

Decision in case 2310/2013/JAS on the European Commission's handling of a request for public access to a document related to the interpretation of the "whistleblowing" rules in the EU Staff Regulations

Decision

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

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

The Ombudsman was not convinced by the Commission's reasons for refusing access and she therefore recommended the Commission to grant public access to the full Legal Opinion.

Following receipt of the Ombudsman's recommendation, the Commission agreed to grant access to significant parts of the Legal Opinion. It maintained, however, that access to the remaining parts would undermine the protection of legal advice.

The Ombudsman remains unconvinced by the Commission's arguments for not granting full access to the Legal Opinion, particularly in view of the overriding public interest in disclosure. She therefore concludes that the Commission's refusal to give full access to the Legal Opinion constitutes maladministration.

The background

1. In September 2013, the complainant, a German national, asked for public access [1] to an opinion of the European Commission's Legal Service (the "Legal Opinion"). The Legal Opinion contains an analysis of the scope of the "whistleblowing" rules in the EU Staff Regulations [2] in cases where members of staff of an EU institution report alleged irregularities in *another* EU institution. The Commission granted partial access to the Legal Opinion but redacted all substantive parts [3] .

2. The complainant then asked the Commission to review its decision not to give full access to the Legal Opinion (making a so-called confirmatory application [4]). The Commission refused to



deal with the review request because it said it had doubts about the complainant's identity. The complainant then turned to the Ombudsman. The complainant was concerned that the Commission had wrongly refused to deal with his review request and had failed to grant him full access to the Legal Opinion. The complainant wanted the Commission to apologise for the delay caused and to grant him full access to the Legal Opinion without further delay.

3. Following a solution proposal by the Ombudsman, the Commission dealt with the complainant's review request and provided a substantive reply. The Ombudsman was not convinced by the Commission's substantive response and she therefore made the recommendation [5] to the Commission that it should grant full access to the Legal Opinion (see below). The present decision takes into account the Commission's detailed opinion on the Ombudsman's recommendation, as well as the complainant's comments.

Complaint that the Commission failed to grant access to the requested document

The Ombudsman's recommendation

4. In response to the complainant's review request, the Commission stated that it could grant only very limited access to the Legal Opinion due to the need to protect both **legal advice** [6] and its **decision-making process** [7]. The Commission also found that there was **no overriding public interest in disclosure**.

5. In her **recommendation**, the Ombudsman took the view that the Commission had not explained how precisely its capacity to request and receive **legal advice** would be impaired by full disclosure of the Legal Opinion [8]. Nor was she convinced by the Commission's argument that the Legal Opinion should be covered by the exception protecting the **decision-making process** [9].

6. Finally, the Ombudsman considered that, in any event, there was an **overriding public interest in the disclosure** of a document that generally and thoroughly analyses certain aspects of the whistleblowing rules and thereby seeks to clarify the Commission's understanding of the duties of staff members [10].

7. The Ombudsman thus found that the Commission's decision not to disclose the substantive part of the Legal Opinion constituted maladministration. The Ombudsman made the following recommendation to the Commission:

The Commission should grant full access to the Legal Opinion.

8. In reply to **the Ombudsman's recommendation**, the Commission stated that it had made a new assessment of the withheld parts of the Legal Opinion and had decided to grant partial access to paragraphs 2, 3, 5 and 6. However, the remaining parts of the Legal Opinion were still covered by the exception protecting legal advice.

9. The Commission also argued that the parts of the Legal Opinion originally not disclosed fell



outside the scope of the complainant's access request.

10. In conclusion, the Commission argued, its decision not to disclose these parts was thus, at the point in time it was taken, fully in line with the applicable legislation and the relevant case-law on access to documents.

11. In his comments, the **complainant** criticised that the Commission had not addressed the overriding public interest in disclosure identified by the Ombudsman. He maintained that he should be granted full access to the document.

The Ombudsman's assessment after the recommendation

12. The Ombudsman notes that the Commission has now agreed to disclose roughly two thirds of the Legal Opinion, thereby partly complying with the Ombudsman's recommendation, albeit that the Commission maintains that it was justified in original decision.

13. However, the Commission did not, as it argues in its reply to the Ombudsman's recommendation, in fact withhold certain parts of the Legal Opinion because it considered them to fall outside the scope of the complainant's access request. Whilst that reflects the Commission's initial position on the original request, the Commission explicitly acknowledged, in its decision on the complainant's review request, that the complainant "*requested access to the Legal Service Opinion*", that is, to the full Legal Opinion. The Commission could thus refuse public access to the Legal Opinion, or parts of it, only if an exception to public access were to apply.

14. In that regard, the Commission argued that disclosure of the withheld parts of the Legal Opinion would undermine the **protection of legal advice** as "*that disclosure [...] would put in the public domain internal opinions on highly sensitive issues, concerning potential conflicts between Union bodies, discussed in the context of the 'whistleblower' provisions of the Staff Regulations, drafted under the responsibility of the Legal Service and intended for internal use as part of the preliminary consultations within the Commission . In addition to being highly sensitive, the Legal Opinion dealt with a matter which had a wide scope and went beyond the significance of the case to which the note refers.*"

15. Having again reviewed the Legal Opinion, the Ombudsman fails to see how the withheld parts, compared with the parts disclosed by the Commission, would concern particularly sensitive issues. While it might be true that the matter dealt with in the document has a wide scope, going beyond the specific case at hand, the Commission did not give a detailed statement of reasons why this would prevent it from disclosing certain parts of the document [11] . Furthermore, the Ombudsman does not agree that those parts of the Legal Opinion that the Commission withheld concern matters of considerably wider scope than those parts of the Legal Opinion that the Commission has now disclosed, but rather the opposite, because they concern a specific matter.

16. Finally, the Ombudsman regrets the fact that the Commission has failed to address her



position that **even if the Legal Opinion were to be partly covered by a relevant exception, the exception would in any event be overridden by the significant public interest in disclosure**.

17. The Ombudsman therefore maintains her view that the Commission should have granted full public access to the Legal Opinion.

Conclusion

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

By disclosing parts of the Legal Opinion, the European Commission has partly fulfilled the Ombudsman's recommendation. However, the Commission's continuing refusal to grant full access to the Legal Opinion still constitutes maladministration.

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

Strasbourg, 20/06/2017

Emily O'Reilly European Ombudsman

[1] The complainant had requested public access on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

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

[3] 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 recommendation available at: <https://www.ombudsman.europa.eu/cases/recommendation.faces/en/72071/html.bookmark> [Link]

[4] Article 7(2) of Regulation 1049/2001.



[5] The Ombudsman's recommendation is available at:
<https://www.ombudsman.europa.eu/cases/recommendation.faces/en/72071/html.bookmark>
[Link]

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

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

[8] Paragraphs 17-23 of the recommendation.

[9] Paragraphs 24-29 of the recommendation.

[10] Paragraphs 30-35 of the recommendation.

[11] See Judgment of the Court of Justice of 1 July 2008, *Sweden and Turco v Council*, Joined cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, paragraph 69.