Recommendation in case 1959/2014/MDC on the European Commission's refusal to grant public access to the award evaluation forms concerning applications for co-funding of mechanisms for the processing of passenger name records

Recommendation
Case 1959/2014/MDC - **Opened on** 13/01/2015 - **Recommendation on** 20/12/2016 - **Decision on** 13/07/2017 - **Institution concerned** European Commission (Maladministration found) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The case concerns the European Commission's refusal to grant public access to the award evaluation forms drawn up to assess the applications of Member States for co-funding by the Commission of measures for setting up Passenger Information Units for the processing of passenger name record (PNR) data. The complaint was lodged by a Member of the European Parliament.

When denying access to the requested documents, the Commission relied on a judgment of the General Court relating to tender procedures which recognised the importance of maintaining the confidentiality of evaluation committees' proceedings. In that case, the Court ruled that disclosure of the opinions of the members of an evaluation committee would compromise their independence and thus seriously undermine the decision-making process of the institution concerned. The complainant considered that this judgment was inapplicable to an evaluation procedure concerning the assessment of applications for funding submitted by Member States.

Following the inquiry, the Ombudsman found that the Commission's refusal to disclose the requested documents was not justified. Moreover, there exists an overriding public interest in the disclosure of the requested documents.

The background to the complaint

1. On 26 March 2014, the complainant, who is a Member of the European Parliament, requested access to " *all Commission documents in which the application of Member States for co-funding by the Commission for setting up Passenger Information Units for the processing of passenger name record (PNR) data are assessed.* " The complainant specifically requested

documents containing information on "[t] *he allocation of points relating to the respective award criteria and the specific motivation for the allocation of points.* " The request covered both applications that were rejected and those that were accepted.

2. The Commission granted partial access to the requested documents. It identified the following categories of documents as falling under the request: (i) the Final report of the ISEC Evaluation Committee - 2012 Targeted Call for Proposals on PNR and its five annexes, and (ii) the Award evaluation forms for each project completed by at least one internal and one external expert.

3. The final report was disclosed with some personal data redacted. Access to the second category of documents was refused because, the Commission argued, disclosure would seriously undermine the Commission's decision-making process. Specifically, it argued that disclosing the documents would reveal preliminary views and policy options under consideration. The Commission considered that its services must be free to explore all possible options when preparing a decision and must not be exposed to external pressure in relation to those views.

4. The complainant submitted a confirmatory application [2] in which she challenged the refusal to disclose the second category of documents. In its reply to the confirmatory application, the Commission confirmed its refusal to grant access to the second category of documents. The Commission relied on the second subparagraph of Article 4(3) of Regulation 1049/2001 [3] (which relates to the protection of the Commission's decision-making process after the decision-making in question has ended). The Commission pointed out that the request had been treated as a request made by the complainant in her private capacity (and not in her role as an MEP). It added that Parliament may be given access to confidential information (which cannot be disclosed to the public) if an official request were made by Parliament.

5. The Commission explained that the documents are part of the Commission's preliminary assessment of grant applications made by Member States under the 2012 *Targeted call for proposals: Law enforcement cooperation through measures to set up Passenger Information Units in Member States for the collection, processing, analysis and exchange of Passenger Name Record (PNR) data* . The call was conducted under the Prevention of and Fight against Crime programme (ISEC) with the aim of supporting Member States that voluntarily intended to set up a national Passenger Information Unit for the processing of Passenger Name Record data on the basis of national law.

6. The Commission stated that the Member States' proposals were examined by an evaluation committee which decided whether to recommend a proposal for EU funding. The committee used experts who carried out detailed assessments. Altogether, 17 proposals were submitted to the Commission, of which at least 16 were examined by at least one Commission and one external expert. 14 proposals were eventually recommended for co-funding. The ISEC Evaluation Committee's conclusions are contained in the Final Report to which the complainant had been granted access.

7. The award evaluation forms were filled out by the experts. The ISEC Evaluation Committee then used them during their preliminary deliberations. The Commission argued that it is very important to protect the work of evaluation committees, and the experts contributing thereto, from external pressure. In fact, the Commission bases its decisions on the committee's opinions, which need to be objective and impartial. In the Commission's view, there is a concrete, immediate and reasonably foreseeable risk that public disclosure of the documents in the second category would seriously undermine the Commission's decision-making process.

8. The Commission explained that the documents contain the experts' opinions on the viability of each proposal. The opinions were given in the context of the evaluation process and were not meant for public use. It stated that " *there is a real and non-hypothetical risk that knowing that the evaluations might be made available to the public, including to the entities who submitted the evaluated proposals, experts would be less willing to express their opinions freely and frankly in future evaluations, leading to self-censorship. Moreover, without this degree of confidentiality, the experts may be subjected to external interference, which would undermine their independence and impartiality.* " As a result, it insisted that the effectiveness of the committee's work would be seriously undermined, as would the Commission's decision-making process.

9. In addition, the Commission stated that although the expert forms are taken into account by the evaluation committee, the evaluation committee enjoys discretion as to whether or not to recommend a proposal for funding. The ISEC Evaluation Committee expressed its definitive view in the Final Report which was disclosed to the complainant. It insisted that the Evaluation Committee's decision-making process would be exposed to public pressure if the expert opinions were made public, for instance, by unfounded questioning of its interpretation of the experts' evaluations. The committee has to have a 'space to think' and to explore all options before making a recommendation. Releasing the expert forms would lead to unwarranted conclusions on the respective merits of different proposals.

10. The Commission stated that its position was based on the General Court's ruling in Case *Sviluppo Globale GEIE v European Commission* (hereinafter, " *Sviluppo* ") [4] in which the General Court recognised the importance of confidentiality of the evaluation committees' proceedings. The Court ruled that disclosure of the opinions of the members of an evaluation committee in a tender procedure would compromise their independence, even after the evaluation committee had taken a decision. The Commission argued that, by analogy, this argument must also apply to the opinions of the experts, which form part of the basis for the opinions of the evaluation committee. In the same case, the court recognised the similarity between the work of evaluation committees in procurement processes and that of EPSO competition selection boards. The proceedings of both EPSO selection boards and of evaluation committees must be kept confidential in order to guarantee independence and objectivity.

11. As regards whether there was an **overriding public interest** in disclosure, the Commission noted that the complainant did not put forward any such interest in her confirmatory application and the Commission could not identify any possible overriding public interest in disclosure either. It said that considering the " *paramount role of EU funding in the*

advancement of the European Union's objectives, it is of vital necessity to ensure the independence and efficiency of proceedings of evaluation committees and the work of experts assigned by the Commission to undertake preliminary assessments in this framework. "

12. Finally, the Commission also examined the possibility of granting partial access to the requested documents. It took the view that no meaningful partial access could be granted without undermining the decision-making process. In particular, according to the Commission, " *experts and evaluation committees would not be able to foresee which parts of the experts' opinions would be disclosed to the public* ". This, in turn, presents a real risk of self-censorship as well as a deterioration of experts' and evaluation committee's impartiality and independence. In this respect, the Commission referred to paragraph 81 of the *Sviluppo* judgment [5] .

The inquiry

13. The Ombudsman first asked the complainant to give specific reasons for her view that the arguments put forward by the Commission were not sufficient and that the Commission had wrongly rejected her request. The Ombudsman asked the complainant to give her views on the judgment of the General Court in the *Sviluppo* case. The Ombudsman stated that while the present case did not concern the same type of procedure as was at issue in *Sviluppo* , the Commission's argument that the conclusions that the General Court reached in that case should apply by analogy to this case appeared, at first sight, to be reasonable.

14. In her reply, the complainant criticised the Commission's position. She argued, first, that the *Sviluppo* case cannot be applied to this case because it concerned a tender procedure and applied an approach followed in cases concerning personnel selection procedures . By contrast, this case concerns a procedure which is not of a competitive nature and in which the applicants are Member States, not private entities. The procedure is thus of a government-to-government nature, where citizens have a great interest in exercising public scrutiny. These fundamental differences also imply that, in this case, there is less risk for the experts to be exposed to external pressure. The experts would also be less inclined to self-censorship because there is no risk that their assessment could cause harm to private interests. According to the complainant, the sensitive nature of selection procedures and tender processes requires more discretion as they concern reputations of private persons and private companies. She added that " *experts might divert into self-censorship in fear of being identified as the person who criticised or preferred a certain candidate or tender over others, risking a bad relationship with individuals and companies that might consider themselves to be disadvantaged by them. For similar reasons, votes in the European Parliament concerning natural persons are not on roll-call.* "

15. Second, the complainant submitted that if the Commission wanted to protect the experts, it could, in any event, have disclosed the evaluation forms without disclosing the experts' names. Only their functions could have been mentioned.

16. Third, the complainant did not agree that the decision-making process could be *seriously* undermined by the disclosure of the documents. The Commission should not be afraid of

"unfounded questioning". Should there be "unfounded criticism", it would be easy for the Commission to dismiss it. On the other hand, the Commission should welcome any "founded questioning". Also, transparency can actually be regarded as a means of avoiding external pressure and of allowing one to verify that there was no undue influence. It can increase the quality of the expert assessment. The Commission did not precisely specify how an expert could be exposed to external pressure. Thus, according to the complainant, the Commission's assessment is entirely general and speculative.

17. Fourth, the complainant stated that, in any event, there is an overriding public interest in disclosure. The public has an interest in knowing how the Member States' proposals were assessed. Thus, the citizens can become familiar with the merits and weaknesses of the proposals. This interest is all the more important in an area where the EU has allocated a large amount of money and where citizens' fundamental rights are at stake. Also, in order to hold the Commission to account, it is important to know on what basis it took its decision. For instance, the public has the right to know whether the Commission invited a balanced panel of experts, consisting of experts in the field of police, justice and intelligence, as well as in the field of fundamental rights. Secrecy can only raise questions about the procedural approach taken by the Commission.

18. The Ombudsman's services then carried out an inspection of the Commission's file concerning this case. Following the inspection, the Ombudsman requested the Commission to submit an opinion on the following allegation and claim:

1) The Commission wrongly denied access to the award evaluation forms. This allegation was based on the following arguments: (i) the Commission's arguments for withholding the documents from public scrutiny are not convincing, and (ii) there is public interest in knowing how the Commission assessed Member States' applications. The way the Commission evaluated the proposals has directly influenced policy making in the Member States with a potentially serious impact on the fundamental rights and privacy of citizens.

2) The Commission should grant access to the award evaluation forms.

19. In her letter to the Commission, the Ombudsman drew the Commission's attention to the fact that in its reply to the complainant's confirmatory application, one of the arguments that it relied on in order to refuse access to the requested documents was that "[t] *here is a real and non-hypothetical risk that knowing that the evaluations might be made available to the public, including to the entities who submitted the evaluated proposals, experts would be less willing to express their opinions freely and frankly in future evaluations, leading to self-censorship* ". The Ombudsman stated that this argument is called into question by the fact that the experts knew that the final section of their evaluation (entitled "Conclusion of the evaluation") could be disclosed to unsuccessful applicants because of a specific note to that effect in the evaluation forms [6] . The Ombudsman added that, even if the public constitutes a much wider audience than the unsuccessful applicants, the fact remains that the experts were aware that their conclusions might be seen by other entities besides the Evaluation Committee. Moreover, if the evaluation conclusions are made available to the Member State applicants, there is a possibility

that they could be further disclosed under the national Freedom of Information legislation of the Member States.

20. 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 recommendation takes into account the arguments and opinions put forward by the parties.

Alleged wrongful denial of access to the award evaluation forms and the related claim

Arguments presented to the Ombudsman

21. In its opinion, the Commission referred to the detailed reasoning set out in the confirmatory decision. The Commission also stated that, contrary to what was argued by the complainant, the selection of the proposals was competitive in nature.

22. As for the Ombudsman's comment that the experts were aware that the 'Conclusion of the evaluation' section could be disclosed to unsuccessful applicants, the Commission noted that the possible disclosure applied to the final part of the individual experts' evaluation, (the Conclusions), not to the entire evaluation. Therefore, the experts carried out their evaluation under the assumption that all other sections of the evaluation would not be disclosed. The Commission also pointed out that, in the end, it was not the conclusions of the individual experts' evaluations that were disclosed to the ISEC Programme Committee and to unsuccessful applicants but " *a consolidated version of the 2 (or 3) evaluations, produced by DG HOME taking into account the individual experts' evaluations and the decisions made by the Evaluation Committee. These consolidated evaluations were annexed to the Evaluation Committee Report (as 'Annex V – Individual conclusions') and were already disclosed to the complainant.* "

23. Moreover, the Commission considered the Ombudsman's argument that, if the evaluation conclusions are made available to the Member State applicants, there is a possibility that they could be further disclosed under the national Freedom of Information legislation of the Member States to be hypothetical. In any event, it submitted that, as the documents in question have been authored by the Commission, the Member States concerned would need to apply their national rules for access to documents and, in all likelihood, consult the Commission in that process.

24. Finally, in response to the Ombudsman's argument that the experts were aware that their conclusions might be seen by other entities besides the Evaluation Committee, the Commission stated that if privileged access were given (to the CIPS/ISEC Programme Committee and to the unsuccessful applicants) this should not be confused with public access under Regulation 1049/2001. Moreover, the Commission stated that if the Ombudsman's argument were followed to its logical conclusion, every document originally intended to be shared in a limited circle would need to be shared with the public. The Commission referred to the judgment of the General Court in Case *Stichting Corporate Europe Observatory v Commission,* T-93/11 [7] in

which the Court held that a limited distribution to a certain pre-determined group cannot lead to the conclusion that the distributed documents should be rendered public.

25. The Commission concluded that it had handled the request for access correctly.

26. In her observations on the Commission's opinion, the complainant referred to her reply to the 'clarificatory inquiry' and reiterated that the selection process at issue in this case was not of a competitive nature since any Member State was in principle eligible for a grant when its PNR system fulfilled certain objective criteria, irrespective of whether or not other Member States qualified as well. According to the complainant, " *the experts would therefore not be subject to third party pressure to the same extent as cases where only one candidate, proposal or tender could win, as was the case in the Sviluppo Globale ruling. Therefore, the Sviluppo Globale case does not support the rejection of this complaint.* "

27. According to the complainant, the Commission failed to demonstrate a real and non-hypothetical risk of self-censorship in future evaluations if the requested documents were disclosed. If, when assessing the projects, the experts applied the objective criteria correctly, there would be no reason for them to resort to self-censorship. The integrity of experts cannot be guaranteed through secrecy. Rather, public scrutiny would serve as an incentive for any expert to provide for the most objective and best quality of advice possible.

28. According to the complainant, the Commission's arguments rely on the premise that it was never the Commission's intention to disclose the expert evaluations concerned. " *However, that in itself does not evidence any undermining of any protected interests, such as the decision-making process. The Commission's comment stating "if the Ombudsman's argument was followed to its logical conclusion, every document originally intended to be shared in a limited circle would need to be shared with the public", shows that the Commission is not appreciative of the point that under the EU transparency system, openness is the starting point in any case and secrecy is only justified when it would actually protect a specified legitimate interest. It is evident that there are cases where documents can be legitimately withheld from the public. However, it is also evident that, when the Commission cannot establish the actual undermining of a protected interest, documents should be disclosed, despite any initial intention of the Commission.* "

29. The complainant pointed out that the Commission failed to explain why the risk of self-censorship would still exist if the identity of the experts were not to be revealed.

30. The complainant reiterated her arguments concerning the existence of an overriding public interest in disclosure outlined in paragraph 17 above. In addition to those arguments, the complainant also referred to the (then) proposed EU PNR Directive [8] which proposed to make the setting-up of a PNR collection system obligatory. The complainant stated that, in line with the proposed Directive, Member States will no longer be able to apply for the co-financing of the costs of the setting up of national Passenger Information Units through the Internal Security Fund. According to the complainant, the public should be able to participate in the debate on the proposed EU PNR Directive. As the expert evaluation forms would inform the public about

criteria which were considered of relevance for the setting up of a PNR collection system, access to the evaluation forms would give the public the necessary information to actively participate in the debate. Therefore, there is an overriding public interest in disclosure of the expert evaluation forms.

The Ombudsman's assessment leading to a recommendation

31. The Ombudsman notes that the Evaluation Committee's Final Report and its annexes have already been disclosed. This case concerns the issue of whether the award evaluation forms, filled in by experts for the purposes of the evaluation made by the Evaluation Committee, should also be made public.

32. The Commission relies upon the judgment of the General Court in the *Sviluppo* [9] case to deny access to the requested documents.

33. In *Sviluppo* , the General Court ruled that the Commission was correct to refuse to grant public access to evaluation grids drawn up by each member of an Evaluation Committee in a tender procedure. The tender in question was aimed at selecting a service provider to assist the customs and tax authorities of Kosovo. One of the bidders was informed that its bid was unsuccessful because another bid was more “economically advantageous”. It was provided with the average of points awarded to it by the evaluation committee and the average points awarded to the winning bidder.

34. The Commission argued that disclosure of the **individual assessments** drawn up by each member of an Evaluation Committee would seriously undermine its decision-making process, since it would call into question the freedom of the members of the evaluation committee to express their opinions. Disclosure of their individual views would therefore endanger the independence and objectivity of the evaluation process in future similar cases.

35. When taking this view the General Court considered that the decision-making processes involved in tender procedures were very similar to those involved in selection procedures of personnel of the EU institutions because they both entail a comparative assessment of candidates in order to make a choice between them on the basis of specific criteria. The General Court took note of the fact that Article 6 of Annex 3 of the Staff Regulations, which governs such selection procedures, rules that the deliberations of selection boards are secret.

36. It is the Ombudsman’s view, however, that the Commission misinterprets the meaning and the scope of the *Sviluppo* case-law. The *Sviluppo* case-law does not establish any general presumption that access should be denied to an entire category of documents. It is also the Ombudsman’s view that the facts of the case under consideration are significantly different from the facts which gave rise to the ruling in *Sviluppo,* to such an extent that it cannot be argued even on an individual assessment of each of the requested documents, that disclosure of the documents would seriously undermine the Commission’s decision-making processes. Finally, the Ombudsman considers that there is, in any event an overriding public interest in disclosure of the documents.

37. Article 42 of the Charter of Fundamental Rights guarantees the right of EU citizens to access documents of the institutions. Regulation 1049/2001 itself expressly states that its purpose is to give **the fullest possible effect to the right of public access to documents of the EU institutions** . At the same time, certain public and private interests should be protected by way of exceptions to that right and the EU institutions should be in a position to carry out their tasks. Any exceptions must be both appropriate and necessary and, since they derogate from the general principle of the widest possible access to documents, **they must be interpreted and applied strictly** . It is, however, in principle open to an EU institution to base its decision refusing a request for access to documents on **general presumptions** which apply to **certain categories of documents** , as considerations of a similar kind are likely to apply to requests for disclosure in relation to documents of the same nature. If there is no general presumption that access to documents may be refused, it will be for the Commission to inspect each individual document and to decide whether access should be granted.

38. The case-law on general presumptions is essentially dictated by the overriding need to ensure that the administrative or judicial procedures at issue operate correctly and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain administrative or judicial procedures is incompatible with the proper conduct of such procedures and of the risk that those procedures could be undermined, on the understanding that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties. The application of specific rules provided for by a legal measure relating to a procedure conducted before an EU institution for the purposes of which the documents requested were produced is one of the criteria for recognising a general presumption [10] .

39. The Court of Justice has acknowledged the existence of general presumptions that access to documents is to be refused in five situations, namely in cases concerning: the documents in the administrative file relating to a procedure for reviewing State aid [11] ; the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control proceedings [12] ; the pleadings lodged by an institution in court proceedings [13] ; the documents relating to an infringement procedure during the pre-litigation stage of that procedure [14] ; and the documents in a file relating to a proceeding under Article 101 TFEU [15] .

40. The General Court has acknowledged the existence of general presumptions in four additional situations, namely in cases concerning: **the bids** submitted by tenderers in a public procurement procedure in the event that a request for access is made by another tenderer [16] ; the documents relating to an ‘EU Pilot’ procedure [17] ; the documents sent by the national competition authorities to the Commission pursuant to Article 11(4) of Regulation 1/2003 [18] ; and documents held by the European Chemicals Agency (ECHA) under the REACH Regulation relating to amounts of chemicals produced or imported [19] .

41. The recognition that an entire category of documents benefits from a general presumption that access is denied is important. It means that the public institution that is asked to release

documents falling within that category does not have to provide any concrete explanations, based on the content of the requested documents or on the relevant context, to justify why disclosure can be denied. Rather, if a general presumption applies, it is for the person seeking access to rebut the general presumption or, alternatively, to argue that there is an overriding public interest in disclosure.

42. It is evident from a careful reading of the *Sviluppo* case, however, that the General Court did not rule that there exists any general presumption that the category of documents at issue in *Sviluppo* , namely the individual evaluations of assessors in a tender process, fall within one of the exceptions set out in Article 4 of Regulation 1049/2001. The *Sviluppo* case-law does not, unlike **all of the cases** cited above, make any reference to the case-law on general presumptions. Nor does it expressly rule that a general presumption exists as regards the category of documents at issue, in *Sviluppo* . In fact, the term "general presumption" is not mentioned in the *Sviluppo* case. This is not surprising. The argumentation in *Sviluppo* is based on an analogy. The General Court noted in the case that there exists a rule in staff selection procedures that the deliberations of selection board must be secret so as to prevent interference with the work of the selection board. **No such legal rule imposing secrecy exists for the work of evaluation boards that evaluate tender bids** . The General Court then rules, **by analogy** , that the evaluation boards must also be protected from external pressure. This statement by the Court does not, however, imply that there exists a **general presumption** that access should be denied to these documents. Indeed, a general presumption has never been recognised to exist solely on the basis of an analogy with a rule **applying to a completely different procedure.** At most, the General Court was making the point that the rationale behind the secrecy of selection boards also applied to **the concrete examination of the documents** at issue in *Sviluppo* .

43. If there is no **general presumption** that access be refused, it will be for the Commission to inspect each individual document and to decide whether access should be granted. The outcome of this analysis will depend on **the specific content of the documents and the specific context in which they were produced and exist.** Specifically, in the case at hand, the Commission would be required to demonstrate, in order to refuse access, that it is reasonably foreseeable that pressure would be put on the Commission's evaluators if their individual assessments were released.

44. There are very convincing reasons why it is not reasonably foreseeable that such pressure will be exerted on evaluators **in a case such as this** .

45. In the *Sviluppo* case, the General Court was examining the assessments of assessors in a tender where there was a number of competing private bidders and one winner. It is reasonably foreseeable that losing bidders might wish to put pressure on the evaluators to improve their bids and to downgrade other bids. Indeed, the company seeking public access in *Sviluppo* was a losing bidder that was seeking to overturn the award of the tender to a competitor (by bringing an action for annulment to the General Court).

46. In this case, however, Member States were not competing with each other for funding.

They all obtained funding if they met the 65 points out of 100 threshold established by the Commission to obtain funding, within the limits of the budget allocated. While their total score did, it appears, determine the amount of funding they obtained, the scores of competing applicants did not affect their funding. Thus, **Member States were not competing with each other and had no incentive to lobby to reduce the scores of other Member States.**

47. Even if Member States might obtain some advantage in having their own scores improved, their situation cannot be compared to that of private bidders. Member States are required, by the Treaties themselves, to cooperate sincerely with the Union and its institutions. Article 4(3) TEU states that

" *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives ."

It would be inconceivable, in a Union governed by the rule of law, underpinned by this duty of sincere cooperation between Member States and the Union, to base a refusal to grant public access to a document, thus limiting the right of access to documents, which is a fundamental right under EU law, on the possibility that a Member State would interfere with the proper functioning of an EU institution. To adopt such an approach would be to accept that any such actions by a Member State could be tolerated. If such interference were to occur, it should be dealt with appropriately, in particular by the Commission, which has the specific duty to act as Guardian of the Treaties.

48. In brief, a derogation by an EU institution from a fundamental right, such as the right of public access to documents, can never be justified based on the (alleged) prospect that a Member State will act illegally.

49. The Ombudsman notes that the Commission has not provided any evidence or argumentation that **undue pressure** would be exerted on its evaluators from sources other than the Member States. As noted above, absent a general presumption that access can be denied, a refusal to grant access must be based on concrete and specific arguments and evidence showing that it is at least reasonably foreseeable that the alleged damage (in this case to the Commission's decision-making processes) will occur. Notwithstanding this, the Ombudsman agrees that it is indeed possible that third parties, such as the complainant, might criticise the evaluations of the Commission should they obtain access to the evaluations. The Ombudsman notes, in this respect, that there was significant opposition to the Commission's funding national PNR systems prior to the adoption of the PNR Directive. It is, however, necessary to emphasise that the EU courts do not consider that Article 4(3) of Regulation

1049/2001 (the protection of an institution's decision-making processes) applies if releasing the document would simply give rise to "external pressure" on an institution's decision-making processes. External pressure will often seek to improve decision-making (for example, by pointing out real errors in the decision-making and causing those errors to be corrected). External pressure will only be deemed to trigger Article 4.3 of Regulation 1049/2001 if it is "undue" external pressure. Such would be the case if external pressure were used to lobby a selection board to admit a candidate or to lobby an evaluation board to award higher marks to a non-deserving bid. It cannot be sustained that the pressure that might be exerted by civil society actors, who might criticise the Commission's PNR funding efforts, falls within this category.

50. Indeed, the fact that such external pressure might emanate from civil society groups (if access were given) is a justification (if such a justification were needed) as to why there is an overriding public interest in disclosure (see paragraphs 53-59 below).

51. It is also worth noting that undue external pressure is very unlikely to affect any given evaluation procedure unless the process in question is on-going, or subject to a review procedure or court procedure which might lead the process to be reopened. It is hardly useful to attempt to change the views of evaluators, through undue external pressure, if the decision-making process in question has definitively ended.

52. As regards whether evaluators might be led to exercise restraint in their evaluations if they feared that their individual (positive or negative) views might be revealed in the future, after the procedures have definitively ended, this can be easily dealt with by simply redacting the names of the evaluators (whilst releasing the evaluations).

53. It still needs to be examined if there is, in any case, an overriding public interest in the disclosure of the requested documents.

54 . The complainant argues, in her final observations to the Ombudsman, that there exists an overriding public interest in disclosure of the documents because the public have an interest in participating in a legislative process (on the adoption of the PNR Directive) and the disclosure of the documents at issue would serve to enhance their ability to participate in that process.

55. It is necessary to emphasise that the Commission cannot, at this stage, be criticised for not taking this argument into account when it originally refused access to the documents since this argument was not put forward by the complainant **until the Ombudsman's inquiry was underway** . The Ombudsman stresses, however, that her procedures are not analogous to court proceedings, where the only issue under consideration (in an access to documents case) is whether the institution's decision refusing access was valid. The Ombudsman is perfectly entitled to ask an institution to take into consideration, in the context of an Ombudsman inquiry, additional arguments as to why a document should be released.

56. It is also worth clarifying that while the legislative process concerning the PNR Directive has now ended (the Directive was adopted in April 2016), this does not mean that the Commission should not now evaluate if this alleged overriding public interest would have been relevant

during the period of time when the legislative procedure in question was on-going. To do otherwise would be tantamount to allowing the Commission to avoid the application of a public interest override by simply refusing to grant access until after the public interest in question had abated.

57. According to the complainant, " *the public should be able to participate in the debate on the proposed EU PNR Directive. As the expert evaluation forms will inform the public about criteria which were considered of relevance for the setting up of a PNR-collection system, access to the evaluation forms will give the public the necessary information to actively participate in the debate* ". Therefore, according to the complainant, there is an overriding public interest in disclosure of the expert evaluation forms.

58. Clearly, the evaluation of the PNR funding requests is not itself a "legislative process". However, it is very reasonable for the complainant, an MEP who was closely involved in the legislative file in question, to argue that the requested documents would have been relevant, alongside many other "background documents", in the legislative debate on the PNR Directive and that the public needed them to take part in that debate.

59. The Ombudsman has viewed copies of the documents and examined them carefully. As would be expected, the documents do discuss how a PNR system functions and do discuss relevant issues such as data protection measures. It is reasonable to consider that such information would be of relevance in a legislative debate on the adoption of an EU PNR system.

60. In light of the above, the Ombudsman finds the Commission was wrong not to disclose the requested documents and recommends that they be released now.

61. The Ombudsman notes the complainant's argument that the public has a right to know whether the Commission invited a balanced panel of experts (see paragraph 17 above). The complainant stated that if the Commission wanted to protect the experts, it could have kept their name secret and at least disclosed their functions.

62 . Having examined the award evaluation forms, the Ombudsman can confirm that the functions of the experts were not indicated anywhere in the forms. Solely their names were mentioned. The Ombudsman has noted, however, that it may be appropriate not to release the names of the evaluators to exclude any possibility that they feel pressured when making their evaluations.

63 . The names of the experts, in any event, constitute personal data. Article 8 of Regulation 45/2001 [20] provides that "*... personal data shall only be transferred ... (b) if the recipient establishes the* **necessity** *of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced* " (emphasis added). It was therefore up to the complainant to put forward reasons establishing that the disclosure of the experts' names was *necessary.* The complainant did not mention any reasons in her request for access to documents or in the confirmatory application.

Conclusion

Recommendation

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

The Commission should release the requested documents taking into account the redactions proposed for reasons of data protection.

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 a detailed opinion by 31 March 2017. The detailed opinion could consist of the acceptance of the recommendation and a description of how it has been implemented.

Emily O'Reilly

European Ombudsman

Strasbourg, 20/12/2016

[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] A confirmatory application is an appeal.

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

The second subparagraph of Article 4(3) of Regulation 1049/2001 reads as follows: "[a] *ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure* ."

[4] Judgment of the General Court of 22 May 2012, *Sviluppo Globale GEIE v European Commission* , T-6/10, ECLI:EU:T:2012:245.

[5] Judgment in *Sviluppo Globale GEIE v European Commission* , cited above , ECLI:EU:T:2012:245. Paragraph 81 reads as follows (translated from French): *"Partial disclosure of the evaluation grids in question would always involve this danger, in that it would*

be difficult for the persons concerned to foretell which parts of their opinions could, later on, be revealed to the public."

[6] The note states as follows: " *Please NOTE that this text will be sent to the CIPS/ISEC Programme Committee to obtain EU Member States representatives' opinion, as well as to unsuccessful Applicants to justify why their project proposals have been rejected* ."

[7] Judgment of the General Court of 7 June 2013, *Stichting Corporate Europe Observatory v Commission,* T-93/11, ECLI:EU:T:2013:308 (confirmed on appeal, Case C-399/13 P), paragraphs 36-39.

[8] This directive has now been adopted: Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [Link] , OJ 2016 L 119, p. 132.

[9] Judgment in *Sviluppo Globale GEIE v European Commission* , cited above , ECLI:EU:T:2012:245.

[10] See, to that effect, judgment of the General Court of 11 June 2015, *McCullough v Cedefop* , T-496/13, ECLI:EU:T:2015:374, paragraph 91 and the case-law cited therein; see also, to that effect, Opinion of Advocate General Cruz Villalón in *Council v Access Info Europe* , C-280/11 P, ECLI:EU:C:2013:325, paragraph 75.

[11] See judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau* , C-139/07 P, ECLI:EU:C:2010:376, paragraph 61.

[12] See judgments of the Court of Justice of 28 June 2012, *Commission v Éditions Odile Jacob* , C-404/10 P, ECLI:EU:C:2012:393, paragraph 123, and *Commission v Agrofert Holding* , C¤477/10 P, ECLI:EU:C:2012:394, paragraph 64.

[13] See judgment of the Court of Justice of 21 September 2010, *Sweden and Others v API and Commission* , C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:541, paragraph 94.

[14] See judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission* , C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738, paragraph 65.

[15] See judgment of the Court of Justice of 27 February 2014, *Commission v EnBW* , C¤365/12 P, ECLI:EU:C:2014:112, paragraph 93.

[16] See judgments of the General Court of 29 January 2013, *Cosepuri v EFSA* , T¤339/10 and T¤532/10, ECLI:EU:T:2013:38, paragraphs 100 and 101; and of 21 September 2016, *Secolux v Commission* , T¤363/14, ECLI:EU:T:2016:521, paragraph 48.

[17] See judgment of the General Court of 25 September 2014, *Spirlea v Commission* ,

T-306/12, currently under appeal, ECLI:EU:T:2014:816, paragraph 63.

[18] See judgment of the General Court of 12 May 2015, *Unión de Almacenistas de Hierros de España v Commission* , T-623/13, ECLI:EU:T:2015:268, paragraph 64.

[19] See judgment of the General Court of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA* , T-245/11, ECLI:EU:T:2015:675, paragraphs 174, 176 and 177.

[20] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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 L8, p. 1.