

Recommendation in case 2310/2013/JAS on the European Commission's handling of a request for public access to documents Made in accordance with Article 3(6) of the Statute of the European Ombudsman

Recommendation

Case 2310/2013/JAS - Opened on 17/12/2013 - Recommendation on 10/10/2016 - Decision on 20/06/2017 - Institutions concerned European Commission (Recommendation partly agreed by the institution) | European Commission (Maladministration found) |

The case concerned a request for public access to an opinion of the European Commission's Legal Service on the scope of the EU Staff Regulations' "whistleblowing" rules in cases where a staff member from one EU institution report irregularities in another institution.

The Commission granted partial access to the document but refused to disclose any of its substantive content. The Commission argued that granting public access to the substance of the document would undermine the protection of legal advice as well as seriously undermine its decision-making process.

The Ombudsman was not convinced that the Commission had established that the disclosure of the full document would undermine the two interests in question. In any case, the Ombudsman took the view that there was a significant and overriding public interest in disclosure of a document which generally and thoroughly analysed certain aspects of the Staff Regulation's whistleblowing rules. The Ombudsman therefore recommended that the Commission should grant public access to the full Legal Opinion.

The background to the complaint

1. The complaint concerns a request for public access [1] to an opinion of the European Commission's Legal Service (hereinafter, the "Legal Opinion"). The Legal Opinion contains an analysis of the scope of the "whistleblowing" rules of the EU Staff Regulations [2] in cases where members of staff of an institution report alleged irregularities in another institution. The access request was made in September 2013.

2. In response to the request of the complainant, a German national, the Commission granted partial access to the document. It redacted all substantive parts of the Legal Opinion.

3. The complainant then made a request for an internal review of the Commission's position, a so-called confirmatory application. The Commission refused to deal with this request on the



basis that it had doubts about the complainant's identity. On 4 December 2013, the complainant turned to the Ombudsman.

The inquiry

4. The Ombudsman opened an inquiry into the following allegations and claims:

Allegations:

- 1) The Commission wrongly refused to deal with the complainant's confirmatory application for public access to documents.
- 2) The Commission failed to grant the complainant access to the requested documents.

Claim:

- 1) The Commission should apologise for the delay caused.
- 2) The Commission should grant the complainant full access to the requested document without further delay.

Allegation that the Commission wrongly refused to deal with the complainant's request for review (confirmatory application)

The Ombudsman's solution proposal

5. In the spirit of seeking a rapid and citizen-friendly solution to this allegation, on 27 March 2014 the Ombudsman proposed that the Commission should proceed with its handling of the complainant's request for public access to documents.

6. The Commission replied that it would do as proposed by the Ombudsman. However, the Commission said that it was reserving the right to take appropriate measures in future whenever it had serious doubts about the identity of a person asking for public access to documents.

7. The Ombudsman welcomes the Commission's positive reply to the solution proposal and considers that the Commission has settled this aspect of the complaint. However, the Ombudsman notes that, in a request for public access to documents, the identity of the requester should not be a consideration in terms of the decision to be made on that request. The decision should be the same irrespective of the identity of the requester. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access (subject to some exceptions) to documents held by an EU institution [3]. Furthermore, in its 2001 implementing provisions the Commission decided to extend this right of public access to documents to persons who are neither citizens nor resident in the EU. In this case, the Commission dealt with the initial request from the complainant; it was not until the



stage of seeking a review that the Commission refused to handle the case. The Ombudsman is not aware of any grounds for believing that the requester was anything other than an EU citizen and a German national [4] .

Allegation that the Commission failed to grant the complainant access to the requested document

Arguments presented to the Ombudsman

8. In response to the Ombudsman's proposal, the Commission provided the complainant with a decision on his request for review. That decision did not differ in substance from its reply to the complainant's initial request: the Commission took the view that it could grant very limited access to the Legal Opinion due to the need to protect legal advice and its decision-making process. The Commission also found that there was no overriding public interest in disclosure.

9. Concerning the **need to protect legal advice** [5] , the Commission argued that the requested Legal Opinion, drafted by its Legal Service, contained a thorough analysis of the scope of the provisions of the Staff Regulations governing whistleblowing [6] in cases where a staff member of one institution reported alleged irregularities in another institution. It said that the Legal Opinion had been requested by OLAF following the Ombudsman's case 1697/2010/(BEH)JN [7] . However, the opinion was not limited to an evaluation of the Ombudsman's case—in fact, the Commission stated, the opinion did not address that case.

10. The Commission said that this issue was a highly sensitive matter. Therefore, the Commission argued, the Legal Opinion was of importance to the handling of such whistleblowing cases in the future. According to the Commission, the possibility of being confronted with earlier legal advice it had given on an issue would undermine the ability of the Legal Service to provide further legal advice on the same issue to the Commission in the future. Furthermore, the release of the Legal Opinion would impair the freedom of the Commission to request legal opinions from its Legal Service and to receive frank, objective and comprehensive advice. Public knowledge of the opinion would limit its discretion in determining the future scope of the relevant two provisions of the Staff Regulations. Finally, the Commission argued that there was a real possibility that it would have to comment on the interpretation of these provisions before the EU Courts.

11. Concerning the **need to protect the decision-making process** [8] , the Commission argued that the Legal Opinion had been drawn up for internal use. Public knowledge of its content would restrict the Commission's scope for decision-making and would undermine the Commission's ability to act in future cases of whistleblowing within the institutions. Therefore, public access to the opinion would seriously undermine the decision-making process of the Commission.

12. Concerning the possible existence of an **overriding public interest in disclosure** , the



Commission argued that there was no such overriding public interest. Instead, it argued, it was simply a case of the complainant's personal interest in obtaining access to the Legal Opinion along with the interest of the EU institutions and their staff in the interpretation of the Staff Regulations.

13. The complainant argued that the Commission had not proven how the interests protected by the exceptions would be concretely and effectively harmed by the full release of the Legal Opinion. According to the complainant, the risk of interests being undermined must be reasonably foreseeable and not purely hypothetical. The Commission had not put forward, he argued, any evidence as regards relevant pending court cases. Furthermore, since the relevant provisions of the Staff Regulations did not allow staff members to sue the Commission before the EU Court of Justice, it was highly unlikely that the interpretation of these provisions would be relevant in a case against the Commission.

14. The complainant also argued that the release of the Legal Opinion would help to promote the public administration's legitimacy in the eyes of citizens. He added that the handling of whistleblowing cases was crucial in this regard. Not releasing the opinion could, he argued, strengthen public doubts concerning the strictness and clarity of the rules governing whistleblowing.

The Ombudsman's assessment

15. The Ombudsman notes that the exceptions to public access to documents must be interpreted and applied strictly, so as not to frustrate the application of the general principle that the public should be given the **widest possible access to documents** held by the institutions [9] .

16. A three-stage examination is necessary in order to determine if an exception to access under the EU rules on public access to documents applies [10] . First, it has to be determined whether the requested document *falls within the category* covered by the invoked exception. Second, it has to be determined whether disclosure of the documents concerned would *undermine* (in respect of legal advice) or *seriously undermine* (in respect of the decision-making process) the protected interest. Finally, if it is established that disclosure would cause harm to the protected interest, the institution must determine, by carrying out a *balancing exercise* , whether an overriding public interest in disclosure, nevertheless, exists [11] .

Exception concerning the protection of legal advice

17. The Ombudsman notes, following an inspection of the Legal Opinion, that the substantive, undisclosed parts of the relevant document do indeed relate to legal advice and thus fall within the scope of that exception. The legal advice is in general terms, not related to the facts of a specific case, but concerns the content of the relevant rules of the Staff Regulations and how they would work in practice.



18. As to whether the disclosure of the Legal Opinion would undermine the protection of legal advice, the Ombudsman notes that the risk of that interest being undermined must, in order to be capable of being relied on, be **reasonably foreseeable and not purely hypothetical** [12] .

19. The Commission argued that disclosure of the opinion would restrict the ability of the Legal Service to offer legal advice without being confronted with previous arguments related to the same issue. It argued that the mere fact of public knowledge of the Legal Opinion would limit its discretion in determining the future scope of the two provision of the Staff Regulations.

20. The Ombudsman notes, however, that an argument of such a general nature cannot justify an exception to the norm of transparency provided for in the EU rules on public access to documents [13] . Furthermore, the Commission simply referred to hypothetical court proceedings and did not substantiate the existence of such a risk with any concrete evidence. For example, as the Commission itself says, the Legal Opinion does not address the—concrete and thus not hypothetical—Ombudsman case 1697/2010/(BEH)JN.

21. The Commission argues that its ability to request legal opinions and to receive frank, objective and comprehensive advice would be impaired by disclosure of the Legal Opinion. The Ombudsman agrees that the exception relating to the protection of legal advice is intended to protect the capacity of EU institutions to request and to receive legal advice [14] .

22. However, the Commission has not explained how precisely its capacity to request and receive legal advice would be impaired by full disclosure of the Legal Opinion in this case. While it is undoubtedly important, for example, that the institutions are able to obtain internal legal opinions independent of external pressures (or indeed of internal pressures), it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice [15] . If any such pressure were ever brought to bear on the Legal Service, the institutions have all the means at their disposal to deal with such pressures. It would clearly be incumbent on the Commission to take the necessary measures to put a stop to any such pressure, and ensure that staff members working in the Legal Service can “speak their mind”. Indeed, the creation and fostering of such a culture within an institution is, itself, an aspect of good administration.

23. Even if one were to conclude that there existed some risk of harm to the protection of legal advice—and the Ombudsman is not convinced that such a risk has been established—such a risk would have to be balanced with the **public interest in disclosure** of the document (see below).

Exception concerning the protection of the decision-making process

24. The Commission has also invoked the need to protect its decision-making processes.

25. The present Legal Opinion contains a general analysis of the scope of the Staff Regulation's whistleblowing provisions in cases where an employee of an EU institution reports alleged irregularities in another institution. The Commission has not argued that the Legal Opinion was



relevant to any particular case, or part of another concrete ongoing decision-making process. It argued, generally, that disclosure would “impair the institution’s decision-making process in future decisions concerning cases of whistleblowing by employees of other institutions”.

26. The Ombudsman notes that the term “decision-making process” covers all processes of internal consultations and deliberations. “Decisions” are positions adopted as a result of those consultations and deliberations, even if such positions do not necessarily constitute formal legally binding “decisions”. In other words, the term “decision” has a broad meaning [16] .

27. However, this does not mean that the term decision-making can cover extremely vague assertions relating to the possibility that the institution might have to take a position on a given issue. The Ombudsman thus considers that the Commission’s argument—that the opinion might be relevant to hypothetical future cases of whistleblowing—is not sufficient.

28. The Ombudsman stresses that, in order to rely on the exception protecting the institution’s decision-making process, a decision-making process must be identified at least to a degree where it becomes possible to assess, taking due account of the content of the document to which disclosure is sought, whether that decision-making process would or would not be seriously undermined by disclosure of that document.

29. Even if it were accepted that the decision-making processes referred to by the Commission were sufficiently identified, this would not imply that the disclosure of the document at issue would seriously undermine the decision-making processes in question. The Ombudsman notes that, essentially, the Commission implies that releasing the document would prevent the Commission from taking an alternative view in a future case. This is simply not the case. The public disclosure of a document, as a result of a request for access to documents, does not in any way imply that the document will thereafter be taken as the position of the institution on that issue. There can be no legitimate expectations that the institution will follow that position in future cases unless the institution formally announces that it will follow that position in future cases. Thus, even if the document were to be made public, the freedom of the Commission to take a different view in future cases would not be impaired. It is important to bear in mind that a consideration of legal advice is usually just one element in the making of an administrative decision.

Overriding public interest

30. In any event, even if harm were to be caused to the above interests by disclosure, this would have to be balanced against a possible **overriding public interest** in the document being made public. In the present case, the complainant argues that the release of the document would be beneficial to, and help promote, the legitimacy of the EU administration. A refusal to release the substance of the document, on the other hand, could strengthen public doubts concerning the strictness and clarity of the EU rules governing whistleblowing as well as the commitment of the EU institutions to follow up on whistle-blower reports.

31. The Commission disagreed that there was a public interest in making the document publicly



available, especially since the interpretation of the Staff Regulations primarily concerned the EU institutions and their staff.

32. The Ombudsman emphasises that whistleblowing is, according to the Staff Regulations, an **obligation for EU staff members**. Staff members are under a duty to report serious irregularities of which they become aware in the course of the performance of their duties. This obligation is not one confined to cases in which one becomes aware of irregularities in one's own institution. It applies wherever a staff member becomes aware of irregularities in any of the EU institutions. The purpose of the whistleblowing requirement is to protect against anything "detrimental to the interests of the Union" (and not just of one's own institution). Failure to comply with this obligation might ultimately lead to disciplinary proceedings against the official concerned.

33. In this context, the Ombudsman strongly agrees with the Commission's general assessment, made in connection with the adoption of new whistleblowing guidelines, that "*it is important to have clear, well-known and trusted reporting channels and whistleblowing arrangements in place*" [17] (emphasis added). Clear rules on the scope and limits of the provisions covering whistleblowing enable staff members to fulfil effectively their duty to speak up if they become aware of serious misconduct or wrongdoing within the institutions. Such clear rules serve the public interest, by fostering integrity, transparency, accountability, and ultimately, legitimacy in and of the EU administration [18].

34. Integrity is an essential principle of the European civil service. The European public expects members of staff of the EU institutions to behave with the highest degree of integrity, which contributes to the overall legitimacy of the EU public administration. In this context, openness strengthens this integrity by allowing citizens to scrutinize the scope and limits of whistleblowing rules within the institutions and to assess whether the institutions are responding adequately to the challenges of internal corruption, fraud and other serious irregularities. Publication of the substance of the Legal Opinion will, in the view of the Ombudsman, enhance public confidence in the operation of the whistleblowing provisions and help re-assure staff who feel obliged to invoke them.

35. In view of the above, the Ombudsman is of the opinion that there is indeed a significant public interest in the disclosure of a document that generally and thoroughly analyses certain aspects of the whistleblowing rules and thereby seeks to clarify the Commission's understanding of the duties of staff members. The Ombudsman considers that this public interest does—in the present case—override any identified need to protect legal advice or to protect the Commission's decision-making process. The Ombudsman finds that the Commission's decision not to disclose the substantive part of the Legal Opinion constitutes maladministration and thus makes a recommendation in that regard.

The recommendation

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



The Commission should grant full access to the Legal Opinion.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send an opinion by 14 January 2016. The opinion could consist of the acceptance of the recommendation and a description of how it has been implemented.

Strasbourg, 10/10/2016,

Emily O' Reilly

European Ombudsman

[1] The complainant had requested public access on the basis of 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.

[2] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 1962 45, p. 1385, Consolidated Version available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01962R0031-20140701&from=EN> [Link].

[3] And institutions may grant access to documents to natural or legal persons not resident or registered in a Member State.

[4] The Ombudsman's proposal to the Commission is being published in conjunction with this Recommendation.

[5] Article 4(2) second indent of Regulation 1049/2001.

[6] Articles 22a and 22b of the Staff Regulations.

[7] Decision of the European Ombudsman closing his inquiry into complaint 1697/2010/(BEH)JN against the European Anti-Fraud Office.

[8] Article 4(3) first subparagraph of Regulation 1049/2001.

[9] Judgment in *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75; Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66; Judgment in *Sweden and Turco v Council*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 36; and Judgment in *Franchet and Byk v Commission*, T-391/03, EU:T:2006:190,



paragraph 84.

[10] Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraph 37.

[11] Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraphs 33-45.

[12] Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraphs 42-43.

[13] Judgment in *Sweden v MyTravel and Commission* EU:C:2011:496, paragraph 116;
Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraph 65.

[14] Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraphs 42 and 62.

[15] Judgment in *Sweden and Turco v Council* EU:C:2008:374, paragraph 64.

[16] Decision of the European Ombudsman closing his inquiry into complaint 1817/2010/(DK)RA against the European Commission, paragraph 37.

[17] European Commission Press Release, 6 December 2012,
http://europa.eu/rapid/press-release_IP-12-1326_en.htm.

[18] See the European Ombudsman's own-initiative inquiry OI/1/2014/PMC concerning whistleblowing.