

## **Draft recommendations of the European Ombudsman in the inquiry into complaint 1398/2013/ANA against the European Commission, made in accordance with Article 3(6) of the Statute of the European Ombudsman**

Recommendation

**Case** 1398/2013/ANA - **Opened on** 13/08/2013 - **Recommendation on** 03/12/2014 -

**Decision on** 31/03/2016 - **Institution concerned** European Commission ( Draft  
recommendation accepted by the institution ) |

### **Article I. The background to the complaint**

1. This complaint is about access to documents relating to the correspondence between the European Commission, certain EU Member States and the United States (US) authorities, on the consequences of the US Foreign Account Tax Compliance Act ('FATCA'). The complaint was brought by Ms Sophie In 't Veld, a Member of the European Parliament.

2. FATCA was signed into US federal law in March 2010 [1] . The objective of FATCA is to prevent cross-border tax evasion by natural and legal persons who are US nationals. FATCA requires financial institutions ('FFIs') outside the US to report to the US Internal Revenue Service about their clients who fall within the scope of FATCA. Because of concerns that FATCA was likely to create considerable difficulties for EU financial institutions due to high compliance costs and the risk of infringement of Member State law (notably, on data protection), in 2011, the Commission, together with five Member States [2] , opened a dialogue with the US Treasury.

3. In this context, on 30 March 2012, the complainant made an initial application under Regulation 1049/2001 [3] to receive a copy of 'all documents held by the Commission relating to the correspondence and talks between the Commission, the EU Member States and the US authorities, on the consequences of FATCA, and particularly the " *government to government* " solutions'.

4. In its reply of 22 May 2012, the Commission identified 15 documents [4] . The Commission granted full access to Documents 4 and 5 and refused access to the remaining documents on the ground that they fell within the scope of the exceptions provided in Article 4 of Regulation 1049/2001 [5] .



5. Specifically, the Commission refused access to Documents **1, 2, 3, and 6** on the grounds of (i) the exception relating to the protection of the public interest as regards international relations in accordance with Article 4(1)(a), third indent of Regulation 1049/2001, (ii) the exception relating to the protection of the public interest as regards the financial, monetary or economic policy of the EU or a Member State in accordance with Article 4(1)(a), fourth indent of Regulation 1049/2001, and (iii) the exception relating to the protection of the Commission's decision-making process in accordance with Article 4(3), first subparagraph of Regulation 1049/2001. The Commission refused access to Documents **7, 8, 9, 10** and **15** on the ground of Article 4(1)(a), third indent and to Documents **11, 12, 13** and **14** on the grounds of (i) Article 4(1)(a), third indent and (ii) Article 4(3), first subparagraph. The Commission stated that partial access could not be granted either.

6. In her confirmatory application of 7 June 2012, the complainant disputed the Commission's interpretation concerning Article 4(1)(a), third indent which the Commission applied to all the non-disclosed documents, Article 4(1)(a), fourth indent in relation to Documents **1, 2, 3, and 6**, and argued that there is an overriding public interest in the disclosure of the documents to which the Commission applied Article 4(3), first sentence of Regulation 1049/2001.

7. On 28 June 2012, the Commission acknowledged receipt of the confirmatory application and informed her that, as regards Documents **1 to 3** and **6 to 13**, it was unable to meet the deadline which it now extended by 15 working days. The Commission said that Document **14** contained e-mail correspondence between the Commission and the members of the Article 29 Working Party [6] and stated, as regards Document **15**, that the e-mails identified belong to the following groups of messages: (a) messages between the Commission and Member States without the involvement of the US and the OECD, (b) messages between the Commission and the US Authorities, where in some cases Member States and/or the OECD have also been involved, and (c) messages between Member States and the US Authorities, where the Commission was simply copied for information. The Commission stated that the e-mails identified in the initial reply under Documents **14 and 15** amounted, at that stage, to more than one thousand pages and argued that, because of the documents' technical character as well as the forthcoming summer break, their assessment and the internal consultations could not be completed before the expiry of the deadline. For these reasons, the Commission proposed to the complainant to seek a fair solution in accordance with Article 6(3) of Regulation 1049/2001, for example, by excluding those e-mails which refer to or contain information identical to the content of Documents **1 to 13**. In the alternative, the Commission asked the complainant to accept that the handling of her application would take more time than the time frames laid down in Regulation 1049/2001 and that she would be sent successive batches of documents as the analysis progresses.

8. By e-mails of 16 and 17 July 2012, the complainant declined the Commission's proposal to narrow the scope of her request concerning Documents **14 and 15**.

9. On 2 August 2012, the Commission informed the complainant that Documents **14 and 15** contain over 200 and 4 000 e-mails respectively. The Commission stated that the documents



needed to be scrutinised in order to select those related to the subject-matter of her request. Given that many of the messages originate from third parties (Member State authorities, the US and the OECD), the Commission had to consult them before deciding on disclosure. After having proceeded to a detailed analysis of the complainant's request in light of the General Court's judgment in *VKI* [7], the Commission estimated that carrying out a full and individual assessment of each relevant e-mail to determine whether an exception provided in Article 4 of Regulation 1049/2001 applies would amount to a workload of one man-year. This would, according to the Commission, entail a very considerable administrative burden that would paralyse the work of the Commission's service handling the complainant's request. Therefore, the Commission considered that the complainant's request was disproportionate.

**10.** Furthermore, the Commission observed that the General Court recognised that, in order to avoid situations in which an applicant makes a request " *relating to a manifestly unreasonable number of documents, perhaps for trivial reasons ...* ", the complainant's interest needed to be established. In this regard, the Commission invited the complainant to specify her interest in obtaining the requested documents and invited her to narrow the scope of her request, in accordance with Article 6(2) and 6(3) of Regulation 1049/2001. The Commission informed the complainant that, according to the Commission's detailed rules for the application of Regulation 1049/2001, " *the deadline for the reply to [her] confirmatory request will run only from the date on which the Commission receives complementary information ... which will enable it to process [her] request.* "

**11.** On 28 August 2012, the Commission took a decision with respect to the complainant's confirmatory application concerning Documents **1 to 3** and **6 to 13** (hereinafter, 'the Commission's decision of 28 August 2012'). In that decision, the Commission gave partial access to Documents **1, 2, 3, 6, 7(a - c) and (k), 8, 10 and 11**. The Commission refused access to Documents **7(d - j) and (l)** and to Documents **12 and 13** in their entirety. The Commission reserved its position regarding Document **9** as this originates from the US authorities which needed to be consulted on possible disclosure on the basis of Article 4(4) of Regulation 1049/2001.

**12.** After providing detailed information about the context and the content of the non-disclosed documents or parts thereof of Documents **1 to 3** and **6 to 13**, the Commission explained why, in its view, the disclosure of these documents would risk undermining the public interest as regards international relations under Article 4(1)(a), third indent of Regulation 1049/2001.

**13.** Specifically, in relation to Documents **1, 2, 3 and 6**, the Commission argued that they contain substantial and detailed information on the (then, ongoing) discussions between the Commission and the Member States, on the one side, and the US authorities on the other side regarding the implications of FATCA for EU citizens and companies as well as the interaction of FATCA with EU and Member State laws.

**14.** Regarding Documents **7(a) to 7(l)**, the Commission argued that these documents are internal meeting reports which contain exhaustive information on the discussion and the positions taken and the exchanges of views within the Commission, with Member States, the



US and the OECD and, in some cases, FFIs regarding the implications of FATCA. In addition, these documents report the objections of principle by some Member States as well as the possible solutions discussed. The Commission pointed out that the records of the meetings were prepared by the Commission for internal use without consulting other participants or verifying their content with them and might, therefore, misrepresent their positions. These documents also reveal positions of Member States, the US and the Commission and possible strategies of the Commission and the Member States involved.

**15.** Regarding Document **10** , the Commission argued that it contains official correspondence between the Commission and the US Treasury on technical matters in the area of personal data protection.

**16.** Regarding Documents **11, 12 and 13** , the Commission argued that these documents reflect the views of Member States' data protection authorities and record the discussions that took place in the framework of the meetings of the Article 29 Working Party on the interaction between FATCA and EU Directive 95/46. The requested documents reflect the Commission's views on the opinions and arguments exchanged between the Member States and include references to the state of play of the negotiations with the US on FATCA as well as the questions, observations and remarks of the participants in that regard.

**17.** In relation to all the above documents, the Commission argued that disclosure of the withheld parts of these documents would have a detrimental effect on the atmosphere of mutual trust and reduce the prospect for a positive outcome of the ongoing negotiations. In addition, it would call into question the trust that the Commission, an observer in this instance, respects the confidentiality attached to international tax negotiations. Moreover, the Commission argued that disclosure would reveal preliminary views and suggestions expressed in the early stages of the negotiations, which should take place in an atmosphere of mutual trust in the confidential treatment of the exchanges by all participants. The Commission underlined that the necessity to preserve this situation will remain until the negotiations have been closed. Furthermore, the Commission argued that the non-disclosed documents or parts thereof contain opinions of the Commission and positions of Member States, including objectives and strategies for the negotiations, as well as opinions and assessments regarding the United States, disclosure of which would disrupt the ongoing negotiations and damage both the EU's and the Member States' relationships with the third country concerned.

**18.** The Commission further stated that the non-disclosed parts of Documents **7(a-f), (i), (k-l), 8 and 10** contain personal data to which access was refused on the basis of the exception relating to the protection of privacy and the integrity of the individual in accordance with Article 4(1)(b) of Regulation 1049/2001.

**19.** On 21 September 2012, the complainant responded to the Commission's invitation of 2 August 2012 to narrow down the request regarding Documents **14 and 15** and argued that her interest in obtaining the documents is clearly stated in her confirmatory application of 7 June 2012 and that her request could not be qualified as " *unreasonable* " when she could not have been aware of the number of documents requested at the time she made it. The complainant



argued that it would not be possible to narrow down her request when she is not familiar with the contents of the requested documents.

**20.** As regards the Commission's reliance on the exception provided in Article 4(1)(a), third indent, the complainant argued that the requested documents do not concern international negotiations and that FATCA does not concern an international agreement but merely an exchange of information. In the complainant's view, the argument that disclosure of the documents could be harmful to international negotiations, and therefore to the public interest as regards international relations, does not appear to be valid.

**21.** On 22 November 2012, the Commission responded to the complainant's confirmatory application in relation to Document **9** and refused to grant access to it on the ground of the exception relating to the protection of the public interest as regards international relations between the Commission and the US under Article 4(1)(a), third indent of Regulation 1049/2001.

**22.** Following a reminder to the Commission regarding her pending request for Documents **14 and 15**, on 13 June 2013, the complainant asked the Commission to grant her access to Documents **14 and 15** before the end of June.

**23.** In its reply of 19 July 2013, the Commission informed the complainant about the developments in the context of FATCA. The Commission stated that it launched discussions with the US authorities to try to find an alternative solution to FATCA. The Commission further stated that it provided a forum for the United States to present FATCA to the EU Member States. However, it informed the complainant that the Commission is no longer involved in discussions with the US authorities, given that the US decided on bilateral solutions and entered into negotiations with individual Member States, excluding the Commission [8].

**24.** As regards the substance of the complainant's request for access to Documents **14 and 15**, the Commission provided a detailed account of the steps it had taken and argued that the requested documents contain not only at least 4 000 emails, but also a considerable number of annexes. The Commission pointed out that an initial screening and assessment of a limited sample of the requested documents showed that most, if not all, of their content cannot be disclosed as disclosure would be prohibited under Article 4 of Regulation 1049/2001, notably the exceptions concerning (i) the protection of the public interest as regards international relations, and (ii) the privacy and integrity of the individuals whose personal data appears in the requested documents. Furthermore, the Commission argued that a substantial part of the content of the requested documents relates to practical arrangements rather than to the substance of the subject-matter and would not therefore be of great assistance to the complainant.

**25.** The Commission expressed its regret that it had not been possible to find an agreement with the complainant on a solution that would reconcile her interest to seek access to these documents and the considerable amount of work involved in analysing them. However, the Commission reiterated that unless the scope of the complainant's request was substantially



narrowed and the handling of the request staggered over a longer period of time, the processing of the documents " *would infringe on the principle of good administration by imposing an administrative burden which would be disproportionate to the useful effect of the response to [the complainant's] request* ". The Commission argued that it would be in the spirit of Article 6(3) of Regulation 1049/2001 to organise a meeting between the complainant, the Commission's Secretary-General and the senior officials of the Commission's Directorate-General for Taxation and Customs Union (hereinafter, 'DG TAXUD') who were involved in the handling of the file and who could answer the complainant's questions, provide context and background and a better insight into the matter. The Commission argued that this could better serve her legitimate interest in being informed about the subject-matter underlying her request for access. According to the Commission, this could potentially give her sufficient insight to narrow down her request.

**26.** In the alternative, the Commission proposed a process to narrow down the scope of the complainant's request and stagger the process of its examination. In doing so, the Commission divided the documents concerned in the following categories: (a) all correspondence and documents within the scope of the original request which originate from the Commission and are addressed to the US authorities; and (b) all correspondence and documents within the scope of the original request from the Commission to third parties concerning specifically the subject of personal data protection. Concerning correspondence from the US authorities to the Commission, and correspondence from third parties on the subject of personal data protection, the Commission proposed to process these documents too, subject to agreement by the US authorities and the relevant third parties. The Commission gave an estimate of four months for processing categories (a) and (b) starting from the moment it receives the complainant's agreement. Should the complainant insist on her broad request, the Commission argued that it would have to spread the screening over a longer time and envisage 50 documents to be processed per month. The Commission asked the complainant to indicate if she would agree either to the meeting or to the staggered examination of her request. The Commission stated that, if the complainant could agree to either solution, the Commission would proceed to the handling of the remaining part of the complainant's request.

**27.** Dissatisfied with the Commission's proposal, on 19 July 2013, the complainant informed the Commission that she insisted on her request and, on the same day, lodged this complaint with the European Ombudsman.

## **Article II. The inquiry**

**28.** The Ombudsman opened an inquiry into the complaint and identified the following allegations and claims:

1) The Commission failed to handle the complainant's request for public access to documents in accordance with the applicable procedural rules.

In support of her first allegation, the complainant argued that, regarding Documents **14 and 15** , the Commission has not decided on her request for access and has, therefore, exceeded the



reasonable time limits for response, infringing thereby Regulation 1049/2001 and Article 17 of the European Code of Good Administrative Behaviour ('ECGAB').

2) Contrary to the substantive rules enshrined in Regulation 1049/2001, the Commission failed to grant full public access to the requested documents.

In support of her second allegation, the complainant argued that, regarding Documents **1 to 3** and **6 to 13**, to the extent that these documents or parts thereof have not been disclosed, the Commission failed to justify the application of the exception in Article 4(1)(a), third indent.

3) The Commission should examine the complainant's request for access to Documents **14 and 15** without further delay.

4) The Commission should grant public access to the requested documents.

**29.** In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint. Her services also carried out an inspection of the Commission's file concerning the present case and sent a report on the inspection of documents to the Commission and the complainant. The complainant did not make any additional observations on the Commission's opinion or the inspection report but reiterated her request for full access to the requested documents. The Ombudsman's draft recommendations take into account the arguments and opinions put forward by the parties.

### **Article III. Allegation that the Commission failed to handle the complainant's request for public access to Documents 14 and 15 in accordance with the applicable procedural rules and the related claim**

#### **(a) The inspection of documents**

**30.** The Ombudsman's services carried out an inspection of the documents falling within the scope of complainant's request for access. The results of the inspection, reported in detail to the parties, are summarised below.

**31.** Concerning Documents **14 and 15**, the Commission's file was divided into 5 folders, each of them containing the e-mail correspondence of the respective Commission officials involved in the FATCA file as follows:

1) The folder of Official 1 contained 1 372 e-mails and their attachments.

2) The folder of Official 2 contained 1 522 e-mails and their attachments.





3) The folder of Official 3 contained 2 012 e-mails and their attachments.

4) The folder of Official 4 contained 78 e-mails.

5) The folder of Official 5 contained 692 e-mails and their attachments.

**32.** The Ombudsman's representatives examined the e-mails and the attachments contained in Documents **14 and 15**. The inspection of documents was spread over three days and took a total of 7.5 working hours. More than half of the inspected e-mails contained attachments, ranging normally from 1 to 3 attachments and occasionally up to 19. There were substantial overlaps because, in many cases, the same officials were involved in the same e-mail exchanges and discussions which resulted in the same e-mail being filed in each official's folder at least once. The overlaps were greater regarding the attached documents because certain documents (e.g. a Background Paper on FATCA or DG TAXUD's 'Defensives' on FATCA) featured many times on account of the fact that they were sent to different services internally, to the US authorities and to third parties. Chronologically, the e-mails and the attachments date roughly from mid-2010 to mid-2012.

**33.** As regards the content of the inspected e-mails and their attachments, these fell within the following broad categories:

E-mails:

A) Exchanges of e-mails among DG TAXUD officials on FATCA such as, for example, e-mails in preparation for the meetings of the Taxation Policy Group ('TPG');

B) Exchanges of e-mails between DG TAXUD officials and third parties such as, for example, e-mails concerning practical arrangements for meetings with stakeholders, Member States and third parties.

Attachments:

C) Papers (e.g. a Background Paper on FATCA, a document on the implications of FATCA for the EU financial institutions, a document concerning data protection issues), draft briefings (e.g. DG TAXUD's 'Defensives' on FATCA) and Minutes of meetings (e.g. the Minutes of the TPG meetings);

D) Contributions from third parties on FATCA. For example, contributions from professional associations, Member States or other interested parties (e.g. the UK and the Swiss position on FATCA).

## **(b) The Commission's opinion**





**34.** In its opinion, the Commission outlined its exchanges with the complainant (summarised above in paragraphs 4-26) and stated that, in order to address the complainant's concerns it provided her with information about the Commission's (limited) role in the FATCA discussions. The Commission confirmed that it had launched discussions with the United States to try to find an alternative solution to FATCA, and that it also provided a forum for the United States to present FATCA to the EU Member States. However, it went on to clarify that the Commission is no longer engaged in talks with the US authorities on FATCA. Following further discussions with five Member States that did not involve the Commission, the United States moved on to bilateral solutions with Member States.

**35.** Against the backdrop of this development, the Commission noted that, by letter dated 19 July 2013, the complainant did not accept its proposal to narrow down the scope of her original request for access to documents. The Commission insisted that it explained many times why it would need more time to deal with Documents **14 and 15**. Consequently, it proposed to the complainant to (a) narrow down her request, (b) meet with the Commission's officials involved in order to discuss a fair solution or accept a reasonable approach and (c) agree on a timetable for treating Documents **14 and 15**. In parallel, by keeping the applicant informed throughout that process, the Commission argued that it has acted in the most dutiful way possible, taking into account the complexity and number of the documents subject to the complainant's request, the diversity of their authors, and the limits of the resources which the Commission has available for dealing with access requests.

**36.** The Commission considered that, by repeatedly refusing to narrow down her request or to discuss a fair solution with the Commission, the complainant has contributed to a lengthier treatment of her access request than necessary. In this respect the Commission stated that, given the number and complexity of the documents requested and the diversity of their authors, a speedier treatment of Documents **14 and 15** would have been at the expense of the treatment of the other parts of the complainant's request, access requests from other applicants and the Commission's core business. In the Commission's view, such treatment would therefore not have been in line with the principle of good administration.

**37.** As regards the complainant's claim, the Commission argued that it has continuously endeavoured to deal with the complainant's request for access to Documents **14 and 15** within the shortest possible deadlines. However, the speed at which it can finalise its assessment depends also on the complainant's willingness to confer with the Commission, pursuant to Article 6(2) and 6(3) of Regulation 1049/2001, to clarify and/or narrow down the scope of her request, or to agree on another fair solution. In this respect, the Commission stated that it has made several offers to the complainant. It remains willing to agree on a fair solution, should the complainant change her position in this respect.

## Section 3.02 The Ombudsman's assessment leading to a draft recommendation

**39.** To examine the complainant's allegation that the Commission failed to abide by the



applicable procedural rules, it should be borne in mind that Regulation 1049/2001 contains specific rules that apply when dealing with requests for access to " *a very large number of documents* ". These rules allow EU institutions to derogate, in exceptional circumstances, from the normally applicable rules and provide for (a) the possibility, in accordance with Article 6(3) of Regulation 1049/2001, to " *confer with the applicant informally, with a view to finding a fair solution* " and (b) the possibility, in accordance with Article 8(2) of Regulation 1049/2001, of extending the generally applicable time limit of 15 working days to reply to a confirmatory application by another 15 working days.

**40.** In this case, the Commission argued that the time limit for replying to the complainant's confirmatory application was suspended during the time it was trying to arrive at a fair solution with the complainant concerning the narrowing of the scope of her request in relation to Documents **14 and 15** . The Commission, in effect, suspended the time limit for replying to the complainant's confirmatory application and made that reply conditional on finding a fair solution. The Commission thereby linked these two procedural possibilities.

**41.** The Ombudsman points out, however, that the Commission is obliged to comply with the strict time limit of Article 8(2) of Regulation 1049/2001 while negotiating with the complainant with a view to finding a fair solution in accordance with Article 6(3) [9] .

**42.** On this specific issue, the General Court held [10] , and the Court of Justice of the European Union ('CJEU') confirmed in the course of the Ombudsman's inquiry into this complaint [11] , that Regulation 1049/2001 does not allow for derogation from the time limits. The CJEU held that these time limits are determinative as regards the conduct of the procedure for access to documents held by the institutions and that the time limits are intended to achieve the swift and straightforward processing of applications for access to documents [12] . Therefore, the possibility of a fair solution provided for in Article 6(3) " *can concern only the content or the number of documents applied for* " [13] .

**43.** The CJEU went on to say that "[t] hat finding cannot be undermined by the Commission's argument relating to the possibility for the institutions to reconcile the interests of an applicant for access to documents in their possession with the interest of good administration. It is true, ..., that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration. Thus, an institution may, in exceptional circumstances, refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate as compared to the objectives set by the application for access to those documents. **However, reliance on the principle of proportionality cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed without creating a situation of legal uncertainty** " [14] .(Emphasis added)

**44.** It is clear that the Court's emphasis on the need for legal certainty is intended, in this context, to protect the position of applicants. In particular, this approach ensures that the



remedies available to applicants, namely, to institute court proceedings or to make a complaint to the Ombudsman, will not be compromised by any suspension of the time limit laid down in Article 8(2) of Regulation 1049/2001. Neither may these remedies be suspended or made conditional on the Commission's efforts at finding a fair solution. However, this was the consequence of what the Commission –wrongly - did in the present case.

**45.** Regarding the Commission's proposals for a fair solution in this case, it should be noted that for an attempted fair solution to be credible, it must, in line with the principle of proportionality, be appropriate and necessary to attain the objectives pursued [15] , that is, the objective of achieving a fair solution while protecting the principle of the widest possible access to documents. Proposals for a fair solution should thus be appropriate and reasonable in the sense that they should give a good understanding to the applicant of the documents covered by the request and thus make it possible for him or her to accept the proposal.

**46.** It is clear that the Commission made the following proposals to the complainant regarding Documents **14 and 15** :

(I) To exclude e-mails which refer to or contain information identical to the content of Documents **1 to 3** and **6 to 13** (the Commission's letter of 28 June 2012);

(II) To accept that the handling of the complainant's application will take more time and that successive batches of documents would be sent (the Commission's letter of 28 June 2012);

(III) To organise a meeting of the Commission's Secretary General and DG TAXUD with the complainant in order to provide her with information on the context and background and a better insight into the matter (the Commission's letter of 19 July 2013);

(IV) To stagger the examination of the complainant's request. Specifically, the Commission gave an estimate of four months for processing the (a) correspondence from the Commission addressed to the US authorities and (b) correspondence from the Commission to third parties specifically on the subject of personal data protection starting from the moment it receives the complainant's agreement. Should the complainant insist on her broad request, the Commission would envisage spreading the screening over a longer time and process 50 documents per month (the Commission's letter of 19 July 2013).

**47.** The Ombudsman acknowledges the complainant's statements, notably in her letter of 19 September 2012, that she is not sufficiently familiar with the content of the requested documents. Having considered the Commission's attempt for a fair solution and the proposals cited in the previous paragraph, the Ombudsman takes the view that the information provided in these proposals does not succeed in giving the complainant a sufficient understanding of the content of the requested documents and thus a genuine opportunity to narrow the scope of her request.

**48.** Specifically, Point I would require a very detailed and careful examination of all documents, including Documents **14 and 15**, in order to establish which " *documents contain identical*



*information* " to Documents **1 to 3** and **6 to 13** of the complainant's request and to ascertain the overlaps. This, in fact, might make the overall process even more cumbersome. Points II and IV, on the other hand, do not give additional, meaningful information about the content of the requested documents as they are focused on the staggering of the examination of the complainant's request.

**49.** Regarding Point III, a meeting with the Commission's Secretary-General and DG TAXUD might indeed have been useful to help the complainant narrow the scope of her request. However, in making this offer, the Commission ought to have made it clear that the offer was one which it would make to any applicant in a similar case and that the offer did not reflect the applicant's status as a Member of the European Parliament. The Commission did not however make it clear that a meeting with the Commission's Secretary-General and DG TAXUD officials was being offered because of the nature of the particular application rather than because of the identity of the particular applicant. In these circumstances, it is understandable that the complainant should have declined this offer.

**50.** On the basis of the above, the Ombudsman considers that the Commission failed to use all possible/reasonable means to negotiate with the complainant in finding a fair solution and that its proposals were not suitable to achieve the objective pursued. The Ombudsman considers that, as a minimum, the Commission's proposals should have contained a much more detailed description of the (categories of) documents covered by the complainant's request, preferably, a table of contents, and, ideally, links to the Commission's register of documents [16] . Thereby the complainant would be given sufficient information to identify the documents that correspond to her needs and thus take a stance on these proposals.

**51.** As regards the proposal for a staggered examination of the requested documents, the Ombudsman acknowledges that the Commission is justifiably concerned about the impact that a speedier processing of Documents **14 and 15** might have had on the treatment of the other parts of the complainant's request as well as on access requests from other applicants. It should be noted, however, that, when the Commission makes a proposal for a fair solution, it cannot simply refrain from proceeding with a request for access simply because the applicant does not agree to that proposal.

**52.** In light of the above findings in paragraphs 44, 50 and 51, the Ombudsman concludes that, (a) by failing to make a suitable/reasonable proposal for a fair solution within the relevant time limit and (b) by making the examination of the complainant's confirmatory application conditional on finding a fair solution without taking any further action, the Commission committed maladministration.

**53.** The Ombudsman considers, however, that this maladministration may still be remedied. Indeed, while the search for a fair solution does not affect the strict time limits provided in Regulation 1049/2001, the expiry of the time limit does not exonerate an EU institution from continuing to seek a fair solution with an applicant in cases concerning a very large number of documents. In this regard, the Ombudsman is adamant that principles of good administration dictate that, in order to enhance the protection of the fundamental citizens' right of access to



documents, an EU institution should, notwithstanding the expiry of the statutory time limit, explore reasonable ways to find a fair solution with the applicant and eventually proceed to an individual examination of the requested documents.

**54.** In order to remedy the maladministration thus found, the Ombudsman considers that the Commission should make a fresh attempt at a fair solution in relation to the complainant's request for access to Documents **14 and 15** . In doing so, the Commission should provide sufficient detail to the complainant, along the lines identified above, that would enable her to narrow down her request, if she so wishes. In this context, it may be useful to point out that the inspection has confirmed the Commission's statement in its letter of 19 July 2013, according to which a substantial part of the requested documents relates to practical arrangements, namely, e-mail exchanges among EU officials to arrange the time and place of meetings. These e-mail exchanges, which do not relate to the substance of the issues discussed, could be identified in a separate category in the Commission's proposal for a fair solution. Such a proposal should be made within a maximum of 15 working days after the date of the present draft recommendation. However, if the Commission's proposal for a fair solution were not to be accepted by the complainant, the Commission should proceed to the assessment of the documents concerned without any further delay. In such a case, it would clearly be advisable to give priority to documents other than the above-mentioned documents relating to practical arrangements.

**55.** In light of these considerations, the Ombudsman makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

## **Article IV. Allegation that, contrary to the substantive rules enshrined in Regulation 1049/2001, the Commission failed to grant full public access to Documents 1, 2, 3 and 6 to 13 and the related claim**

### **(a) The inspection of documents**

**56.** The Ombudsman's representatives requested and received copies of the full versions of Documents **1, 2, 3 and 6 to 13** .

### **(b) The Commission's opinion**

**57.** The Commission argued that, as regards Documents **1, 2, 3 and 6 to 13** , it has taken a reasoned decision to refuse access, following a detailed and substantive assessment based on a narrow interpretation of the exceptions defined in Article 4 of Regulation 1049/2001. In so doing, it argues that it has acted fully in compliance with the requirements of Regulation 1049/2001 and the CJEU's case law.



**58.** More specifically, the Commission referred to its extensive reasoning, in its confirmatory decisions of 28 August and 22 November 2012 (summarised in paragraphs 12-19 and 22 above), explaining why access could not be granted to Documents **1, 2, 3 and 6 to 13** pursuant to the exception concerning the protection of the public interest as regards international relations enshrined in Article 4(1)(a) third indent of Regulation 1049/2001. The Commission considers that in so doing, it acted fully in compliance with the requirements of Regulation 1049/2001 and the case law. Therefore, the Commission argued that the complainant's allegation that the Commission failed to justify the application of the exception in question cannot be upheld.

## Section 4.02 The Ombudsman's assessment leading to a draft recommendation

**59.** Some of the deletions made by the Commission on Documents **1, 2, 3, 6, 7(a - c) and (k), 10 and 11** and all the deletions on Document **8**, concern personal data. The Commission justified these deletions under the protection of privacy and the integrity of the individual, in accordance with Article 4(1)(b) of Regulation 1049/2001. Given that the complainant did not complain about these deletions, the Ombudsman's ensuing analysis does not concern this issue.

**60.** All of the remaining deletions to the partially disclosed documents, as well as the refusal to give access to entire documents, were based on the exception relating to the protection of the public interest as regards international relations under Article 4(1)(a), third indent of Regulation 1049/2001. This is a mandatory exception which is not qualified by an "*overriding public interest*" test. Accordingly, the complainant's argument that there is an overriding public interest in the disclosure of the documents is not a relevant consideration as Article 4(1)(a), third indent of the Regulation does not provide for such a public interest balancing test.

**61.** The Ombudsman's analysis therefore concentrates on the Commission's decision to refuse access to Documents **7 (d) to 7 (j), 7(l), 9, 12 and 13** and its decision to give only partial access to Documents **1 to 3, 6, 7(a), 7(b), 7 (c), 7(k), 10 and 11** under the exception relating to the protection of the public interest as regards international relations.

**62.** Transparency is an essential aspect of good democratic governance. Transparency makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. As such, openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability. Transparency also facilitates citizen participation in public activities by ensuring access to information and the means to take part in the process of governance to which they are subject.

**63.** The right of access to documents held by the Union institutions is not only an important aspect of transparency but, more importantly, a fundamental citizens' right [17] that is embodied in the Union legal order by Regulation 1049/2001 [18]. The right of public access to





documents, however, is not absolute; it is subject to certain limitations, which are based on grounds of public or private interest [19] . These limitations are laid down in Article 4 of Regulation 1049/2001 [20] . In view of the objectives pursued by Regulation 1049/2001, in particular the aim of ensuring the widest possible access to documents held by the institutions, these exceptions have to be interpreted strictly [21] .

**64.** When applying these exceptions, the CJEU has ruled that the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation 1049/2001 is not sufficient to justify the application of that provision. Indeed, if the institution concerned decides to refuse access to a document, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical [22] .

**65.** In this case, the Commission invoked Article 4(1)(a), third indent of Regulation No 1049/2001 which provides that the "*institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations*".

**66.** Both the complainant and the Commission have referred to the relevant case-law [23] . The Court has accepted that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) , combined with the fact that access must be refused by the institution if disclosure of a document to the public would undermine the protection of one of those interests, requires that great care must be taken in deciding on such cases. The Court has held that such a decision therefore requires some discretion. Consequently, the Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers [24] . The Ombudsman exercises an equivalent standard of review in order to verify whether the procedural rules have been complied with and whether, in this case, the Commission gave plausible and sufficiently concrete explanations for its decision [25] .

**67.** In light of the above considerations and having carefully examined the relevant documents, the Ombudsman draws the following conclusions.

**68.** First, regarding the documents identified as Documents **7 (d) to 7 (j)**, **7(l)**, and Document **9** to which no access was given, the Ombudsman finds that the documents concerned contain sensitive information pertaining to the international relations of the EU and its Member States and that the Commission did not, at the time it took the decisions on the complainant's confirmatory applications, commit a manifest error of assessment when refusing access to them or to parts thereof. She therefore considers that the Commission's refusal not to grant access to these documents is justified in substance. Having carefully examined the documents in question, the Ombudsman accepts the Commission's explanations that in order to protect the





mutual trust between the parties and the need to safeguard the objectives of the negotiations, which would be specifically and actually undermined within the meaning of the case-law cited above while the negotiations were still ongoing, militate against giving partial access either to these documents.

**69.** Second, regarding the documents to which partial access was given and which are identified as Document **2** , Document **6** (from mid-page 10 to page 13), Documents **7 (a)**, **7(b)**, **7(c)** **7(l)** , and Document **10** , the Ombudsman finds that the Commission's position is justified for the same reasons identified in the preceding paragraph. The extent of the deletions appears justified too.

**70.** Third, regarding the documents to which partial access was given and which are identified as Document **1** , Document **3** and Document **6** (only as regards pages 9 to mid-page 10) the Ombudsman considers, on the basis of her inspection of documents, that the deletions made by the Commission contain information already disclosed to a large extent (for instance, in Document **4** or the disclosed parts of Document **2** ). The Ombudsman therefore finds that the Commission failed to give sufficient explanations for the extent of these deletions.

**71.** Fourth, regarding the documents identified as Document **11** (partial access), and Documents **12 and 13** (no access), which concern the exchanges and the work of the Article 29 Working Party and which detail the views and arguments about the impact of FATCA on the data protection rules of the Member States, the Ombudsman considers, on the basis of her inspection of documents, that, while they fall within the scope of the exception relating to the protection of the public interest concerning international relations, the Commission did not give convincing explanations as to how this interest would be sufficiently and actually undermined by their disclosure. This is especially the case given that, in its decision of 28 August 2012, the Commission provided a link to a letter which contained the Article 29 Working Party's detailed position on the matter [26] . Moreover, in relation to Documents **12** and **13** to which access was denied in their entirety, the Commission did not separately discuss why at least partial access to them was not possible. In view of this, the Ombudsman considers that the Commission failed to give convincing explanations as to how disclosure of these documents or parts thereof might seriously harm the interests protected by the exception in question.

**72.** In light of the above considerations, the Ombudsman finds that the Commission did not give as broad access to Document **1** , Document **3** and Document **6** (only as regards pages 9 to mid-page 10) as it should have done. Moreover, the Commission failed to give satisfactory reasons for refusing access to Document **11** (partial access), and Documents **12** and **13** (no access). This constitutes maladministration. To remedy the maladministration, the Ombudsman considers that the Commission should re-examine **the complainant's request for access to the non-disclosed documents or parts of Document 1 , Document 3 , Document 6 (only as regards pages 9 to mid-page 10), Document 11 , and Documents 12 and 13 and consider providing broader public access to them .**

**73.** In light of her conclusions in the preceding paragraphs, the Ombudsman makes a further draft recommendation below, in accordance with Article 3(6) of the Statute of the European



Ombudsman.

## Article V. The draft recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendations to the Commission:

**1) The Commission should make a fresh attempt at a fair solution in relation to the complainant's request for access to Documents 14 and 15. In doing so, the Commission should provide sufficient detail to the complainant, along the lines identified in paragraph 54, that would enable the complainant to narrow the scope of her request if she so wishes. Such a proposal should be made within a maximum of 15 working days . In the event that this proposal were not to be accepted by the complainant, the Commission should proceed to the assessment of the documents concerned without any further delay.**

**2) The Commission should re-examine the complainant's request for access to the non-disclosed documents or parts thereof as regards Document 1, Document 3, Document 6 (only as regards pages 9 to mid-page 10), Document 11, and Documents 12 and 13.**

The Commission and the complainant will be informed of these draft recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 March 2015. The detailed opinion could consist of the acceptance of the draft recommendations and a description of how they have been implemented.

Emily O'Reilly

Done in Strasbourg on 3 December 2014

[1] For more information on FATCA, see [http://en.wikipedia.org/wiki/Foreign\\_Account\\_Tax\\_Compliance\\_Act](http://en.wikipedia.org/wiki/Foreign_Account_Tax_Compliance_Act)

[2] The EU Member States involved in these discussions were: the United Kingdom, France, Germany, Italy and Spain.

[3] 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.

[4] Document 1 (Section 5 of the summary record of the meeting of the Taxation Policy Group (TPG) on FATCA on 19 January 2011), Document 2 (Working document for the TGP meeting -



" *FATCA state of play* "), Document **3** (Section on FATCA in the summary record of the meeting of the TGP on 6 February 2012), Document **4** (Letter from the Council of the EU and the European Commission to the US authorities dated 24 March 2011), Document **5** (Working document for the meeting of Working Party IV (Direct Taxation), Document **6** (Agenda Item 2 of the summary record of the meeting of the Working Party IV entitled " *FATCA: latest state of play including data protection issues* "), Document **7** (Minutes of meetings involving the Commission, the Member States, the US Treasury and the OECD from 3 March 2011 to 27 April 2012 - 12 documents), Document **8** (letter from the Commission to the US authorities of 15 July 2011), Document **9** (e-mail from the US authorities to the Commission of 24 September 2011 plus an attachment), Document **10** (letter from the Commission to the US authorities of 23 November 2011), Documents **11** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 7 December 2011), Document **12** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 18 January 2012), Document **13** (unofficial TAXUD report of FATCA discussions at the meeting of the Article 29 Working Party on 7 March 2012), Document **14** (e-mail correspondence between the Commission and the members of the Article 29 Working Party from December 2011 to April 2012 relating to the opinion of the Article 29 Working Party on the interaction of provisions of FATCA with Directive 95/46), Document **15** (e-mail correspondence between the Commission, the Member States, the US Treasury and the OECD from April 2011 to April 2012 relating to the implementation of FATCA).

[5] The main relevant provisions of Article 4 of Regulation 1049/2001 are:

" 1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

*(a) the public interest as regards:*

....

— *international relations,*

— *the financial, monetary or economic policy of the [Union] or a Member State;*

*(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

...

*3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. "*

[6] Article 29 of the Data Protection Directive (Directive 95/46 of the European Parliament and



of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ 1995, L 284, p. 1) established the Article 29 Working Party, which is composed of representatives of the Data Protection Authorities designated by the Member States and advises the Commission and contributes to the uniform application of the national rules adopted pursuant to the Data Protection Directive.

[7] Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

[8] Already by 26 July 2012, the US and the five EU Member States agreed on a Model Agreement that could be used by any EU Member State or third country that is interested in signing up to the proposed approach for the implementation of FATCA.

[9] In a recent decision the Ombudsman found that failure to comply with the statutory time limits for dealing with an access to documents request did not, in the circumstances of that case, amount to maladministration. In that case, the Commission had provided a full and detailed list of all the documents falling within the scope of the complainant's request, divided the request into four batches, given a detailed timetable for the handling of the request and, eventually, following the complainant's refusal to agree to the proposed fair solution, carried out an individual assessment of all the documents within the strictures of the timetable that the Commission had set itself. See, Decision of the European Ombudsman closing the inquiry into complaint 1869/2013/AN against the European Commission, paragraphs 16-30, available at <http://www.ombudsman.europa.eu/cases/decision.faces/en/58251/html.bookmark> [Link]

[10] Case T-392/07 *Guido Strack v European Commission* , ECLI:EU:T:2013:8, paragraphs 50-51.

[11] Case C-127/13 P *Guido Strack v European Commission* , judgment of 2 October 2014, ECLI:EU:C:2014:2250.

[12] Case C-127/13 P *Guido Strack v European Commission* , paragraph 25 and Case C-362/08 P *Internationaler Hilfsfonds v Commission* , EU:C:2010:40, paragraph 53.

[13] Case C-127/13 P *Guido Strack v European Commission* , paragraph 26.

[14] Case C-127/13 P *Guido Strack v European Commission* , paragraphs 27-8.

[15] VKI , paragraph 99.

[16]

<http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=search&language=en&CFID=5964662&CFTOKEN=> [Link]. The Ombudsman is well aware that compliance with the duty to register documents in accordance with Article 11 of Regulation 1049/2001 cannot be enforced by means of an application for access to documents (Case C-127/13 P *Strack* , cited above, paragraph 44) but this case serves as an example where, had the Commission inserted these documents in the public register, it would have been very helpful.



[17] Article 42 of the Charter of Fundamental Rights of the European Union.

[18] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 69; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 51.

[19] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62; *Technische Glaswerke* , paragraph 53.

[20] Case C-64/05 *Sweden v Commission* [2007] ECR I-11389, paragraph 57.

[21] *Sweden v API and Commission* , paragraph 73; *Sison v Council* , paragraph 63.

[22] Case C-350/12 P *Council v In't Veld* , judgment of 3 July 2014, ECLI:EU:C:2014:2039, paragraphs 51-52; C-404/10 P *Commission v Éditions Odile Jacob* , EU:C:2012:393, paragraph 116; Case C-280/11 P *Council v Access Info Europe* , EU:C:2013:671, paragraph 31.

[23] Case T-301/10 *Sophie in 't Veld v European Commission* , ECLI:EU:T:2013:135, paragraphs 108-109.

[24] *Sison v Council* , cited above, paragraph 34.

[25] See, for instance, Decision of the European Ombudsman closing the inquiry into complaint 1633/2008/DK against the European Commission, available at:  
<http://www.ombudsman.europa.eu/cases/decision.faces/en/10577/html.bookmark>

[26]

[http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621\\_letter\\_to\\_t](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_t)