

## **Proposal for a solution in the inquiry into complaint 682/2014/JF on the Commission's handling of an application for public access to documents**

Solution - 20/05/2014

**Case** 682/2014/JF - **Opened on** 20/05/2014 - **Recommendation on** 16/12/2016 - **Decision on** 19/12/2017 - **Institution concerned** European Commission ( Maladministration found ) |

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

The Commission refused to register an application for public access to documents made by a trainee at Access Info Europe, a non-governmental organisation. The organisation turned to the Ombudsman complaining that the Commission is requiring too much information from people wishing to obtain public access to its documents.

The Ombudsman agrees that the Commission is entitled to require applicants to provide their full name. The Ombudsman is not, however, convinced that the requirement that all applicants must provide their postal address and business domain is in line with principles of good administration. The need to ensure legal certainty, to safeguard personal data, to avoid abuse of the right to public access and to use the institution's limited resources as efficiently as possible can, in the Ombudsman's view, normally be attained in other ways better in line with principles of good administration.

The Ombudsman therefore proposes that the Commission should register and deal with the application in question here and that it should refrain from requiring all applicants to provide their full addresses and business domain. The Commission may, however, encourage applicants to provide such information, explaining the usefulness of being provided with it.

## **The background to the complaint**

1. The complaint was made by Access Info Europe, a non-governmental organisation that runs the AsktheEU.org website which seeks to improve transparency as regards access to the EU institutions' documents.
2. On 14 November 2013, a person working as an intern at Access Info Europe submitted to the Commission, via the AsktheEU.org website, an application for public access to certain



Commission documents. The application was made in accordance with EU legislation on public access to EU institutions' documents, that is, Regulation 1049/2001 [2] . The individual making the application signed the request with her first name.

3. The following day, the Commission replied that in order to register the application in its access to documents database, it needed the applicant's name, surname, country of residence and activity sector. The applicant replied stating that Regulation 1049/2001 does not require applicants to provide such information [3] . She nevertheless explained that she worked as an intern for Access Info Europe and again signed her e-mail with her first name.

4. The Commission replied that its request for the applicant's name, surname, country of residence and activity sector was not based on any legal obligation stemming from Regulation 1049/2001. The Commission asked for that information because, "*in order to be able to ensure the legal right of the applicant to receive an answer, [it] need [ed] to know the basic details of this person. [The Commission's] registration system requires this information in order to be able to process a request*" [4] . The Commission stated that, once it received this information, it would register the application.

5. The applicant replied that she is a Polish citizen, living in Sweden and working as an intern at Access Info Europe, which is a legal person registered in Spain. She took the view that the Treaties of the European Union ('TEU') and on the Functioning of the European Union ('TFEU') do not require applicants requesting public access to documents to provide information in respect of their sectors of activity. That information is irrelevant when a member of the public exercises the fundamental right to request access to documents. Asking for such information was, therefore, in her view, inappropriate.

6. Also, while the applicant did not mind providing the Commission with her surname, she considered that Regulation 1049/2001 does not require her to identify herself fully. In addition, the Commission already knew her first name and e-mail address. In the applicant's view, "*access to documents is a fundamental human right... which can be exercised by any person (legal or natural, citizen or resident)*" in the EU. EU institutions do not need to know who the applicant is in order to comply with their obligation, under the Treaties, to conduct their work as openly as possible. She argued that the Council of Europe, for example, did not require applicants to identify themselves [5] . In any event, the Commission's request that she identify herself would only make sense if the Commission could establish her identity with a sufficient degree of certainty, namely through copies of her passport and/or residence documents. The Commission, however, did not ask for any such documents and the request that she identify herself was, therefore, ultimately, pointless. However, if the Commission were to ask for identity documents, it would, in the applicant's view, create an overly bureaucratic burden which would be incompatible with the right of access to information. In addition, the Commission's requirements were inconsistent with its practice to date in respect of requests reaching it both via the AsktheEU.org website and submitted directly by individual applicants. The applicant, again, signed her e-mail with her first name.

7. In its reply, the Commission referred to this entry on the AsktheEU.org website:



*" Why will my name and my request appear publicly on the site?*

*We publish your request on the internet so that anybody can read it and make use of the information that you have found. We do not normally delete requests (more details).*

*Your name is part of your request, so has to be published as well. It is only fair, as we're going to publish the name of the civil servant who writes the response to your request.*

*Using your real name also helps people get in touch with you to assist you with your research or to campaign with you.*

*Can I make an access to information request using a pseudonym?*

*You are advised to use your real name when making an access to documents request. You are exercising a right which is the basis for an open and democratic society and this should be under your real name.*

*If you feel that your name is very well known – for example you are a famous person or well known journalist or known to the EU body – you might want to get a friend or colleague to file the request. If you are really stuck, contact us and we will try to help you file the request; please note that we don't have the resources to do this for everyone.*

*Please note that if you use a pseudonym, you will not be able to exercise your legal right to appeal to the European Ombudsman or the Court of Justice.*

*We ask for a first and a last name. If you have more than one first or last name you can use these, but the minimum is a first and last name.*

*If we see silly names or really obvious pseudonyms, we will remove the request and contact the requester about this. Please do not impersonate someone else! "*

The Commission, again, explained that it would register the applicant's request as soon as she provided her name, surname, country and activity sector.

8. On 10 April 2014, the complainant turned to the European Ombudsman.

## **The inquiry**

9. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

The Commission wrongly refused to register the application of 14 November 2013.



The Commission should register the application or clearly explain why it cannot do so, having particular regard to the detailed arguments provided by the applicant.

10. 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's proposed solution takes into account the arguments and opinions put forward by the parties.

### **Allegation of wrongful refusal to register the application**

Arguments presented to the Ombudsman

11. In support of its allegation, the complainant argued that the Commission (i) was imposing unlawful and unreasonable conditions for the registration of applications for access to documents and (ii) failed to take proper account of the applicant's arguments.

12. In its opinion, the Commission acknowledged not having addressed the applicant's detailed arguments and apologised for this fact. It also confirmed its decision to refuse to register the application, stating that the applicant could re-submit her application, provided she also informed the Commission of her surname and full address [6] . The Commission also replied to the complainant's arguments, as follows.

13. The Commission does not consider that it is imposing unlawful and unreasonable conditions on applicants. It stated that the applicable rules provide for a right of access to, first and foremost, EU citizens and legal entities registered in an EU country [7] . In order to be able to verify whether an applicant falls within this category, EU institutions must know the applicant's name, surname and complete address. Until April 2014, the Commission asked applicants to provide their first name and surname, as well as their e-mail address and country of residence or registration. As from April 2014, it required also a complete and valid postal address, including the street, postal code and city. In its electronic form for requesting documents, the Commission explains clearly that it reserves the right to refuse registration of an application where the data supplied is incorrect or incomplete.

14. The Commission stated that it applied the above measures to ensure:

(a) **Legal certainty** : According to Article 297 TFEU, "[d] ecisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification. " Also, the Commission's Code of Good Administrative Behaviour provides that Commission decisions should be communicated to " *the persons and parties concerned* ", that is, to a particular recipient and not to an anonymous party. When applicants request public access to a document under Regulation 1049/2001, they ask the EU institutions to make decisions. Replies that may be subject to administrative or judicial review must, therefore, be sent to the addressees by means of registered mail with an acknowledgement of receipt. " *In the absence of an acknowledgement of receipt it is not possible to ascertain whether the legal deadlines for redress had been respected* ". If the applicant does not reveal his (or her) identity



and does not respect the applicable deadline for submitting a complaint to the European Ombudsman or an appeal to the Court of Justice of the European Union (the 'CJEU'), he or she is deprived of means of redress. By requesting applicants to provide their names, surnames and valid postal addresses, the Commission not only ensures that it is able to notify applicants of its decisions, but also that applicants are able to challenge those decisions, if they wish to do so. Other institutions, namely the CJEU, also ask applicants to provide their full names and addresses in their respective electronic forms for access to documents requests;

(b) **Protection of the privacy and the integrity of the individual** , where a request for access to documents concerns documents including personal data: Establishing whether the applicant is a EU resident is a precondition necessary to correctly apply the exception of the protection of the privacy and the integrity of the individual [8] , in accordance with the *Bavarian Lager* ruling of the CJEU [9] . Union legislation on the protection of personal data ('Regulation 45/2001') requires that an adequate level of protection is ensured in the recipient's third-country or international organisation [10] . The Commission must thus know the applicant's name, surname and postal address;

(c) **Efficient use of its scarce resources** to deal with requests submitted by " *real* " applicants: Anonymous applications cannot be considered as having been submitted by " *real* " applicants. Without them being required to provide a name, surname and an address, applicants may make requests under an identity that is invented, unclear, or of a third person. By asking applicants to provide their names, surnames and postal addresses, the Commission protects itself and other citizens and legal persons from abuse; and

(d) **The possibility of conferring with the applicant informally** , with a view to finding a fair solution to cases where a very long document or a very large number of documents is requested: [11] This possibility should not be compromised by the applicant making numerous requests under different or unclear identities [12] . In 2012 and 2013, the Commission received 57 confirmatory requests from, as it suspects, one single applicant operating under 13 different identities.

**15.** The Commission agreed that asking applicants for evidence of their identities on a regular basis would be disproportionate and it assured the complainant that it does not, and does not intend to, do so. However, in exceptional cases, namely where it has strong legitimate doubts as to whether the applicant has submitted his request under his real identity, the Commission reserves the right to ask for a proof of identity [13] .

**16.** The Commission stated, further, that it had asked the applicant to provide information about her sector of activity for statistical and transparency purposes only. The Commission includes that information in its Annual Report on Access to Documents (the 'Annual Report'). Applicants are not obliged to give that information and providing that information is not a condition necessary for their applications to be registered. The applicant provided that information, but even if she had not done so, her request for access to documents would have been registered, as long as she also provided her surname.



17. In its current electronic form for requesting access to its documents, the Commission asks applicants to explain their "*Business domain*" by means of a drop-down menu providing for different options. If applicants do not want to specify their domain, they can simply choose "*Citizens*" in the drop-down menu. The Commission finds this information relevant and does not consider it to be inappropriate to ask for it. In any event, the Commission registers applications for access to documents which reach it by e-mail and letter and which do not provide this information. Such applications are referred to in the Annual Report as cases in which the applicant's profile was "*not specified*".

18. In its observations, the complainant argued that, in addition to stating her first name, nationality and country of residence, the applicant also provided the Commission with the complainant *organisation's* full name, mission, country of registered office, and area of activity. The complainant, in effect, argued that the applicant in this case was itself, Access Info Europe, and not the individual representative of Access Info Europe who made the application on its behalf. Given that the application was made by the complainant, a legal person, it was not necessary for its representative to provide her surname; accordingly, the Commission could thus have registered the application.

19. The complainant disagreed with the Commission's position that the right of access to institutions' documents "*belongs first and foremost to the EU citizens and legal entities residing or registered in an EU country*". It noted that, according to the Commission's own rules, applicants who are not resident (or having registered offices) in a Member State have the same right of access as have EU citizens or applicants who are resident in, or with registered offices in, a Member State. Furthermore, according to the complainant, the Commission has to treat all applicants, including those from third countries, equally. The complainant questioned whether the Commission actually seeks to establish whether an applicant is an EU citizen when the postal address is in a third country and if, in such a case, it treats that applicant differently from an EU applicant residing in an EU Member State. Similarly, the complainant questioned whether the Commission imposes requirements on a third country applicant living in a Member State which it does not impose on an EU citizen. If it does so, the complainant questioned whether such requirements could be considered as compatible with the fundamental right of access to documents. The complainant took the view that it should not matter who makes an application for access.

20. The complainant further claimed that the Commission systematically refuses to register applications for public access to documents that reach it without an address, independently of whether the requested documents contain personal data or not. In the complainant's view, data protection concerns are not correctly addressed by the Commission requiring all applicants to provide their postal addresses. Doing so is, therefore, disproportionate. It would be preferable for the Commission to explain, when releasing documents containing personal data, how that data may or may not be used.

21. The complainant also took the view that the TFEU does not require the Commission to send its decisions by post. The TFEU requires that decisions reach the persons affected by those decisions. Sending decisions by e-mail reduces the administrative burden and costs of



both the applicant and the institution. There are technical possibilities that could ensure that the Commission receives an acknowledgement of receipt to an e-mail, for example, through the "*confirmation of receipt*" functionality of Outlook. According to the complainant, the European Medicines Agency ('EMA') uses a software programme that ensures that applicants receive EMA documents safely. Sending replies to applications for access to documents which may be the subject of administrative or judicial appeals by registered mail is costly and inefficient when compared to available electronic delivery solutions.

**22.** The complainant further expressed the view that an applicant who prefers to remain anonymous is still a "*real*" applicant exercising a fundamental right. An applicant may have good reasons for making the application anonymously or under a pseudonym, namely being an activist, a known journalist or a whistleblower. In any event, it is unclear how asking for a postal address will allow for the applicant's identity to be identified. The applicant may simply make up both his full name and postal address, or ask a relative or a friend to make the application. The complainant further noted that the Commission does not accept that applicants may use its postal address when submitting their requests through the AsktheEU.org website. The Commission's new policy creates difficulties for the complainant, as the AsktheEU.org website is designed in such a way that, if applicants are obliged to provide their addresses, these addresses will necessarily be made public on the website.

**23.** The complainant further argued that conferring with applicants by e-mail and telephone would allow for a solution in cases where access to a very long document or a very large number of documents is requested. In any event, the behaviour of one applicant making multiple requests and confirmatory applications should not lead to policies that negatively affect all potential applicants for public access to Commission documents.

**24.** The complainant took the view that asking applicants to indicate their sectors of activity is invasive and inappropriate. It is invasive because the Commission does not explain to applicants how it will use that information or if that information will have an impact on the processing of their requests. It is inappropriate because requesting public access to documents is a right that should not be dependent on applicants declaring their field of work or even stating that they are citizens. The option "*citizen*" would appear to exclude EU residents who are not EU citizens. Other options, such as "*business person*" or "*lobbyist*" are missing from the list. In any event, the Commission made the registration of the application for access conditional on the applicant providing information on her sector of activity and refused to register her application even when she provided that information. Moreover, the Commission did not make it completely clear, in its opinion to the Ombudsman, that providing this information is indeed voluntary.

**25.** Finally, the complainant informed the Ombudsman that, according to its analysis of information received from the Commission in the meantime, before April 2014, the Commission requested proof of the applicant's identity and the applicant's postal address in a limited number of cases only, namely where attempts to contact the applicant had failed, or when it had serious doubts about the applicant's identity. Since April 2014, when the new policy came into force, and until the end of the year, some 25 applications for public access to Commission documents





were refused registration due to the applicants' failure to provide a postal address. The complainant further forwarded to the Ombudsman links to questions on access to Commission documents raised by some MEPs and the Commission's answers to those questions [14] .

**26.** In the course of the inquiry, the complainant clarified that, in addition to dealing with the Commission's refusal to register its individual application, it also wishes the Ombudsman to inquire into the Commission's additional requirements (subsequent to the application at issue here) for registering public access applications. , The complainant asked that the arguments it had made in relation to the specific application be taken into account also in the Ombudsman's consideration of the additional requirements introduced by the Commission subsequent to the making of the specific application.

## The Ombudsman's preliminary assessment leading to the solution proposal

**27.** EU legislation on public access to EU institutions' documents was enacted to ensure the widest and the easiest access possible to these documents in a manner consistent with good administrative practice [15] .

**28.** EU citizens, and natural and legal persons residing or having their registered offices in a Member State, have the right of access to EU institutions' documents [16] . EU institutions may also grant access to their documents to natural and legal persons who do not reside or do not have their registered offices in a Member State [17] . The Commission's rules implementing the EU legislation on public access to documents (the 'Implementing Decision') [18] do not distinguish between EU and non-EU natural and legal persons when it comes to the right of access to its documents [19] . While the Commission has argued that the right of access to its documents " *belongs first and foremost to the EU citizens and legal entities residing or registered in an EU country* ", the Ombudsman is not convinced of the relevance of this argument. It remains the case that Regulation 1049/2001 allows for the granting of access to non-resident persons and the Commission has provided for this in its own Implementing provisions [20] .

**29.** It remains to be established whether the Commission is providing public access to its documents in the easiest way possible and in a manner that is consistent with good administrative practice, when it asks applicants to provide their first name, surname, complete address and activity sector.

**30.** The Ombudsman finds it reasonable for the Commission to ask applicants to provide their first name and surname, or, in case of a legal person, their registered title. The Ombudsman is of the view that an open and transparent EU administration should, in principle, have the right to expect openness in return from the citizens or legal persons that it serves. Trust between EU institutions and EU citizens or legal persons is ultimately built on the basis of contacts between these parties. EU officials are required to identify themselves by name in their contacts with citizens or legal persons [21] . The same can thus be expected from citizens or legal persons, who should not, in principle, have a right to anonymity when making applications for public





access to documents.

**31.** Requiring applicants to identify themselves by their real name also serves as a starting point for detecting possible abuse of the right to public access. These issues will be developed further below.

*On the refusal to register the application for access*

**32.** In this case, the Commission asked the individual who submitted the application to provide her first name, surname, country of residence and activity sector. That individual provided the requested information, with the exception of her surname. The Commission did not register the application. It is not clear to the Ombudsman that the application, as made, was intended to be submitted on behalf of the complainant *organisation*, rather than on behalf of the individual who happened to be an intern with that *organisation*. Given the way in which the application and additional correspondence was formulated, it was reasonable for the Commission to understand the application as being submitted by the *individual*. Since the Ombudsman accepts that it was reasonable for the Commission to ask the applicant (as it understood the situation) to provide her full name, the Commission was entitled to refuse to register her application when she did not provide that information.

**33.** However, in its complaint to the Ombudsman the complainant clarified that the application had been made on its behalf, that is, on behalf of a legal person having its registered office in an EU Member State which, in addition, is a non-governmental organisation well-known to the Commission [22]. Given that this fact has become clear to the Commission during the course of the present inquiry, there is, in the Ombudsman's view, no longer any reason for the Commission not to deal with the complainant's application for access. The Ombudsman will therefore propose a corresponding solution below.

*On the Commission's general policy on information required from applicants for public access to its documents*

**34.** The complainant put forward concerns about the Commission requiring all applicants to provide their full postal address and sector of activity.

**35.** On the issue of the need for applicants to provide their postal address, the Commission argued that this information is needed to ensure legal certainty. While the Ombudsman recognises that a registered letter with acknowledgement of receipt is a suitable method of giving notice [23], she is not convinced that legal certainty may be ensured *only* by means of letters sent to the applicant's postal address [24]. Time has passed since the relevant case law, and communications technology has taken a leap forward. Modern communication is mainly done by e-mail, which is a means of communicating with citizens that is normally fully in line with - or even preferable in terms of - good administrative practice, given that it is quicker, simpler to administer than registered mail and virtually free of cost. There are simple functionalities included even in general use e-mail systems that allow senders to know when their messages have been received by the addressees and if there were any failures in the



delivery. Moreover, there are institutions that use dedicated e-mail systems to communicate decisions that affect the rights or interests of individuals. For example, the European Personnel Selection Office ('EPSO') informs candidates participating in its open competitions of their results through the EPSO Profile mailbox. Another example is that the Commission itself, as well as EU agencies, communicate appraisal reports to members of their staff by electronic means and accept that the period of three months in which to lodge a complaint in respect of those reports starts to run on communication of information by those means [25] . Similarly, there is EU legislation explicitly providing for the possibility of notification by electronic means, with clear requirements in respect of acknowledgement of receipt [26] . The Ombudsman does not see, and the Commission has not validly explained, why using e-mail systems with some of the above security functionalities and/or specific requirements regarding the acknowledgement of receipt, would not be sufficient to ensure that an applicant is notified of the Commission's decision in a manner which would ensure that there is legal certainty as regards the applicant's right to challenge the decision if s/he so wishes. The requirement that the applicant must provide a full postal address in order for the Commission to register the access application is therefore not indisputably consistent with good administrative practice .

**36.** The Commission also stated that a postal address is needed to ensure the privacy and the integrity of the individual, when a request concerns documents containing personal data. Although it is true that the Commission must be attentive to the adequacy of the level of protection of personal data afforded by a third country if the applicant resides outside the EU [27] - and *if* the Commission actually grants access to such personal data after having carried out the weighing exercise set out in the *Bavaria lager* judgment - each and every individual applicant is required to provide his or her postal address irrespective of whether he or she is requesting documents containing personal data. In addition, in order to comply with this aspect of the EU data protection rules, it would be sufficient for the Commission to know the applicant's country of residence. The requirement that the applicant must provide a full postal address in order for the Commission to register the access request is therefore not indisputably consistent with good administrative practice.

**37.** Finally, the Commission argues that the obligation to provide a postal address allows it to protect its scarce resources from abuse, such as from applicants who are not "*real*" and from applicants who submit numerous, split applications under different names in order to avoid having to agree to a fair solution on a request for access to very numerous documents. As stated above, the Ombudsman agrees with the principle that applicants are not entitled to anonymity and that they should therefore provide their first name and surname when requesting public access to EU institutions' documents. She, therefore, also agrees with the Commission's statement that applicants should not make "*requests under an invented identity, unclear identity or under the identity of a third person*".

**38.** The Ombudsman recognises that the EU administration is entitled to take appropriate and proportionate measures in order to prevent abuse of the rights stemming from Regulation 1049/2001. Where the Commission has legitimate doubts about the identity of a particular applicant, apparently using a fake identity (or identities), or the identity of someone else, in order to abuse the public access rules, it would seem proportionate to seek to verify the identity



of that applicant. This might be done, for example, by asking for the applicant's postal address and sending the applicant a registered letter requiring an acknowledgement of receipt. In appropriate case, the more intrusive step of seeking identity documents could be taken. [28] The question as to whether there are legitimate doubts about the identity, as well as legitimate reasons to consider that the right to access is being abused, is for the Commission to evaluate on a case-by-case basis, clearly setting out the reasons for its concerns in this regard.

**39.** However, the Ombudsman does not see, and the Commission has not validly explained, how the need to prevent abuse justifies the need for *all* applicants to provide their postal address. While she agrees with the Commission's view that its resources should be dedicated to serving real applicants, she is not convinced by the Commission's view that information that would need to be requested as a matter of exception ought to be asked for as a general rule. Given that the Commission stresses the need for an efficient use of its resources, sending replies by e-mail would clearly make sense at least in those cases where access is granted and where the documents released do not contain personal data. In such cases, there would not be any need to ask for a postal address. The Ombudsman understands that the European Parliament, for example, uses e-mail in such cases. On the basis of the above, the Ombudsman does not consider that the Commission's policy of requiring all applicants to provide their postal address to be indisputably in line with its obligation to ensure the easiest access possible to its documents in a manner that is consistent with good administrative practice. She will therefore propose a corresponding solution below.

**40.** Finally, the Ombudsman notes that the Commission's online form for requesting public access to its documents [29] identifies the " *Business domain* " section as " *Required information* ". The form further states that the Commission "[r]eserve[s] the right to refuse to deal with [a] request in case of incomplete or incorrect data in the above electronic form ". The Ombudsman finds no valid reason for the Commission to refuse to deal with an application for access to documents because no " *Business domain* " has been indicated. The Ombudsman notes in this regard that the Commission has explained that it registers requests sent to it by e-mail or letter which do not contain any information on the applicant's " *business domain* " [30] . It is inconsistent that applicants using the online application form must necessarily choose one of the options of the drop-down menu (namely the " *Citizens* " option if they do not wish to indicate their business domain), while those applying by e-mail or letter do not need to provide any information regarding their sectors of activity.

**41.** In light of the above, the Ombudsman does not consider that the Commission's policy, of requiring applicants requesting public access to its documents via its online form to provide their " *Business domain* ", to be consistent with good administrative practice. She will again propose a corresponding solution below.

**42.** This does not mean, however, that the Commission cannot *encourage* applicants to provide information such as their postal address or business domain, particularly if the applicant does not reside in the EU. The Commission should explain, in its online form for requesting public access to documents, the usefulness of being provided with such information. The Ombudsman believes that citizens will be more likely to provide this data if they understand the



reasoning behind the Commission's wish to be provided with such data.

**The proposal for a solution**

**Taking account of this preliminary assessment, the Ombudsman proposes that the Commission**

- (i) register the application for access to the Commission's documents, made on 14 November 2013, and deal with it promptly;**
- (ii) refrain from requiring all applicants to provide their postal address when applying for public access to its documents; and**
- (iii) refrain from requiring applicants to declare their " *Business domain* ".**

**However, the Commission may *encourage* applicants to provide their postal address or country of residence, as well as their " *Business domain* ". The Commission should explain, in its online application form, the usefulness of being provided with such information.**

Strasbourg, 15/09/2015

Emily O'Reilly

European Ombudsman

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

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

[3] Article 6(1) of Regulation 1049/2001 provides that: "[a] *pplications for access to documents shall be made in any written form, including electronic form, in one of the languages referred to in... the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.* "

[4] The Commission included the link to the online form available on its register of documents: <http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb> [Link]

[5] The applicant referred to Article 4 of the Council of Europe Convention on Access to Official Documents which, according to her, provides that " *Parties may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request*



"." The Explanatory Report to the Convention states that " *the present Convention does not require Parties to the Convention to grant applicants a right to submit requests anonymously, but encourages this by including an optional obligation in this respect. In the countries where such a right exists, it has been deemed unnecessary to require the applicant's identity when there at the same time is no obligation for the applicant to declare any reasons for the request.* "

[6] The Commission had dropped its requirement that the applicant give information on her activity sector. The Ombudsman understands that this was so because the complainant had already explained to the Commission that she worked as an intern for *Access Info Europe* .

[7] Article 2(1) of Regulation 1049/2001: "[a] ny 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 to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation. "

[8] Article 4(1)(b) of Regulation 1049/2001: "[t] he institutions shall refuse access to a document where disclosure would undermine the protection of... privacy and the integrity of the individual, in particular in accordance with [Union] legislation regarding the protection of personal data. "

[9] Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.* , ECR [2010] I-6055, Paragraphs 56 to 63.

[10] Article 9 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

[11] In accordance with Article 6(3) of Regulation 1049/2001: "[i] n the event an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution. "

[12] The Commission stated, in this respect, that "[i] ndeed, in its *Ryanair* judgment, the General Court confirmed that Article 6(3) cannot be evaded by splitting the application into a number of applications [Judgment of the General Court in case T-494/08, *Ryanair Ltd v Commission* , paragraph 34]".

[13] The Commission referred the Ombudsman to the comments it submitted in inquiry 2310/2013/VL.

[14]

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-005902&language=EN>  
[Link];

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-005902&language=EN>



[Link];

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-001076+0+DOC+XML+V0//EN8>  
[Link]; and

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-001076&language=EN>

[15] Article 1 of Regulation 1049/2001: “[t]he purpose of this Regulation is: (a) to define the principles, conditions and limits of public or private interest governing the right of access to European Parliament, Council and Commission... documents... in such a way as to ensure the widest possible access to documents, (b) to establish rules ensuring the easiest possible exercise of this right, and (c) to promote good administrative practice on access to documents.”

[16] Article 2(1) of Regulation 1049/2001: “[a]ny 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 to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.”

[17] Article 2(2) of Regulation 1049/2001: “[t]he institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.”

[18] Annex to the Commission decision of 5 December 2001 amending its rules of procedure setting out the detailed rules for the application of Regulation 1049/2001 (OJ 2001 L 344, p. 94).

[19] Article 1 of the Implementing Decision: “[c]itizens of the Union and natural and legal persons residing or having their registered office in a Member State shall exercise their right of access to Commission documents under Article 255(1) of the Treaty... [C]itizens of third countries not residing in a Member State and legal persons not having their registered [office] in one of the Member States shall enjoy the right of access to Commission documents on the same terms as the beneficiaries referred to in Article 255(1) of the Treaty...” (emphasis added)

[20] Additionally, the Ombudsman notes that, according to Article 1 of the Implementing Decision, citizens of third countries not residing in a Member State and legal persons not having their registered office in one of the Member States “pursuant to Article 195(1) of the Treaty... shall not have the option of laying down a complaint before the European Ombudsman. But if the Commission wholly or partly refuses them access to a document after a confirmatory application, they may bring an action before the Court of First Instance of the European Communities...” The Ombudsman emphasises that the foregoing provision omits to mention that the Ombudsman has the right to open an inquiry at her own initiative into a refusal by the Commission to grant access to a document to an applicant who is a third-country citizen not resident in the EU or a legal person having its registered office in one of the Member States.





[21] Article 14(2) of the European Code of Good Administrative Behaviour.

[22] Given that the mission of the complainant organisation is to defend and promote the right of access to information in Europe, the Ombudsman finds no reason to believe that the way in which this case is being pursued has not been agreed with the individual who submitted the access application.

[23] See, for example, Case T-12/90, *Bayer v Commission* [1991] ECR II-219, paragraph 18: "[a] registered letter with acknowledgment of receipt is a suitable method of giving notice inasmuch as it enables the date from which time begins to run to be determined. Furthermore, a decision is duly notified once it has been communicated to the person to whom it is addressed and that person is in a position to take cognizance of it..."

[24] Article 20 of the European Code of Good Administrative Practice only requires decisions affecting the rights or interests of individuals to be notified *in writing*, which does not necessarily imply a registered letter.

[25] See, for example, Article 7 'Appeal procedure' of Commission Decision of 4 March 2015 giving to agencies an *ex ante* agreement regarding general provisions for implementing Article 87(1) of the CEOS and the first paragraph of Article 44 of the Staff Regulations (COM(2015) 1456 final): "[t] he report shall become final by decision of the appeal assessor. The jobholder shall be notified, by e-mail or other means, that the decision rendering the report final has been adopted ... Such notification constitutes communication ... The period of three months in which to lodge a complaint, provided for in Article 90(2) of the Staff Regulations, starts to run on communication of information" and 8 'Time limits': " 1. The time limits... shall be calculated only from the time when the relevant decision has been notified to the person concerned or, at the latest, when the latter, acting as a diligent official, agent, may be expected to be aware of the content of that decision and reasons of it. 2. These time limits shall be suspended, however, if and for as long as the jobholder is unable to use the electronic system." (emphasis added)

[26] See, for example, Article 13 'Service with proof of receipt by the defendant' of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure " [t] he European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods: (a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant; (b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of service; (c) postal service attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant; (d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant." (emphasis added)

[27] Article 9 of Regulation 45/2001, and the relevant guidelines provided by the European





Data Protection Supervisor;

<https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Papers/BackgroundP/11->

[28] See the letter of 27 March 2014 from the European Ombudsman to President Barroso in case 2310/2013/VL.

[29] <http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb>

[30] Article 10(1) of the European Code of Good Administrative Behaviour: "[t] he official shall be consistent in his or her own administrative behaviour as well as with the administrative action of the institution. The official shall follow the institution's normal practices, unless there are legitimate grounds for departing from those practices in an individual case. Where such grounds exist, they shall be recorded in writing ."