European Ombudsman

Proposal of the European Ombudsman for a friendly solution in his inquiry into complaint 2232/2011/RA against the European Commission

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

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. This complaint concerns the European Commission's handling of two requests for public access to documents relating to the Commission's proposal for a new regulation on the Common Fisheries Policy.

2. On 5 July 2011, the complainant — an academic researcher — made a request, pursuant to Regulation 1049/2001 [2] , for access to documents COM(2011) 425/1 and COM(2011) 425/2, which he said were draft versions of the proposed Common Fisheries Policy reform regulation [3] . The Commission adopted its proposal one week later, on 13 July 2011 [4] . The Commission replied to the complainant on 29 July 2011, providing him with the final version of the proposal, as adopted by the Commission on 13 July 2011. On the same day, the complainant clarified that his request concerned **draft** versions of the proposal and not the final version. He was informed on 3 August that the document with reference COM(2011) 425/2 did not exist. As regards document COM(2011) 425/1, the Commission stated that internal consultation was necessary before a decision on access could be taken.

3. The complainant made a confirmatory application to the Commission on 30 August 2011. On 23 September 2011, the Commission informed the complainant that it extended the deadline for replying to him to 14 October 2011, pursuant to Article 8(2) of Regulation 1049/2001. On 12 October 2011, the Commission informed the complainant that it would not be able to meet the extended deadline as it had still not completed its internal consultations. The Commission expressed its regret for this additional delay and apologised for any inconvenience caused.

4. On 13 October 2011, the Commission replied to a related request from the complainant — submitted on 19 and 20 September 2011 — for access to further documents concerning the

Commission's proposal for a reform of the Common Fisheries Policy, refusing access to the documents concerned. The request concerned a version of COM(2011)425 that pre-dated version COM(2011)425/1, namely the version that was used for the inter-service consultations. The new request also concerned all subsequent proposals for amendments to the draft submitted by the Commission's Directorate General Internal Market and Services, Directorate General Environment and Directorate General Health and Consumers. On 14 October 2011, the complainant filed a confirmatory application regarding this refusal. This application was registered on 17 October 2011. On 24 October 2011, the Commission informed the complainant that it would handle the two applications together, as they were closely related.

5. In response to concerns the complainant raised over the delay in handling his request for access to document COM(2011) 425/1, the Commission stated that such documents are 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. This was, it stated, the case as regards the proposal for the Common Fisheries Policy. The Commission informed the complainant that it was carrying out a detailed analysis with a view to assessing to what extent disclosure of the early version would adversely affect the legislative procedure.

6. On 8 November 2011, the complainant was informed that the confirmatory application filed on 14 October 2011 could not be handled within the 15 day time limit set out in Regulation 1049/2001, and that a further 15 days were needed. The letter specified that this also concerned the complainant's application for document COM(2011)425/1. On 8 November 2011, the complainant was informed about further delays in relation to his confirmatory applications [5] .

7. On 9 November 2011, the complainant turned to the Ombudsman. On 2 December, the Ombudsman invited the Commission to provide a prompt reply to the complainant. The Commission replied on 21 December to both access to documents requests. It provided the complainant with partial access to the requested documents.

8. In its reply, the Commission noted that the documents corresponding to the complainant's requests are the following:

(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).

9. The Commission granted partial access to the preliminary versions of the proposal, mentioned under points (1) and (4) above, as well as to the two notes of the services, mentioned under points (2) and (3) above. It refused access to some parts of the documents on the basis of the exception provided for in the second subparagraph of Article 4(3) of Regulation 1049/2001, which aims at protecting the institution's decision-making process.

10. The Commission explained that, during the legislative process, it takes part in the discussions and contributes to possible compromises. Pursuant to Article 293 TFEU, the Commission can amend its proposal at any time. The undisclosed parts of documents (1) and (4) contain, it said, wording and positions that the Commission did not maintain in the final version of its proposal. However, it cannot be excluded that the Commission will revert to these positions during the course of the inter-institutional negotiations. Public release of the undisclosed parts of documents (1) and (4) would, in the present circumstances, seriously undermine the Commission's decision-making process with regard to the positions it may adopt in the course of the inter-institutional negotiations on the matter in question. Putting in the public domain the possible options the Commission may consider in the discussions with Parliament and Council would prejudice the Commission's margin of manoeuvre and severely reduce its capacity to contribute to reaching compromises, thus seriously affecting its decision-making process. Disclosure of the undisclosed parts of the two preliminary versions would hamper the Commission's ability to take decisions in the inter-institutional debate. It would 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 and which are based on policy options that were considered in the internal deliberations, but were not retained.

11. With regard to documents (2) and (3), the Commission stated that the undisclosed parts of these notes contain positions that will be considered by the Commission when deciding on possible modified proposals or on the line to take in negotiations before the Council. In this situation, and for the same reasons as set out above with regard to the withheld parts of documents (1) and (4), disclosure of the undisclosed parts of these two notes would hinder the Commission's ability to take decisions in the inter-institutional debate.

12. The Commission examined whether there was an overriding public interest in disclosure, but concluded that there is no public interest that would outweigh the interest of the protection of the Commission's decision-making process. The Commission acknowledged the enhanced transparency requirements regarding the legislative process, but considered that, at the present, early stage of the process, it is more important to protect the Commission's ability to take decisions in the inter-institutional debate without some of its possible positions being known to the public. This, it said, does not prejudge the ability of various interest groups to let their points of view be known to the Commission on the basis of the proposal that the Commission has adopted.

13. In his observations on the Commission's reply, the complainant first noted that the Commission maintained that one of the documents he requested does not exist, namely, the

reply of DG Internal Market and Services to the inter-service consultation. He stated that the Commission should have told him, in its initial reply to him, that one of the documents requested did not exist.

14. The complainant then argued that the Commission failed to explain concretely how public access to positions it has not maintained in the course of its deliberations will undermine its ability to reach compromises. The complainant contested the Commission's view that making the documents accessible to the public would complicate the Commission's negotiation position. In this respect, he noted that document (1) had been widely leaked. The complainant further argued that the public will be negatively affected by non-disclosure.

15. In light of the observations of the complainant, the Ombudsman decided to direct an inquiry towards the Commission concerning its refusal to give full access to the documents.

The subject matter of the inquiry

16. The complainant alleged that the Commission failed to deal with his requests for public access to documents appropriately.

In support of this allegation, the complainant argued that the Commission:

- failed to provide convincing and concrete explanations as to why the documents in question could not be released in full;

- did not inform him that one of the requested documents did not exist, at the time he made his initial application for access to documents, dated 19 and 20 September 2011;

- failed to handle his request for public access to document COM(2011)425/1 according to the time limits set out in Regulation 1049/2001.

17. The complainant claimed that the Commission should review its refusal to provide full access to the documents in question, taking account of the case-law of the EU courts as regards access to documents concerning legislative procedures.

The inquiry

18. The complaint was submitted to the Ombudsman on 9 November 2011. On 2 December, the Ombudsman's services contacted the relevant service of the Commission, inviting the Commission to provide a prompt reply to the complainant. The Commission provided that reply on 21 December, giving the complainant partial access to the requested documents. The complainant submitted observations on that reply on 21 December 2011 and 5 January 2012.

19. On 2 February 2012, the Ombudsman asked the Commission for an opinion on this case.

This correspondence also contained a request to inspect the relevant documents, as well as the following questions:

Could the Commission inform the Ombudsman of how it considers its position in this case can be reconciled with the Treaty provisions on transparency of the EU legislative procedure, specifically with Article 15(2) TFEU which provides that *"the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act"* ?

In its opinion on this case, could the Commission take into account the Ombudsman's assessment leading to his draft recommendation in case 2293/2008/TN? [6]

In the event the Commission still considers that access to the full version of the documents in question should be denied, could 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?

20. The Commission replied on 10 July 2012. The complainant submitted his observations on that opinion on 16 July. The Ombudsman's services inspected the documents in question on 28 August 2012.

The Ombudsman's analysis and provisional conclusions

A. Allegation of failure to deal with the complainant's requests for public access to documents appropriately

Arguments presented to the Ombudsman

Failure to provide convincing and concrete explanations as to why the documents in question could not be released in full

21. In its opinion, the Commission argued that its decision of 21 December 2011 contained concrete explanations regarding partial refusal of the requested documents. It presented detailed reasons as to why full disclosure of the four requested documents would be detrimental to the interests protected by virtue of the second subparagraph of Article 4(3) of Regulation 1049/2001, namely, the protection of the Commission's decision-making process.

22. In reply to the Ombudsman's question regarding Article 15(2) TFEU, the Commission underlined that that provision stipulates that the European Parliament shall meet in public, as shall the Council, when considering and voting on a draft legislative act. The Treaty article expressly refers to the two co-legislators — it does not touch distinctly on the Commission. It has to be kept in mind, said the Commission, that the latter's role in the legislative process

differs substantially from that of the co-legislators, in that the Commission fulfils a vital arbitrating role in conciliating interests of the Member States, trade and industry, and citizens in the process of defining Union policies and proposing legislation. The Commission must, therefore, in certain circumstances be able to protect its internal discussions and preliminary deliberations in order to safeguard its ability to fulfil these tasks effectively.

23. The Commission underlined that, in the majority of cases, it discloses the preparatory version of its legislative proposals. In the present case, it granted substantial partial access to two preparatory versions of its proposal COM(2011)425 final. It refused access to certain parts of the documents, as giving access to these parts of the documents would affect the Commission's participation in the ongoing inter-institutional negotiations on the reform of the Common Fisheries Policy, which is, it states, a particularly sensitive policy area.

24. In reply to the Ombudsman's second question, the Commission stated that it has considered the Ombudsman's assessment leading to his draft recommendation in case 2293/2008/TN. However, in the present case, the Commission provided detailed arguments concerning the fact that full disclosure of the documents would carry the risk of undermining the decision-making process. Neither the TFEU, nor Regulation 1049/2001, exclude that access to documents produced by the institutions in the legislative process is subject to the exceptions laid down in Regulation 1049/2001. After it has adopted a proposal for an act of the Parliament and of the Council, the Commission usually makes available its preparatory documents, unless there is an exception in Regulation 1049/2001 that applies. In the present case, the Commission performed the required *"harm test"* , which resulted in a partial disclosure of the documents.

25. In reply to the Ombudsman's third question, the Commission considered that the reasoning invoked in its decision of 21 December 2011 for partially refusing access to the requested documents remains valid at present. The inter-institutional negotiation process on the Commission's proposal on the reform of the Common Fisheries Policy is ongoing. The Commission considers that the (possible) completion of the legislative process is something that would need to be taken into account in any further re-examination of the requested documents in view of public access, in line with the provision in Article 4(7) of Regulation 1049/2001, which stipulates that *"[t]he exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document."*

26. In his observations, the complainant stated that the Commission had never explained what distinguishes this particular decision-making process from other legislative processes. He referred to the Commission's statement that, in the majority of cases, the Commission discloses preliminary versions of its legislative proposals and wonders why substantive reasons as to why this case should be a minority case have not been given. The only argument provided is the intensity of the debate around this matter, which, said the complainant, should rather be an argument in favour of public interest in disclosure, rather than confidentiality.

27. Moreover, the way in which partial disclosure of the documents has been granted underlines this lack of argumentation, he said. In his view, all elements that have not been

maintained during the decision-making process or that have been altered have been deleted from the drafts disclosed to the public. This indiscriminate approach to deletion underlines that the Commission has not performed a comprehensive *"harm test"* . The assumption that disclosure of any formulation not upheld during the drafting phase would harm the Commission's position in the negotiations has never been proven by the Commission.

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

28. The Commission stated that the complainant used his right to file a confirmatory application against the Commission's decision of 13 October 2011 concerning his initial applications of 19 and 20 September 2011. The confirmatory decision of the Commission, dated 21 December 2011, which is the final act on the application, identified clearly the documents that fall within the scope of the complainant's requests.

29. In his observations, the complainant pointed out that a major issue he raised with the Ombudsman was that the Commission's reply to his confirmatory application indicated that one of the documents (the contribution by DG Internal Market and Services to the interservice consultation) did not exist. Had there been a proper check of his initial application for access for documents, this should have been discovered, he said. In the complainant's view, there is, as a result, good reason to believe that his initial request was not handled properly and was refused in general terms, thereby delaying the overall procedure considerably, as the so-called *"harm test"* was only carried out during the confirmatory stage of the procedure.

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

30. The complainant argued that the Commission, without giving him appropriate notice, failed to reply to his initial request within the extended time limit laid down in Regulation 1049/2001. The complainant further argued that his confirmatory application was not handled within the time limit provided for in the Regulation. He also pointed out that a final reply to his request for access to the document in question was made dependent on a decision regarding another confirmatory application he had submitted, thereby further delaying a response. Moreover, the letter dated 23 September 2011, informing him that the time limit for dealing with his confirmatory application had been extended to 14 October, lacked any explanation as to why the case presented was exceptional [7] .

31. The Commission recognised, and sincerely apologised for, the fact that the time-limits laid down in Regulation 1049/2001 were not met when handling the complainant's request. It pointed out, however, that it took measures to inform the complainant about the reasons for the delay in holding replies sent on 23 September, 12 October, and 30 November 2011. The Commission also provided answers to the complainant's enquiries about his request on 24 October 2011.

32. In his observations, the complainant pointed out that the time limits were exceeded as regards both the initial request and the confirmatory request. The Commission never gave

reasons for the delay in replying to the initial request, while the reasons given for the delay in replying to the confirmatory request were sporadic and non-conclusive. At least once beyond the legal time limit, a reply was promised for the near future, but the deadline was not met. The reasons for the Commission's failure to respond on time were not explained, he said. A proper explanation should at least consist of a description of the stage in the internal decision-making procedure a request is at and why there is a delay beyond the time limits, in the present case far beyond the legal limits.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

Failure to provide convincing and concrete explanations as to why the documents in question could not be released in full

Preliminary remarks

33. The Ombudsman notes 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"* [8] .

34. 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.

35. 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"* .

36. The Court of Justice of the EU has underscored the importance of transparency as far as the work of the legislator is concerned [9] . 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." **[10]** 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."* **[11]**

37. 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. [12] 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. [13]

38. The Ombudsman underlines 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 [14] . The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights [15] .

39. The Ombudsman therefore underlines 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 recalls, 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.

40. The Ombudsman further underlines 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 [16] , any exceptions to this principle must be interpreted strictly [17] . 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 [18] . 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 [19] .

Article 4(3) of Regulation 1049/2001

41. 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.

42. The Ombudsman understands 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 is 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 [20] .

43. First, consistent with the principles contained in the TEU and the TFEU [21] 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 [22] . 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* " [23] . 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.

44. Second, the Ombudsman is cognisant of the fact, as recognised by Advocate General Cruz Villalón in *Council v Access Info Europe* , that transparency may prove to be *"inconvenient"* [24] . 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** *."* **[25]** (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 .

45. 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 [26] .

46. The Ombudsman points 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.

47. 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 [27] . 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 [28] .

48. 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 is 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.

49. 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 underlines 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.

50. Seventh, the Ombudsman strongly agrees 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

51. 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"* .

52. The Ombudsman notes 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 [29] .

53. 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 [30] . 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.

54. 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.

55. The Ombudsman notes 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.

56. The Ombudsman does 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.

57. 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.

58. 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.

59. 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.

60. The Ombudsman also notes 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 [31] . In the Ombudsman's view, the Commission has 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.

61. The Ombudsman has, moreover, 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 his inspection of the specific documents, the Ombudsman does not consider that their substance, or style are 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, is that public disclosure of these specific documents would not be liable to seriously undermine the Commission's decision-making process.

62 **.** The Ombudsman's preliminary view is 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 considers it necessary to make a proposal for a friendly solution in which he calls 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. 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.

63 **.** Nothing prevents the Commission, when it reviews its decision refusing access, from taking into account events that have occurred **since** it adopted its decision on the confirmatory application. With regard to the present case, the Ombudsman understands that, on 29 May 2013, the Commission together with the Parliament and Council as co-legislators, reached an agreement on the reform of the Common Fisheries Policy during the final trilogue meeting [32] . He therefore calls on the Commission to take that fact into account in reviewing its decision in the present case.

64 **.** The Ombudsman's proposal for a friendly solution also reflects the need for the Commission to consider whether there is an overriding public interest in disclosure of the documents in this case. In other words, in the event the Commission disagrees with the Ombudsman's assessment pertaining to the protection of its decision-making process, the harm envisaged must be weighed against the public interest in disclosure, in order to verify whether the public interest in disclosure does, in fact, override the protected interest. The Ombudsman recalls, in this regard, the justification put forward by the Commission in its response to the complainant's confirmatory application as to why it considered that there was no public interest that would outweigh the interest of the protection of the Commission's decision-making process (see paragraph 12 above). Specifically, the Commission referred to *"the present, early stage of the process"* , a consideration that the Ombudsman notes is no longer apt.

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

65. 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.

66. The Commission's position is that the complainant used his right to file a confirmatory application against the initial decision of 13 October 2011 concerning his initial application of 19 and 20 September 2011. The confirmatory decision of the Commission of 21 December 2011, which is the final act on the request, identified clearly the documents that fall under the scope of the requests.

67. The Ombudsman's opinion is that, from a legal perspective, the Commission is correct in its view that a decision on a confirmatory application provides an opportunity to correct any position adopted by the institution at the stage of the initial application. As such, the Commission's action

was legally correct.

68. The Ombudsman notes, 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.

69. In light of this conclusion, the Ombudsman considers 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 1049/200 1

70. 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.

71. Regulation 1049/2001 requires that initial applications, as well as confirmatory applications, shall be handled "promptly". Regulation 1049/2001 also sets out time limits for the processing of applications for access to documents: the initial application and the confirmatory application must be processed within 15 working days; this time limit may, in exceptional circumstances, be extended by 15 working days for the initial application and for the confirmatory application [33] .

72. The Ombudsman notes that the complainant's initial application for access to document COM(2011)425/1 was lodged on 5 July 2011. On 3 August (21 working days later), the Commission informed the complainant that it had to extend *"the prescribed period by the end of the August before (...) a reply"* . No information was received by the complainant by 30 August (19 working days later), when the latter decided to submit a confirmatory application.

73. With regard to the complainant's confirmatory application, the Commission informed him on 23 September (that is, on the day the initial 15 day time limit expired) that it could not deal with his application within the time-limit and that it would have to extend this period by another 15 working days in accordance with Article 8(2) of Regulation 1049/2001. In a letter to the complainant dated 12 October, the complainant was informed that the Commission was, again, not able to answer within the time limit set by Regulation 1049/2001 (14 October). The Commission provided a substantive reply to the complainant on 21 December, namely three

and a half months after he submitted his confirmatory application and five and a half months after he submitted his initial application.

74. The Ombudsman notes that the Commission should make every effort to respond to requests for access to documents in due time. Where it is aware that it will not meet the relevant deadlines, it should inform the applicant, in advance of the expiry of the deadline, and explain why it cannot meet the deadline. It should, moreover, apologise to the applicant for any inconvenience caused by a delay.

75. In the case at hand, the Commission failed to reply within the deadlines set out in Regulation 1049/2001 as far as the complainant's initial and confirmatory applications were concerned. The Commission recognised, and sincerely apologised for, the fact that the said deadlines were not met. It pointed out, however, that it took measures to inform the complainant about the reasons for the delay in holding replies sent on 23 September, 12 October, and 30 November 2011. The Commission explained the delay in dealing with the confirmatory application as follows: (i) its internal consultations were ongoing; (ii) the documents concern a particularly sensitive area of policy and present differences on substance with the final version adopted by the Commission; (iii) it was carrying out a detailed analysis with a view to assessing to what extent disclosure of the early version would adversely affect the legislative procedure. The Commission also provided answers to the complainant's enquiries about his request on 24 October 2011.

76. Faced with a failure by the Commission to meet the deadlines for responding laid down in Regulation 1049/2001, the Ombudsman considers that the appropriate means of remedying this error is to acknowledge it, explain the reasons for it, and apologise for it. As the Commission has already done so, the Ombudsman does not consider it useful to deal with this matter further in the context of his friendly solution proposal.

B. The proposal for a friendly solution

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.

P. Nikiforos Diamandouros

Done in Strasbourg on 19 September 2013

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[3] The final version of the proposal contains the reference COM(2011) 425 final.

[4] See the Proposal for a Regulation of the European Parliament and of the Council

on the Common Fisheries Policy, available at: http://ec.europa.eu/fisheries/reform/index_en.htm [Link]

[5] It appears that a further holding reply was sent to the complainant on 30 November.

[6] Case 2293/2008/TN concerned the Commission's refusal to grant a request for 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. Specifically, the subject matter of the documents concerned the UK opt-out from the Charter of Fundamental Rights. Shortly after the Ombudsman closed the case, the Commission provided access to the requested documents.

[7] The letter referred to the need to consult internally other services involved.

[8] Article 17(1) TEU.

[9] 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.

[10] 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.

[11] Idem, at paragraph 64.

[12] 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.

[13] 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.

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

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

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

[17] 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.

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

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

[20] 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.

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

[22] 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.

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

[24] 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."*

[25] Idem, at paragraph 66.

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

[27] 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.*

[28] Idem, at paragraph 78.

[29] 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.

[30] 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 [Link], paragraph 49.

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

[32] See the Commission press release available at: http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2013/05/20130530_en.htm

[33] Article 7(1) and 7(3), and Article 8(1) and 8(2) of Regulation 1049/2001.