators. Those roles impact significantly on the interests of all EU citizens since they can be decisive in terms of the eventual content of legislation. It is important, indeed vital, for the legitimacy of the Commission, for the legitimacy of EU law, and for the legitimacy of the EU itself, that the Commission carries out these roles as transparently as possible. It is only by being transparent that citizens can verify that the Commission is acting in the public interest when it carries out these roles. It is only by doing so that the Commission can be held accountable for how it carries out these roles. [6] The present inquiry relates to documents which illustrate how the Commission acts in its role as the proposer of EU legislation. The documents at issue in the present case are drafts leading to the proposal of a legislative act (namely, the Commission's Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy). They are clearly documents drawn up in the course of the procedures for the adoption of legislative acts. [7]

11. The Ombudsman underlined that, when the Commission responds to requests for access to documents relating to the adoption of EU legislation, and especially where it analyses whether there is an overriding public interest in disclosure of documents relating to the adoption of EU legislation, the Commission must bear in mind the very special importance that obtaining access to documents relating to the adoption of EU legislation can have for citizens in a democratic legal order, such as the EU legal order. Openness in respect of access to documents relating to the adoption of EU legislation contributes to strengthening democracy by allowing citizens to follow in detail the decision-making process within the institutions taking part in legislative procedures, and thereby to scrutinise all the

relevant information which has formed the basis of a particular legislative act. Doing so provides them with knowledge and understanding of the various considerations underpinning legislation which will affect their lives [8] . The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights [9] .

12. The Ombudsman therefore underlined that there exists a general presumption that the public interest is served by making publicly accessible as much information pertaining to a particular legislative procedure as possible. There exists a further presumption that transparency, in general, and access to documents, in particular, are beneficial, leading to a more informed debate and better outcomes overall. The Ombudsman recalled, in this regard, that Recital 2 of Regulation 1049/2001 states that openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

13. The Ombudsman further underlined that, in view of the aim set out in Regulation 1049/2001 of ensuring the widest possible access to documents held by the Council, the Parliament and the Commission [10] , any exceptions to this principle must be interpreted strictly [11] . Furthermore, the principle of proportionality requires that if an exception is applied to the general rule of access, the application of that exception must remain within the limits of what is appropriate and necessary for protecting the defined objective public and private interests which are set out in the exception [12] . The examination carried out by an institution to determine that a protected interest would be (seriously) undermined by public disclosure of a requested document must be apparent from the reasoning set out in the decision limiting public access [13] .

Article 4(3) of Regulation 1049/2001

14. Article 4(3) of Regulation 1049/2001 provides for the possibility to refuse access to a document if disclosure would seriously undermine the decision- making process of the institution concerned. The Commission has argued that, in the event the documents in question are disclosed in their entirety, its ability to take decisions in the context of the inter-institutional negotiations on the reform of the Common Fisheries Policy risks being seriously undermined. It argued that putting in the public domain the possible options the Commission may consider in the discussions with Parliament and Council would prejudice its margin of manoeuvre and severely reduce its capacity to contribute to reaching compromises. The Commission pointed out that it fulfils a vital arbitrating role in the legislative process, in conciliating interests of the Member States, trade and industry, and citizens in the process of defining Union policies and proposing legislation. It must, it said, in certain circumstances be able to protect its internal discussions and preliminary deliberations in order to safeguard its ability to fulfil these tasks effectively. Disclosure of the undisclosed parts of the two preliminary versions of its proposal would, it said, reveal to the public, and to its negotiating partners, possible changes to the proposal that may become relevant in the course of the legislative process. The possible changes to the proposal are based on policy options that were considered in the internal deliberations but were not

retained. The Commission referred to the fact that its proposal can be amended at any time pursuant to Article 293 TFEU.

15. The Ombudsman understood the Commission's argument to be that revealing policy options that were considered in the internal deliberations, but were not retained, would be damaging. The Ombudsman was not convinced that the arguments put forward by the Commission are of a sufficiently detailed nature to indicate that the Commission would be subject to pressure of such a nature and intensity that its decision-making process would be seriously undermined as a result of disclosure of the documents in question [14] .

16. First, consistent with the principles contained in the TEU and the TFEU [15] that participation of the public in EU decision-making, and in particular in decision-making related to the legislative process is positive and to be encouraged, any pressure that might be exerted on the Commission as a result of the public disclosure of the documents must, in principle, be presumed to be positive with the result that the outcome of the legislative process can be presumed to be improved if the Commission's internal opinions are revealed and debated by all stakeholders and the co-legislators [16] . In other words, it could better serve the interests of these constituents (and by extension the general interest), if the latter had access to the documents in question. This is, after all, one of the main objectives of opening up decision-making within the institutions. As outlined by the General Court, " *if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information* " [17] . In the context of a legislative process, the presumption is that all information relating to how decisions are taken is of benefit unless it can be specifically shown that it will not be. By withholding such information from citizens, their ability to participate effectively in the decision-making process is commensurately limited.

17. Second, the Ombudsman stated that she was cognisant of the fact, as recognised by Advocate General Cruz Villalón in *Council v Access Info Europe* , that transparency may prove to be *"inconvenient"* [18] . However, as pointed out by the Advocate General, albeit with direct reference to the Council, *"the disadvantages that transparency brings, in terms of effectiveness, for the negotiation and adoption of decisions might perhaps be such as to justify sacrificing it where the Council is acting as an intergovernmental body and carrying out functions of that nature, but* **that can never be the case where it is participating in a legislative procedure** *. In other words, from an objective point of view, transparency might seem to be a disadvantage in the context of inter-State 'negotiations', but not in 'deliberations' between parties that must reach agreement on the content of a 'legislative' measure. While, in the first case, the predominant concern of each State may be its own interest,* **in the second case that concern must be the interest of the Union, which is a common interest, founded on the implementation of its fundamental principles, among them democracy** ." [19] (emphasis added) In the Ombudsman's view, these considerations are central in this case, where the Commission is under a specific obligation to promote the general interest of the Union.

18. Third, the fact that the Commission has opted for one particular position in a legislative proposal does not imply that damage would necessarily occur to its decision-making process

if the positions it has not adopted are made known to the public. As underlined by the Court in *Sweden and Turco v Council* , in relation to the disclosure of legal opinions forming part of the legislative process, the formulation of different opinions is inherent in a legislative process. It cannot be automatically deemed to be harmful to the legislative process that such views are expressed and made public. Indeed, making public such opinions strengthens and legitimises the legislative process [20] .

19. The Ombudsman pointed out, in this regard, that it is incumbent upon the Commission, where it is called upon to do so, to explain why it took a particular position, rather than the other possible positions it could have taken and why that particular position best promotes the general interest. Put another way, the Commission should be publicly accountable for how it promotes the general interest. While the Commission is responsible for defending its proposal in the face of counter arguments, it should not seek to shield alternative positions from public scrutiny. After all, the Commission's proposal has delimited the scope of the reform in this particular case. It is of utmost importance for the legislative process that its position be understood. The general public needs to understand why its proposal takes the shape that it does. While it is clear that the Commission would like to maintain its original proposal throughout the legislative procedure, and for that reason might prefer if people did not take into account diverging positions that were expressed and considered within the Commission prior to the adoption of its proposal, the fact remains that these alternative positions exist. The Commission should not hide the fact that there are alternative positions that may also be worthy of consideration during the legislative process. The inter-institutional debate should, in any case, operate so as to ensure that, if the Commission's proposal is indeed the one that best promotes the general interest, it will be adopted by the co-legislators.

20. Fourth, the General Court, in its judgment in *Access Info Europe v Council* , confirmed that a document drawn up at the proposal stage of legislation is designed to be discussed and is not designed to remain unchanged. Public opinion is perfectly capable of understanding that an institution that produces such a document is likely to amend its content subsequently [21] . It is also in the nature of democratic debate that views put forward at the proposal stage of legislation can be subject to both positive and negative comments on the part of the public and the media [22] .

21. Fifth, many of the divergent positions that were considered internally by the Commission during the process of formulating its proposal, will, in all likelihood, and in any case, form part of the inter-institutional debate between the Council and the Parliament. The Ombudsman was not convinced that revealing that such views were also discussed internally by the Commission would seriously undermine the Commission's decision-making process. Indeed, it would be surprising, and indeed disturbing, if it ever emerged that the Commission had not, internally, dealt with many divergent opinions during the process of formulating its proposals.

22. Sixth, as the Ombudsman stressed in his decision in case 2293/2008/TN, the very objective sought by the rules on public access is to reveal how the institutions operate, thereby allowing citizens to understand the way decisions are taken, on their behalf. Such

openness generates and maintains the legitimacy of the institutions and of the EU in the eyes of citizens. It should also be borne in mind that the very purpose of Regulation 1049/2001 is to allow citizens to become aware, to the greatest extent possible, of how the EU public administration, which works on behalf of citizens, functions. As such, its very aim is to offer access to various points of view, from within and outside the institutions, which enable an institution to adopt an eventual position. Revealing these various points of view is therefore the very aim of disclosure. The documents here concerned shed light on various aspects of the process by which EU legislation is drafted. The Ombudsman underlined the value of this information, in allowing citizens to follow decision-making in the Commission. By providing access to the series of documents here concerned, the public can follow the evolution in the Commission's thinking and attempt to understand the rationale for its final position.

23. Seventh, the Ombudsman strongly agreed with the complainant that there is a risk that "insiders", with detailed knowledge and contacts, can enjoy privileged access to such documents, while the general public, who can rely only on their fundamental right of public access to documents, are denied the same privilege. It is difficult to see how such potential disparities could ensure that the general interest is promoted. As the complainant contends, it is only the general public who are negatively affected by non-disclosure.

Second subparagraph of Article 4(3) of Regulation 1049/2001

24. The second subparagraph of Article 4(3) of Regulation 1049/2001 states that *"[a] ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"* .

25. The Ombudsman noted that the second subparagraph of Article 4(3) of Regulation 1049/2001 can apply where it is reasonably foreseeable and not purely hypothetical that the drafters of *"opinions"* to be used as part of deliberations and preliminary consultations would be reticent about expressing their full and frank views for fear of their opinions being publicly disclosed [23] .

26. An institution that argues that the second subparagraph of Article 4(3) applies must, however, put forward specific characteristics of an opinion which would lead to a conclusion that it is particularly *"sensitive"* , and thus liable to lead to self-censorship if there is a prospect that it will be disclosed to the public [24] . If this were not the case, the exception set out in the second subparagraph of Article 4(3) could be invoked as regards any opinion used for internal use as part of deliberations and preliminary consultations within the institution. Such an expansive interpretation of this provision would clearly run counter to the principle that the exceptions to the principle of access laid down in Regulation 1049/2001 must be interpreted narrowly.

27. The case-law does not formally exclude the possibility that an exception provided for in Article 4 of Regulation 1049/2001 can apply to documents drawn up *"in the course of"* the

procedures *"for the adoption of"* legislative acts.

28. The Ombudsman noted that the very nature of legislative procedures in a democratic system requires that different, even conflicting, but legitimate interests, and the views thereon are openly discussed. Including all such interests and views in the public debate broadens, deepens and improves the quality of that debate, and the quality of democracy.

29. The Ombudsman did not agree that the prospect of a lively public debate, which might well arise as a result of the public disclosure of documents produced by the Commission when preparing a proposal for legislation, should give rise to reticence on the part of public officials tasked with participating in the preparation of a Commission proposal.

30. The prospect of such lively public debate is of relevance, however, in understanding whether there would be, in any case, an overriding public interest in disclosure. In a democratic EU, it is all the more important, in relation to those issues which are complicated, highly disputed, involving conflicting interests, and where difficult choices have to be made, that those who participate in the legislative procedure should not be allowed to determine in secret how and why they made their proposals.

31. The Commission has underlined that, in the majority of cases, it discloses the preparatory version of its legislative proposals. Such documents are, it said, in principle disclosed unless they concern a particularly sensitive area of policy and present differences on substance with the final version adopted by the Commission. The reform of the Common Fisheries Policy is, it stated, a particularly sensitive policy area.

32. The complainant, on the other hand, argued that the Commission has never explained what distinguishes this particular decision-making process from other legislative processes. The complainant notes that no substantive reasons have been given as to why this case should be an exception to the general rule.

33. The Ombudsman also noted that in *Access Info Europe v Council,* the Court laid down an exacting standard of proof in terms of determining the extent to which a particular subject matter is sensitive [25] . In the Ombudsman’s view, the Commission failed to explain, to this standard, why this particular subject matter is so sensitive that the preparatory works of its proposal had to be concealed from public scrutiny with an eye to protecting the decision-making procedure.

34. The Ombudsman, moreover, underlined that her services had inspected the various documents in this case. As might be expected, the opinions they contain tend to reflect the policy priorities of the entities responsible for their drafting, namely, DG Maritime Affairs and Fisheries, in the case of the earlier versions of the Commission's proposal, and DG Environment and DG Health and Consumer Protection, respectively, in the case of their contributions to the interservice consultation. It is natural for there to be differences of opinion within the Commission. The purpose of the Commission's inter-service consultation is, after all, to gather the views of the Commission's various services on a draft produced by one particular service. On the basis of the inspection of the specific documents, the

Ombudsman took the view that their substance, or style are not such that their public disclosure would tend to inhibit the expression of similar views in future inter-service consultations. On the contrary, public disclosure would show that the Commission properly carried out the process of seeking the points of view of its services, with the aim of defining the common European interest. The Ombudsman's considered opinion, therefore, was that public disclosure of these specific documents would not be liable to seriously undermine the Commission's decision-making process.

35. The Ombudsman's preliminary view was therefore that the Commission was wrong to invoke the exception in Regulation 1049/2001 pertaining to the protection of the institution's decision-making process in that it did not adequately reason its position. In light of this conclusion, the Ombudsman considered it necessary to make a proposal for a friendly solution calling on the Commission to reconsider its refusal to grant full access to the requested documents. In the event that the Commission insists that disclosure of the documents would seriously undermine its decision-making process, it should provide detailed reasons for its position. The Ombudsman added that nothing prevents the Commission from taking into account events that have occurred since it adopted its decision on the confirmatory application (the Ombudsman asked the Commission to take into account the fact that on 29 May 2013 an agreement on the reform of the Common Fisheries Policy was reached during the final trilogue meeting).

36. The Ombudsman's proposal for a friendly solution also reflected the need for the Commission to consider whether there is an overriding public interest in disclosure of the documents in this case.

Failure to inform the complainant that one of the requested documents did not exist

37. A separate aspect of the complainant's allegation relates to the failure to inform the complainant that one of the requested documents did not exist. The complainant argued that the Commission was wrong to imply, at the stage of replying to his initial application, that one of the documents he had requested, namely a contribution of DG Internal Market to the interservice consultation, did exist. It later confirmed, at the stage of the response to the confirmatory application, that no such document existed. In the complainant's view, this confirms that his initial request was not handled properly. This delayed the overall procedure considerably.

38. The Ombudsman noted, however, that good administration requires more than merely complying with one's legal obligations. He notes, in this regard, that the Commission's response to the complainant's initial application refers, in general terms, to the fact that the four documents he requested *"contain opinions of the Commission services for internal use (...) Disclosure of these documents would seriously undermine the Commission's decision-making process and its right to enjoy a free 'space-to-think' area. Disclosure (...) can also seriously undermine its position and role in the context of the inter-institutional legislative procedure on the CFP Reform that has just started."* However, the examination that an institution is obliged to carry out in response to a request for public access to documents must be specific in nature. The fact that the Commission invoked the above arguments in relation to a document that

turned out **not to exist** suggests that the Commission did not deal with the complainant's initial application with due diligence.

39. In light of this conclusion, the Ombudsman considered it necessary to make a second proposal for a friendly solution, where he asks the Commission to recognise that its failure to inform the complainant at the initial application stage that the document did not even exist was an error and to apologise for it.

Failure to handle the complainant's request for document COM(2011)425/1 according to the time limits set out in Regulation 1049/2001

40. The complainant argued that the Commission failed to handle his request for document COM(2011)425/1 according to the time limits set out in Regulation 1049/2001.

41. The Ombudsman found that delays had occurred.

The proposal for a friendly solution

42. The Ombudsman, in light of all of the above, made the following proposal for a friendly solution to the Commission.

"Taking into account the Ombudsman's findings, the Commission could consider granting full access to the requested documents. In the event that the Commission continues to take the view that disclosure of the documents would seriously undermine its decision-making process, it should provide detailed reasons for its position. Moreover, the Commission should carry out the balancing exercise necessary to determine whether there is an overriding public interest in providing public access in this case. If it concludes that there is no such overriding public interest in disclosure, it should provide detailed explanations as to why not.

Taking into account the Ombudsman's findings, the, Commission could recognise that its failure to inform the complainant, at the initial application stage, that a document containing the contribution of DG Internal Market to the interservice consultation did not even exist was an error and could apologise for that error."

The Ombudsman's assessment after the proposal for a friendly solution/draft recommendation

43. As regards the first part of the friendly solution proposed by the Ombudsman, the Commission stated that, as proposed by the Ombudsman, the Directorate General for Maritime Affairs and Fisheries (DG MARE) has carried out a detailed analysis of the documents covered by the complainant's application in light of the current circumstances. Following this review, the Directorate General concerned has granted full access to the documents requested, as the exception of Article 4(3) of Regulation 1049/2001 is not applicable anymore under these new circumstances. In light of this, it is not necessary to

carry out the balancing exercise to determine whether there is an overriding public interest in providing public access in this case.

44. Regarding the second part of the friendly solution proposed by the Ombudsman, the Commission agreed that its failure, at the initial application stage, to inform the complainant that a document containing the contribution of DG Internal Market to the interservice consultation did not even exist, was an error, for which it apologises.

45. The complainant informed the Ombudsman that he appreciated the full disclosure of the documents requested by the European Commission. The complainant underlined, however, that his own reasoning, and that of the Ombudsman, suggested that he should have had the right to access these documents even beforehand. He then stated that he would have preferred if the Commission had, in its response to the Ombudsman, made that point clear. In this respect, he added that the Commission's reasoning does not show a clear intention to change practices with regard to future (similar) requests or to admit failure in substance. The current reasoning implicitly suggests, he stated, that the Commission was right all the way through and only now was actually obliged to disclose the documents.

46. As regards the second part of the Ombudsman proposal for a friendly solution, the excuse from the European Commission does address the maladministration by the Commission when it failed to check whether a submission from DG MARKT existed. He added, however, that the response of the Commission does not address the considerable delays in the handling of the request.

47. Finally, the complainant thanked the Ombudsman's Office and all colleagues involved for their work on this important case.

48. The Ombudsman considers that, by releasing the requested documents, and by apologising for its failure to properly identify the documents it had in its possession, the Commission has complied with the Ombudsman's proposal for friendly solution.

49 . In the proposal for a friendly solution, the Ombudsman noted that nothing prevented the Commission, when it reviewed its decision refusing access to the requested documents, from taking into account events that have occurred **since** it adopted its decision on the confirmatory application. While the Ombudsman welcomes the fact that the Commission took into account developments since it adopted its confirmatory decision (namely the fact that on 29 May 2013, an agreement on the reform of the Common Fisheries Policy was reached during the final trilogue meeting), the Ombudsman underlines that the proposal for a friendly solution was based on the view that **the Commission's decision of December 2011 refusing access was wrong** . The Ombudsman thus hopes and expects that the Commission will, as regards similar future cases, take care to deal with requests for public access to documents properly.

50. In this respect, the Ombudsman again underlines the vital importance, for the legitimacy of the Commission, for the legitimacy of EU law, and for the legitimacy of the EU itself, for the Commission to carry out its important role in the legislative process as transparently as

possible. The Ombudsman thus trusts that, in the future, when the Commission responds to requests for access to documents relating to the adoption of EU legislation, and especially where it analyses whether there is an overriding public interest in disclosure of documents relating to the adoption of EU legislation, the Commission will bear in mind the very special importance that obtaining access to documents relating to the adoption of EU legislation can have for citizens in a democratic legal order, such as the EU legal order.

B. Conclusion

On the basis of his Commission into this complaint, the Ombudsman closes it with the following conclusion:

By accepting the Ombudsman's friendly solution and by disclosing the requested documents, the Commission has taken the necessary steps to settle the complaint.

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

Emily O'Reilly

Done in Strasbourg on 26 May 2014

[1] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's friendly solution proposal/draft recommendation available at: http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54458/html.bookmark.

[2] Article 17(1) TEU.

[3] See, notably, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, and Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073.

[4] See the Opinion of Advocate General Cruz Villalón of 16 May 2013 in Case C-280/11 P *Council v Access Info Europe* , at paragraph 63.

[5] Idem, at paragraph 64.

[6] The above view is reflected in Recital 6 in the preamble to Regulation No 1049/2001 which states that *"[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity"* . That principle also applies to the Commission when it is fulfilling its role in the legislative process.

[7] In this regard, the Ombudsman asked the Commission, in its opinion on this case, to take into account his assessment leading to his draft recommendation in case 2293/2008/TN,

which concerned the Commission's refusal to give public access to documents drafted by the Commission's services in the context of the Intergovernmental Conference leading up to the signing of the Lisbon Treaty by the Member States.

[8] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 46.

[9] See Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraph 57 and the case-law cited therein.

[10] Article 1(a) of Regulation 1049/2001.

[11] See Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 66 and Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63.

[12] See Case C-353/99 *P Council* v *Hautala* [2001] ECR I-9565, paragraph 28.

[13] Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69.

[14] Moreover, in view of the Commission's position that disclosure of the policy options that were not retained would be damaging to the interinstitutional negotiations, the Ombudsman wonders why the Commission did not give a more detailed answer in response to the Ombudsman's question that it explain what future circumstances (such as the conclusion of the Common Fisheries Policy reform process) would be relevant as regards the issue of public access. The Ombudsman also notes that, once the Parliament and the Council agree on the reform, the potential for the damage foreseen by the Commission is no longer there.

[15] See Article 10(3) and 11(1) to (3) TEU and Article 15 TFEU.

[16] In Case C-280/11 P *Council v Access Info Europe* , Advocate General Cruz Villalón pointed out, in relation to the Council, that *"(..) i t could even be said that what the Council sees as seriously undermining its decision-making process is the best way of ensuring that the legislative procedure in which the Council is engaged in this case is properly carried through"* ; See paragraph 65 of the Advocate General's Opinion.

[17] See Case T-233/09, *Access Info Europe v Council* [2011] ECR II-1073, paragraph 69.

[18] See the Opinion of Advocate General Cruz Villalón in Case C-280/11 P *Council v Access Info Europe* , paragraph 67: *"(..) when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation 'easier', if easy is taken to mean 'hidden from public scrutiny', as public scrutiny places serious constraints on those involved in legislating."*

[19] Idem, at paragraph 66.

[20] Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 69.

[21] Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraph 69. The General Court further comments, at paragraphs 70 to 72 of its judgment, that the harm that the Council refers to in this regard is more a sign of a largely unsubstantiated preconception that citizens and the institutions are unable properly to comprehend the deeper meaning of democratic debate and, specifically, the fact that it is normal to alter a position or strategy precisely as a result of rational discussion between accountable bodies. See also, in this regard, paragraph 72 of the Opinion of Advocate General Cruz Villalón in Case C-280/11 P *Council v Access Info Europe.*

[22] Idem, at paragraph 78.

[23] This is what the Court has referred to as a *"deterrent effect".* See Case T-121/05 *Borax Europe Ltd v Commission* [2009] ECR II-27, paragraph 70.

[24] The risk of self-censorship occurring may be acute if the opinions which the authors are required to express are particularly sensitive, for example if they are (self) critical, speculative, or controversial. See the Ombudsman's decision in case 355/2007/(TN)FOR, available at: http://www.ombudsman.europa.eu/cases/decision.faces/en/5515/html.bookmark , paragraph 49.

[25] See Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraphs 77 and 78.