

Recommendation of the European Ombudsman on the European Commission's requirements for dealing with public access to documents requests in her inquiry into complaint 682/2014/JF

Recommendation

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(6) of the Statute of the European Ombudsman [1]

The European Commission refused to register an application for public access to documents made by an intern at Access Info Europe, a non-governmental organisation. The organisation turned to the Ombudsman complaining that the Commission requires too much information from those seeking public access to documents.

The Ombudsman agrees that the Commission is entitled to require applicants to provide their full name. The Ombudsman is not convinced that the requirement that all applicants must provide their postal address is in line with principles of good administration however. There are other ways of ensuring legal certainty, safeguarding personal data, avoiding abuse of the right to public access and ensuring the institution's limited resources are used as efficiently as possible.

The Ombudsman therefore recommends that the Commission register and deal with the application in question and that it no longer requires applicants to provide their full postal address, so long as a suitable alternative address for correspondence, such as an email address, is supplied. The Ombudsman also invites the Commission to consider alternative means of corresponding with applicants.

The background

1. In reply to a request for public access to documents, the Commission stated that it needed the applicant's name and surname, country of residence, and sector of activity to register the request.
2. The applicant believed that EU rules on public access to documents [2] do not require such information. She questioned how her sector of activity would be relevant for the Commission's



handling of her request. She also argued that giving the Commission her full name would be pointless as the Commission would not in any event be able to establish her identity with certainty because it did not ask her to provide a copy of her passport. She clarified, nonetheless, that she was a Polish citizen living in Sweden and working as an intern for the non-governmental organisation *Access Info Europe*.

3. The Commission refused to register the access request because the applicant had not provided the requested information.

4. In April 2014, *Access Info Europe* complained to the Ombudsman. It alleged that the Commission had wrongly refused to register the access request. It claimed that the Commission should register the request or clearly explain why it could not do so, having particular regard to the detailed arguments made by the applicant as to why she should not have been obliged to provide the requested information [3].

Allegation of wrongful refusal to register the application

The Ombudsman's proposal for a solution

5. The Ombudsman proposed a solution, based on the following analysis, taking into account the arguments and opinions put forward by the parties.

6. The EU institutions are expected to ensure the widest and easiest access possible to their documents, in a manner consistent with good administrative practice [4]. The question was thus whether the Commission does so when it asks applicants to provide their first name, surname, address, and activity sector.

On the refusal to register the application for access

7. In the complaint to the Ombudsman, the complainant - *Access Info Europe* - clarified that the application had been made on its behalf, that is, on behalf of a legal entity with a registered office in an EU Member State, which is also well-known to the Commission. On the basis of these clarifications, the Commission's reason for not dealing with the access request was no longer valid. However, the Ombudsman accepts that an applicant for public access to documents should give their name and an address for correspondence (which may be an email address) when making their request.

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

8. The Commission argued that all applicants must provide their postal addresses for reasons of legal certainty. When applicants request public access to a document, they are asking the EU institutions to make official 'decisions'. The Commission must be able to notify applicants of its decisions on access requests and the applicants must be able to challenge these decisions if they wish. 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 because "[i]n the absence of an acknowledgement of receipt it is not possible to ascertain whether the legal deadlines for redress had been respected" [5] .

9. The Commission regards the sending of a registered letter with acknowledgement of receipt to applicants' postal addresses to be a suitable method of giving notice, based on previous court rulings [6] . However, the Ombudsman was not convinced that this is the *only* means by which sufficient legal certainty can be ensured [7] . Communication has clearly evolved since the court rulings and modern communication is done mainly by e-mail, which is quicker, simpler to administer, essentially free of cost, and therefore fully in line with good administrative practice - or even preferable. Most general use e-mail systems have simple functionalities that allow senders to know when the e-mails have been received. Some institutions use dedicated e-mail systems to communicate decisions that affect the rights or interests of individuals. The European Personnel Selection Office ('EPSO') informs candidates participating in its recruitment competitions of their results through the online "EPSO Profile mailbox". The Commission and EU agencies communicate appraisal reports to members of their staff by electronic means and the period within which a complaint can be lodged begins once the message has been communicated [8] .

10. The Ombudsman did not consider the Commission to have validly explained why it would not be sufficient to use online or e-mail systems with certain security functionalities and/or specific requirements regarding the acknowledgement of receipt.

11. The Commission argued that the applicant's postal address is needed in order to ensure the privacy and the integrity of the individual, when a request concerns access to documents containing personal data.

12. However, the Ombudsman noted that the Commission requires all applicants to give their postal address, irrespective of whether the requested documents contain personal data.

13. The Commission also argued that the applicant's postal address is needed to avoid abuse. There are applicants who are not " *real* " and/or who submit numerous, split applications under different names, notably in the cases seeking access to numerous documents.

14. The Ombudsman agrees that applicants wanting access to documents should be honest and clear about their identity and that the EU administration is entitled to take appropriate and proportionate measures to prevent abuse. Where the Commission has legitimate doubts about the identity of a particular applicant, appearing to use a fake identity (or identities) or the identity of someone else, thereby abusing the public access rules, it would seem proportionate for the EU administration to seek to verify the identity of that applicant. The Commission could do so by, for example, asking for the applicant's postal address and sending a registered letter requiring an acknowledgement of receipt. The Commission could even ask for a copy of the applicant's identity documents. It is up to the Commission to evaluate, on a case-by-case basis, whether there are legitimate doubts about an applicant's identity or legitimate reasons to consider that the right to access is being abused.



15. However, the Ombudsman did not consider the Commission to have validly explained how the need to prevent abuse justifies *all* applicants having to provide their postal address. It seems unnecessary and inappropriate to operate on the assumption that an applicant is not acting in good faith and that some verification is necessary in every case. The right being exercised is that of public access to documents, not an exclusive right to the applicant.

16. Sending replies to access requests by e-mail would be unproblematic, particularly if access has already been granted and if the documents released do not contain personal data. The Ombudsman understands that the European Parliament uses e-mail in such cases, where the documents released do not contain personal data, for example.

17. The Ombudsman therefore concluded that the Commission's policy of requiring all applicants to provide their postal address is not in line with its obligation to ensure the easiest access possible to its documents, in a manner that is consistent with good administrative practice.

18. Finally, the Ombudsman noted that the Commission required applicants who submitted their access requests through the online form to give their "*Business domain*" even though it registered applications by e-mail without that information having been provided. The Ombudsman found this practice inconsistent.

19. In light of the above, the Ombudsman proposed, on 15 September 2015, as a solution to the complaint that *the Commission*

(i) register the application... 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.

The Commission's reply regarding its refusal to register the access request

20. In reply to the proposed solution, the Commission stated that it had not been aware that the access request had been made on behalf of the complainant (*Access Info Europe*) before the complaint was made to the Ombudsman [9]. The Commission had thus not had an opportunity to "*address and resolve this issue*" before the Ombudsman started her inquiry. In any event, even though the Commission had become aware of the applicant's identity during the inquiry, it had not become aware of the postal address. The applicant's postal address was a necessary condition for registering the access request and the Commission needs to be sure that the



address is correct, even for recurrent applicants.

The Commission's reply regarding its general policy on information required from applicants making requests for public access to its documents

21. The Commission stated that it is bound by the EU Courts' findings that the "*simple functionalities included even in general use e-mail systems*", as referred to by the Ombudsman, are not sufficient. In any event, replying to applicants by e-mail and requesting them to acknowledge receipt by means of an e-mail reply would not be "*practicable nor adequate*" to ensure legal certainty, as the Commission receives "*over 300 confirmatory requests*" every year. Requests for access to documents are administrative requests and, in most jurisdictions, citizens have to give their address when making such requests to their national administrations.

22. The Commission did not rule out introducing a system similar to that used by EPSO in the future. However, it considered that the current practice is more proportionate given the creation of an EPSO profile requires more information than the Commission asks for to register access requests (e.g. date of birth, gender, citizenship and main language).

23. Regarding its staff appraisal reports, the Commission communicates them through an internal IT system. The EU legislation that allows for notification of decisions by electronic means also requires acknowledgement of receipt of comparable evidential value as those delivered by personal or postal services. In any event, the Commission's practice is "*clearly not unreasonable*" in light of that legislation.

24. The Commission concluded that its practice is in line with the case-law of the EU Courts and the principles of legal certainty and proportionality.

25. Finally, the Commission explained that it has changed its online form to make it optional for applicants to give information about their "*Business domain*".

The complainant's comments

26. According to the complainant, the Commission has acknowledged in the past that its practice of asking for the applicants' postal addresses was based on one case of abuse only [10]. The complainant emphasised that the purpose of EU rules on public access to documents is to ensure the easiest possible exercise of the right to public access and these rules require the EU administration to "*develop good administrative practices in order to facilitate the exercise of the right of access*" [11]. Also, applicants may choose their preferred means of access, such as getting access in electronic form [12]. Many applicants prefer receiving documents by e-mail. Sending replies both by e-mail and by registered post in such situations is an unnecessary cost. The complainant also contended that, contrary to the Commission's claim, citizens are not required to give their postal addresses when requesting public access to documents in a majority of countries across Europe.

27. The complainant acknowledged the Commission's need to ensure that its replies to access



requests are properly delivered and that it could be a challenge to ensure this with e-mails. The complainant suggested that the Commission look at technical solutions such as the European Medicines Agency's Eudralink, or that it consider a system similar to that often used to register with online services and/or for changing passwords [13] . Such a system would not be difficult to implement from an IT perspective, would allow the sender's e-mail address to be verified and would make it unnecessary to send documents by registered mail.

28. The complainant welcomed the Commission's decision to make it optional for applicants to give information about their "*Business domain*".

The Ombudsman's assessment after the solution proposal

On the complainant's access request

29. This inquiry concerns the specific issue of how the Commission dealt with the complainant's access request, but also the general issue of what information an applicant for public access to documents should have to give to the Commission for it to process an access request. The general issue is closely linked to the obligation for the Commission to ensure the widest and easiest access possible to its documents, in a manner consistent with good administrative practice. [14] The Ombudsman has already acknowledged that it is good administrative practice for the Commission to require an applicant to give their *name* .

30. There are two main reasons for the Commission requiring an applicant to give a *postal address* . Firstly, the Commission wants to make sure that the applicant receives the reply, mainly so that the applicant can take follow-up action in response to a decision if they so wish. Secondly, the Commission wants to avoid abuse of EU rules on public access to documents.

31. The Commission acknowledges that, through the Ombudsman's inquiry, it now knows that the relevant access request was made on behalf of *Access Info Europe* . However, the Commission claims that it still does not have the complainant's **postal address** and that it therefore cannot register the request for access. Beyond the issue of whether the Commission is entitled to require a postal address, this statement is not factually correct: the complaint which the Ombudsman forwarded to the Commission clearly indicates the complainant's postal address on the first page. Against this background, the Commission's continued failure to register the request and respond to it amounts to maladministration.

32. In light of the above, the Ombudsman will recommend [15] that the Commission promptly registers and deals with the access request.

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

33. The Ombudsman is not convinced that the Commission needs *all* applicants to give their postal addresses to ensure legal certainty (that is, proper notification of its decisions so that the applicants may challenge them) and to avoid abuse.



34. The case-law referred to by the Commission does not rule out the possibility of communicating decisions by e-mail or other online systems. What is important is to be able to prove that the applicant received a decision [16] . Other case-law clearly suggests that acknowledging receipt by e-mail would be sufficient [17] .

35. The Commission argues that asking applicants to confirm receipt by e-mail replies would not be practical or adequate to ensure legal certainty because of the high number of confirmatory applications it deals with each year [18] .

36. However, the Ombudsman is not convinced by the Commission's claim that replying to a high number of confirmatory applications *by registered post* is less onerous than taking note of *electronic acknowledgements of receipt* of its decisions. Replying to confirmatory applications by electronic or online means would appear to be less cumbersome, and more time and cost efficient than handling correspondence sent and received by registered post.

37. As stated in her proposal for a solution, the Ombudsman acknowledges that the Commission's resources should be used to serve “ *real* ” applicants and that it is entitled to take appropriate and proportionate measures to prevent abuse of EU rules on public access to documents. The Ombudsman also acknowledges that the Commission should ensure compliance with data protection laws. However, the Commission has not validly explained how asking *all* applicants to provide their postal address would be justified by, and proportionate to, the need to prevent abuse and/or to respect data protection laws.

38. In light of the above, the Ombudsman does not find it justified for the Commission to insist on a postal address from everyone requesting public access to its documents, when a suitable alternative address for correspondence is provided, given that such a policy does not ensure the widest and easiest access possible in a manner consistent with good administrative practice . Requiring all applicants to give their postal address is thus maladministration and the Ombudsman will recommend [19] the Commission to change its policy.

39. The Ombudsman notes that there are clearly various means of electronic communication that the Commission could consider to ensure the easiest possible access to its documents, in a manner consistent with good administrative practice [20] . The Ombudsman welcomes that the Commission does not rule out introducing an online system in the future, similar to that used by EPSO. EPSO clearly considers this system to be compliant with EU law. Such a system would not automatically mean that applicants should have to provide as much information as required by EPSO, as suggested by the Commission, given that a lot more information is needed from someone applying to participate in a recruitment competition than from someone requesting public access to documents. Other means of ensuring proper receipt of decisions on access requests have been suggested by the complainant in this case (see annex). The Ombudsman therefore invites the Commission to further consider putting in place an electronic system for communicating decisions on access requests.

40. Finally, the Ombudsman welcomes that the Commission ended the requirement for



applicants to list their “ *Business activity* ”.

The recommendation

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

The Commission should

- (i) register the application and deal with it promptly; and**
- (ii) no longer require all applicants to provide their postal address, if a suitable alternative address for correspondence is supplied.**

Suggestion for improvement

The Ombudsman invites the Commission to consider alternative online systems or electronic means of communicating its decisions on access requests.

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.

Strasbourg, 16/12/2016

Emily O'Reilly European Ombudsman

Annex

The complainant suggested the following system of dealing with requests for access:

“ 1. The Commission receives a request for access to EU documents via email (or for example via AsktheEU.org).

2. The Commission sends an (automatic) email with a unique link. For the request to be registered and processed, the requester clicks the link and is taken to a web page with some kind of confirmation message.

3. At the same time as taking you to a confirmation message, another automatic email is sent that confirms the registration number and provides other information typical in the current acknowledgements sent by the Commission and other EU bodies, such as the time frame and information on how to appeal. Information could be provided about who to contact (by phone



as well as by email) if an answer is not received in 15 working days. All this information could also be contained in the web page confirmation message.

4. Given that the email has been confirmed by this mechanism, it is safe to assume that further correspondence will also be successfully delivered. In any case, the Commission could include a link in the final decision that the requester clicks on to confirm receipt. The system could even schedule an automatic resend after 5 days if the requester fails to confirm receipt.

Here a further transparency innovation is possible: at the time of making the request (at stages 2 and 3), the requester could also be informed that any documents released in response to their request will be made proactively available on line. This would achieve the double goal of increasing levels of proactive publication and ensuring that if the requester cannot find the email, they know where to look to see if information has been published (this works well with AsktheEU.org: some requesters check their emails for messages, others simply go to the web page where all the information is public). It goes without saying that any documents released should also automatically be included in the register of documents. "

[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] Article 6(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) 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. "

[3] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal available at:

<http://www.ombudsman.europa.eu/en/cases/solution.faces/en/74051/html.bookmark>

[4] 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. "



[5] The quote is from the Commission's submission. Article 8(1) of Regulation 1049/2001: " 1. [1] *n the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman...* "

[6] 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 in as much 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...* "

[7] 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.

[8] See, for example, Article 7 'Appeal procedure' of Annex I to 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) The annex is available here: <http://ec.europa.eu/transparency/regdoc/rep/3/2015/EN/3-2015-1456-EN-F1-1-ANNEX-1.PDF> [Link]

[9] The Commission referred to Article 2(4) of the Ombudsman's Statute: "[a] *complaint... must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.* "

[10] The complainant referred to a written answer from the Commission to an MEP. The written question and the Commission's answer are available here:

<https://juliareda.eu/2015/06/singular-abuse-of-freedom-of-information/>

[11] Article 1(b) and Article 15(1) of Regulation 1049/2001.

[12] Article 10(1) of Regulation 1049/2001.



[13] See annex.

[14] 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.”

[15] On the basis of Article 3(6) of the Ombudsman’s Statute.

[16] In Case T-411/06 *Sogelma v EAR* , ECLI:EU:T:2008:419, the General Court ruled that “ 78 [I] t must be observed that the EAR could have chosen a means of communication which enabled it to establish accurately the date on which the letter reached the tenderer. It is true that the EAR asked the applicant, in its e-mail of 9 October 2006, to confirm by e-mail receipt of the message. However, it did not receive such confirmation. It is clear that, if the sender of an e-mail who does not receive any confirmation of receipt takes no further action, he is normally not able to prove that that e-mail was received and, when necessary, on which date. ” (emphasis added)

[17] In Case T-167/10 *Evropaiki Dynamiki v European Commission* , ECLI:EU:T:2012:651, the General Court ruled that “ 49 [t] here is no evidence enabling it to be established that the applicant’s IT system guarantees proper receipt of the e-mail by its intended recipient in the same way as, for example, the intended recipient’s signature or the signature of a person recognised as competent for that purpose in the event of a notification carried out by an express delivery service with acknowledgment of receipt.

50 In the present case, such proof could have been provided by, for example, a reply by e-mail sent by the intended recipient of the document ... ” (emphasis added)

[18] “[T] he Commission receives over 300 confirmatory requests on an annual basis. At such high number of requests, a system whereby the Commission would ask each applicant to confirm receipt by replying is neither practical nor adequate to ensure legal certainty...”

[19] On the basis of Article 3(6) of the Ombudsman’s Statute.

[20] Article 1 of Regulation 1049/2001.