

## **Decision of the European Ombudsman closing the inquiry into complaint 119/2015/PHP on the European Commission's handling of a request for public access to documents related to TTIP**

Decision

**Case 119/2015/PHP - Opened on 18/02/2015 - Decision on 04/11/2015 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned a request for access to documents concerning the Trans-Atlantic Trade Investment Partnership (TTIP) negotiations. The Commission denied access to some of the requested documents on grounds of the protection of international relations and the decision-making process. The complainants turned to the Ombudsman and argued that the Commission had not sufficiently justified the refusal to grant access and had failed to make a document-by-document assessment. Moreover, the complainants referred to the existence of an overriding public interest when environmental information is concerned.

The Ombudsman inquired into the issue and found no maladministration by the Commission. In her closing decision, the Ombudsman observed that some of the concerns raised by the complainants had already been addressed in the context of the Ombudsman's own-initiative inquiry on the transparency of the TTIP negotiations. She has therefore decided to close the case.

### **The background to the complaint**

1. On 17 February 2014, ClientEarth, the European Environmental Bureau, Friends of the Earth Europe, Corporate Europe Observatory and the European Federation of Journalists (hereinafter the "complainants") made a request, under Regulation 1049/2001, [1] for access to the following documents related to the Trans-Atlantic Trade Investment Partnership (TTIP):

- a) The text of the EU's negotiation mandate;
- b) The text of the EU's positions on: regulatory cooperation, Investment Protection and Investor-to-state Dispute Settlement (ISDS), the chemical sector, food safety, sustainable development and energy, as disclosed to the Government of the United States of America (US);



c) Any other reports or papers provided to the US by the EU on the topics identified in b) above;

d) Any reports or papers provided to EU Member States and the European Parliament on the topics identified in b) above.

2. On 6 May 2014, the Commission refused to grant access to most of the requested documents on grounds of the protection of international relations and the decision-making process. [2] The Commission stated that document (a) was a Council document, and therefore it could not take a position on its disclosure. The Commission also provided the internet links to certain documents that were public at the time.

3. On 27 May 2014, the complainants sought a review (known as a "confirmatory application"), pointing out that the Commission had failed to: (i) identify the documents falling under the scope of their request; (ii) state the specific reasons for denying disclosure of each document; and (iii) say whether partial access could be granted.

4. As regards document (a), the complainants argued that the Commission should have consulted the Council as a third party. [3] Concerning the documents under (b), the complainants reminded the Commission that, when environmental information is concerned, the grounds for refusal should be interpreted in a restrictive way. Moreover, the Commission had not specified why disclosure, in particular as regards documents already shared with the US, would damage international relations.

5. On 9 July 2014, the Commission confirmed its initial decision. The Commission identified 17 documents falling under the scope of the request [4] and pointed out that 4 of the documents were already public. The Commission confirmed its decision to refuse access to the remainder of the documents, invoking the same exceptions as in its initial decision and arguing that the EU Courts had interpreted those exceptions in a restrictive way. The Commission informed the complainants that as regards document (a) it had consulted the Council, which had specified that the document should not be released. Finally, the Commission refused to grant partial access.

6. In light of the Commission's reply, the complainants turned to the Ombudsman.

## **The inquiry**

7. The Ombudsman opened an inquiry into the complaint and identified the following allegations and related claims:

### **Allegations**

1) The Commission wrongly refused access to the documents requested, by relying on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(3), first subparagraph (protection of decision-making process) of Regulation 1049/2001, and failed



to make a document-by-document assessment and properly consider the possibility of granting partial access to the requested documents.

2) The Commission failed to properly consider its obligations under Regulation 1367/2006 on the application of the provisions of the Aarhus Convention.

3) The Commission, in the context of the TTIP negotiations, failed to implement transparency in such a way as to allow citizens to make meaningful access to documents requests.

4) The Commission failed to handle the access to documents request in a timely manner.

### **Claims**

1) The Commission ought to reconsider its rejection of the complainants' access to documents request on a case-by-case basis and in light of its recent commitment to increase transparency.

2) Any exception invoked for refusing the disclosure in whole or in part of the requested documents should be restrictively interpreted and take into account the public interest, giving due consideration to the Aarhus regime where relevant.

3) The Commission should publish a comprehensive list of documents, including those the content of which is redacted, with reasons stated for why such documents could not be made public.

8. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman also inspected the Commission's file on this case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Preliminary remarks**

9. Since the complainants' initial and confirmatory requests were submitted, there have been some important developments as regards the Commission's approach on public access to documents and transparency concerning TTIP. In particular, the Ombudsman's own-initiative inquiry OI/10/2014/RA on the transparency of the TTIP negotiations dealt with this matter in detail. [5] In addition, in the Communication to the Commission of 25 November 2014, [6] the Commission announced its decision to give broader access to documents in the context of the TTIP negotiations, a decision welcomed by the Ombudsman.

10. In her decision of 6 January 2015 closing her own-initiative inquiry OI/10/2014/RA, the Ombudsman made ten suggestions to the Commission with a view to ensuring that the TTIP negotiating process enjoys greater legitimacy and public trust. In its response, the Commission said that it is working on a more proactive approach to publishing TTIP documents and outlined



the full range of actions it had taken. In this context, the Ombudsman subsequently provided a detailed analysis of the Commission's reply and welcomed the fact that the Commission had moved to build further on the transparency measures already put in place. Moreover, the Ombudsman identified a number of areas for reflection that might be useful for the Commission as the negotiations proceed, pointing out that despite the significant progress that had been made during the inquiry, there was still room for improvement as regard enhancing the transparency of the TTIP negotiations. [7]

11. In her letter to the Commission opening her own-initiative inquiry, the Ombudsman referred to significant delays on the part of the Commission in replying to the numerous and broad-ranging requests for public access relating to TTIP documents. The Commission replied that it regretted these delays and assured the Ombudsman that every effort was being made to ensure that requests for access to documents were handled as rapidly and efficiently as possible. The Ombudsman was pleased to find that the Commission had begun to act on her suggestions. For example, the Commission had begun to proactively assess relevant negotiation documents to see if they could be published. This is in line with the aim of the Ombudsman's initial suggestion intended to enable the Commission to react rapidly to access to documents requests and, indeed, to pre-empt them by proactively publishing negotiating documents. The Ombudsman also welcomed the Commission's decision to publish the list of TTIP documents that it shared with the Council and Parliament in 2013 and 2014, which she believes should facilitate the Commission's handling of access to documents requests.

12. In light of the foregoing, the Ombudsman takes the view that the thrusts of the third and fourth allegations have been comprehensively addressed in the course of the own-initiative inquiry OI/10/2014/RA. It is not necessary, therefore, to deal further with these allegations in this decision.

13. In what follows, the Ombudsman will limit her assessment to the first and second allegations set out in Paragraph 7 above.

## **1) Allegation that the Commission wrongly refused access**

### **Arguments presented to the Ombudsman**

14. The Commission argued that its confirmatory decision contained extensive reasoning as regards the application of the two exceptions it had relied upon. In addition, the Commission mentioned that the Court of Justice had ruled that, although the principle of transparency cannot be excluded in international negotiations, the institutions have a wide discretion to determine whether the disclosure of documents could undermine the public interest in this area. [8]

15. The Commission further stated that, following its normal practice, it had carried out a document-by-document assessment which was reflected in its confirmatory decision. Moreover,



the Commission said that, according to the case law, a single justification may apply to documents belonging to the same category. [9] In this regard, the Commission argued that its detailed assessment showed that, having regard to the specific content of the documents, eight of the requested documents shared the same characteristics, justifying their treatment as belonging to the same category.

**16.** Furthermore, contrary to what the complainants had asserted, the Commission stated that for as long as the negotiations are ongoing, there are no "*settled negotiations positions*". However, the Commission reaffirmed its commitment to pro-actively assess TTIP negotiating documents with a view to publishing those that no longer pose a risk to the negotiating process.

**17.** In their reply, the complainants argued that the judgment mentioned by the Commission also established that the institution concerned must explain how disclosure of a document could specifically and actually undermine the interest protected by the exception, and that that risk must be reasonably foreseeable and not purely hypothetical. Not respecting the duty to state reasons would, in the complainants' view, undermine the access to documents regime and therefore seriously jeopardise the public's participation in the decision-making process. Moreover, the complainant considered that the Commission had failed to explain how the documents already disclosed to the US authorities would weaken the tactical position of the EU.

## The Ombudsman's assessment

**18.** The Ombudsman notes that the document under (a) was made public on 9 October 2014. [10] There is therefore no further need to deal with this document in this decision.

**19.** In relation to the remainder of the Commission's explanations, the Ombudsman observes that some of the conclusions in her decision in her own-initiative inquiry OI/10/2014/RA are very relevant to the analysis of this allegation. [11] In particular, in that decision the Ombudsman stated that the exception on international relations does not apply simply because the subject matter of a document "concerns" international relations. On the contrary, it is necessary to show that, based on the content of a document, its disclosure would undermine the public interest as regards international relations.

**20.** In this respect, the Ombudsman notes that the Commission appears not to have simply relied on the fact that the documents concerned international relations. The Commission stated that the requested documents were all negotiating documents, and that their disclosure would undermine the Commission's position in the current negotiations and its relations with the US. The Commission also argued that in order to achieve a successful result, it is essential that the Commission keeps a certain margin of manoeuvre in the negotiating process. Moreover, the Commission stated that some of the documents contained direct and indirect references to the position of the US.

**21.** The Ombudsman agrees with the Commission that, as the EU Courts have recognised, releasing the documents requested could - at that point in time - have negatively affected the



*mutual trust* between the parties. Indeed, granting access to documents that reflect a non-settled position, and at a sensitive point of the negotiation, could indeed harm the EU's position and its relations with the US, even if the documents had in the meantime been shared with the US authorities. Sharing documents with a negotiating partner does not imply that a stable position has been reached.

22. Indeed, in its confirmatory decision, the Commission said that the documents requested had been drawn up for internal use, with a view to preparing the negotiations. During her inspection of the Commission's file, the Ombudsman verified that this was in fact the case. In light of this, the Commission considered that granting public access to the documents in question would seriously hamper a free exchange of views, first, within the Commission's services and, second, vis-à-vis the US authorities. In this respect, the Commission's argument that releasing the documents could also seriously undermine the protection of the decision-making process appears reasonable. The question of whether the Commission assessed if there was an overriding public interest in disclosure is dealt with in the context of the second allegation.

23. The Ombudsman is thus of the opinion that the Commission's position was duly justified. In its confirmatory decision it did not rely merely on the applicable exceptions but referred to the risks being reasonably foreseeable and not purely hypothetical. [12] Furthermore, the Ombudsman notes that in its reply to the Ombudsman own-initiative inquiry OI/10/2014/RA, the Commission stated that its practice now is to publish the full text of documents relating to trade agreements the moment they are "stabilised", that is when there is no longer a foreseeable risk to the negotiating process. [13]

24. Finally, the Ombudsman considers that, contrary to what the complainants argue, the Commission appears to have undertaken a document-by-document assessment. In fact, in the confirmatory decision, the Commission referred in particular to certain documents in order to exemplify and justify the application of the exceptions. For example, the Commission mentioned three documents, their content, and the reasons for not sharing them with the US authorities. [14] Moreover, in its opinion the Commission pointed to specific documents (namely, documents 4, 6 and 8-13) and said that, having regard to their *specific content*, the documents shared similar characteristics so as to justify their treatment as belonging to the same category. It appears thus that the Commission did examine each document and the information it contained.

25. In light of the Commission's reasoning, the Ombudsman considers that the Commission's decision to refuse granting access to the requested documents was reasonable and based on a comprehensive examination of the exceptions invoked.

## **2) Allegation that the Commission failed to properly consider its obligations under Regulation 1367/2006**

### **Arguments presented to the Ombudsman**



**26.** The complainants argued that the requested information clearly fell under the definition of "environmental information". [15] In their view, the requested documents relate to measures that will have implications for how the environmental legislation will be developed and applied in the EU if a trade and investment agreement is concluded with the US. Therefore, relying on the Aarhus Convention and Regulation 1367/2006, [16] the complainants referred to the need for a "very restrictive" interpretation of the exceptions invoked by the Commission to refuse access to the documents requested, and mentioned the latter's obligation to consider the existence of an overriding public interest.

**27.** In its opinion, the Commission referred to the reasoning contained in its confirmatory decision, where it had explained that the requested documents did not include information on "emissions into the environment", but were of a more general nature. Furthermore, the Commission had also argued that to the extent that the documents could be deemed to include "environmental information" (something that, in the Commission's view, the complainant had not substantiated) there was no overriding public interest in disclosing the documents in question.

## The Ombudsman's assessment

**28.** The complainants argued that the Commission's failure to acknowledge that some or all the negotiating documents contain environmental information undermines public faith in the Commission's intention to increase transparency. However, the Ombudsman notes that the Commission's duty in this case consists of assessing whether the documents requested could be disclosed or whether, on the contrary, the exceptions in Regulation 1049/2001 would prevent that disclosure. [17] Following the relevant case law, it is clear that general considerations, such as the fact that a document constitutes environmental information, are not a sufficient basis for deciding that the requirements of transparency should displace whatever exception would otherwise apply to refuse a request for public access to that document. Therefore, an overriding public interest in disclosure cannot "*be inferred from the mere fact, even if it is proved, that the information at issue constitutes environmental information.*" [18] The Ombudsman will thus examine whether, in the light of Regulation 1367/2006, the Commission's position when applying the exceptions invoked was justified.

**29.** In line with the applicable case law, where the institutions intend to refuse a request for access to documents on the basis of an exception, that exception must be interpreted and applied strictly so as not to frustrate the application of the general principle of giving the widest possible public access to documents held by the institutions. This is even more so the case where the information requested "relates to emissions into the environment". In particular, Article 6 of Regulation 1367/2006 provides in certain cases for an overriding public interest in disclosure which is superior to the interest protected by a relevant exception provided for in Article 4 of Regulation 1049/2001. [19] For this overriding public interest to apply, the information in the document sought must relate "to emissions into the environment". In order to determine whether Article 6 would apply in this case, it is thus necessary to ascertain whether the information requested relates to emissions into the environment.





**30.** The EU courts have stated that neither Regulation 1049/2001 nor Regulation 1367/2006 and their application implies that the notion of emission into the environment should be interpreted restrictively; it suffices that the information requested relates in a *sufficiently direct* manner to emissions into the environment. [20] Moreover, the EU courts have specifically clarified that "emissions" are releases into the environment which affect or are likely to affect the elements of the environment. [21]

**31.** In its confirmatory decision, the Commission stated that the requested documents did not include information relating to emissions into the environment. The Ombudsman's inspection of the documents in question has confirmed that the Commission's position was correct: the documents in question do not contain information relating to emissions into the environment. On this basis, the overriding public interests test, provided for under Article 6 of Regulation 1367/2006, does not apply.

**32.** To the extent that the Commission relied on Article 4(3) of Regulation 1049/2001 - protection of the decision-making process - this exception is subject to an overriding public interest test. Contrary to the assertion of the complainants, the Ombudsman is satisfied that the Commission did consider this public interest test and that it concluded, correctly, that there was no overriding public interest which displaced the protection of the decision-making process. In any event, all of the documents were protected from disclosure under Article 4(1)(a) of Regulation 1049/2001 which is not qualified by an overriding public interest test.

**33.** In the light of the foregoing, the Ombudsman takes the view that there was no maladministration as regards the first and second allegations. In addition, as mentioned already, the Ombudsman has analysed in depth the wider issues related to the transparency of the TTIP negotiations in the course of her own-initiative inquiry OI/10/2014/RA. For reasons of completeness, the present decision should therefore be read together with the conclusions and suggestions put forward in that context.

## Conclusion

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

**There was no maladministration by the Commission.**

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

Emily O'Reilly

Strasbourg, 04/11/2015





[1] 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 L 145/43 31.5.2001, hereinafter "Regulation 1049/2001").

[2] Articles 4(1)(a) and 4(3) Regulation 1049/2001.

[3] Article 4(4) Regulation 1049/2001.

[4] From the beginning of the negotiations until 17 February 2014 (when the request was submitted).

[5] The documents related to the Ombudsman's investigation are available at:  
<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>

[6] Communication to the Commission on transparency in TTIP negotiations (C(2014) 9052 final).

[7] "Ombudsman's analysis of the Commission's follow-up reply in OI/10/2014/RA on transparency and public participation in the TTIP negotiations", available at:  
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59898/html.bookmark>

[8] Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039.

[9] Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg v Commission*, T-344/08, ECLI:EU:T:2012:242.

[10] <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

[11] The full text of the decision and the documents related to the Ombudsman's investigation are available at:  
<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>

[12] Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039.

[13] In this regard, the Commission's dedicated website also states that "[w]e will make the whole text of the agreement public once negotiations have been concluded – well in advance of its signature and ratification." As an example, the Commission refers to the publication of a recently completed EU trade agreement. It should be noted that, in the context of her own-initiative inquiry, the Ombudsman invited the Commission to pursue, in its ongoing discussions with the US, the possibility of disclosing "stabilised" chapters of the agreement.



[14] The Commission explicitly mentioned that documents 14, 15 and 16 should not be, by definition, shared with the US authorities because they were reports to the Member States and the INTA Committee about the negotiations.

[15] Article 2(1)(d) Regulation 1367/2006.

[16] Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[17] Judgment of the General Court of 9 June 2010, *Éditions Jacob v Commission*, T-237/05, ECLI:EU:T:2010:224: " *it is for the institution concerned to consider whether, first, the document to which access is sought falls within the scope of one or other of the exceptions laid down in Article 4 of Regulation No 1049/2001, and secondly, whether disclosure of that document would specifically and actually undermine the protected interest and, if so, whether the need for protection applies to the whole of the document* ".

[18] Judgment of the General Court of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, T-245/11, ECLI:EU:T:2015:675.

[19] Judgment of the General Court of 8 October 2013, *Stichting Greenpeace Nederland and PAN Europe v Commission*, T-545/11, ECLI:EU:T:2013:523.

[20] Judgment of the General Court of 8 October 2013, *Stichting Greenpeace Nederland and PAN Europe v Commission*, T-545/11, ECLI:EU:T:2013:523.

[21] Judgment of the General Court of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, T-245/11, ECLI:EU:T:2015:675.