

Decision in case 861/2017/PL on the European Commission's refusal to give public access to all documents related to two infringement procedures against the United Kingdom on how it applies the 'Free Movement Directive'

Decision

Case 861/2017/PL - Opened on 16/06/2017 - Decision on 19/12/2017 - Institution concerned European Commission (No maladministration found) |

The case concerned the European Commission's refusal to grant public access to all documents related to two infringement procedures against the United Kingdom on how it applies the 'Free Movement Directive', following a request by a Member of the European Parliament, Sophie in 't Veld.

The Commission justified its decision to deny access to the requested documents by citing the need to protect the ongoing infringement procedures. It considered that there was no overriding public interest in disclosing the documents. The complainant disagreed and turned to the Ombudsman.

The Ombudsman opened an inquiry and inspected the files on the two infringement procedures. She confirmed that the procedures were still ongoing and could be undermined by the disclosure of the documents. Based on her inspection of the documents, she considered that there were no overriding public interests justifying the disclosure of the documents. Thus, she concluded that there had been no maladministration in refusing access.

Background to the complaint

1. In 2011 and 2012, the European Commission launched two infringement procedures [1] against the UK regarding its application of the Free Movement Directive 2004/38/EC [2] . The infringement procedures concern, among matters, the UK's restrictive interpretation of the requirements for recognising permanent residency.

2. In April 2012, the Commission announced that it was giving the UK *"two months to comply with European Union rules on the free movement of EU citizens and their families across the EU or face an EU court case"*. [3] However, in 2017, in reply to questions from the European



Parliament, the Commission stated that the infringement procedures were still ongoing.

3. On 9 March 2017, the complainant, Member of the European Parliament Sophie in 't Veld, asked for public access to all of the Commission's documents related to the two infringement procedures.

4. On 29 March 2017, the Commission refused access to the requested documents, justifying its decision under the provisions of the EU's regulation on public access to documents by stating that disclosure would undermine the ongoing infringement procedures [4]. The Commission also considered that there was no overriding public interest in disclosing the documents.

5. The complainant asked the Commission to review its decision by making a 'confirmatory application' [5]. On review, the Commission confirmed its decision to refuse public access to all the requested documents. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman.

The inquiry

6. The Ombudsman opened an inquiry into the complaint that the Commission had wrongly refused to grant public access to the documents related to the infringement procedures against the United Kingdom on the application of the Free Movement Directive (NIF/2011/2054 and NIF/2012/4106).

7. The Ombudsman inspected the relevant files. The Ombudsman's decision takes into account the arguments and views put forward by the parties.

The Commission's failure to grant access to the requested documents

Arguments presented to the Ombudsman

8. The complainant argued that the Commission had failed to explain how disclosing the requested documents would "specifically and actually" undermine the ongoing procedures. [6] She claimed that there was an overriding public interest in disclosure given the uncertainty about the situation of citizens from other EU Member States living in the UK, particularly following the formal notification by the UK of its intention to withdraw from the EU.

9. In its final reply, the Commission confirmed its refusal to grant full or partial access to the requested documents. It argued that EU case law had found that the Commission was justified in applying a general approach of non-disclosure to documents in ongoing infringement proceedings. [7] Thus, it is not required to carry out a specific and individual assessment of the content of each requested document.



10. The Commission also argued that there was no overriding public interest in granting access to the requested documents. It stated that citizens from other EU Member States living in the UK *“do not need to have access to the documents of the infringements procedure in order to know what their current rights are. As to their situation after the withdrawal that will depend on the terms of the withdrawal agreement; the documents of the infringement procedure cannot possibly give information as to what the provisions of that agreement, for which the negotiations have not yet started”*.

The Ombudsman's assessment

11. EU institutions may refuse requests for public access to documents based on a ‘general presumption’ of non-disclosure for certain categories of documents [8] . One of these categories includes documents from infringement procedures at a ‘pre-litigation stage’ [9] . EU case law [10] has found that a general presumption of non-disclosure means that the institution concerned does not have a duty to assess how the documents in question specifically and individually undermine the protected interest.

12. However, the Ombudsman considers that if the Commission was not actively handling an infringement case, the above presumption could be called into question.

13. The Ombudsman inspected the files on the two infringement procedures. The inspection confirmed that both infringement procedures are still ongoing and the Commission is actively working on them. In particular, the case team examined internal documents and correspondence, which confirm that the files are active. The latest documents were from the end of June 2017, after the date of the request.

14. It follows that the Commission was entitled to refuse access to the requested documents, applying the general presumption that disclosing them would likely undermine the ongoing infringement procedures [11] .

15. Even if a general presumption applies, the documents should nevertheless be released if there is a clear public interest in disclosure, which overrides the general presumption of non-disclosure. To this end, the complainant had argued that the disclosure of the documents was justified by *“the interest of more than 3 million European citizens in the UK who need to know urgently what their situation is, especially in light of the official notification of Brexit under Article 50 (...)”*.

16. The complainant argues, first, that the disclosure of these documents would bring clarity to citizens from other EU Member States currently residing in the UK and, second, that this information is particularly important in view of the UK’s planned withdrawal from the EU.

17. Having inspected the documents, the Ombudsman considers that disclosure would not address these public interest arguments.



18. The Ombudsman accepts that the documents would not provide citizens from other EU Member States currently residing in the UK with information regarding the current situation in terms their rights under the EU Treaty and the Free Movement Directive. There is therefore no overriding public interest in disclosure on those grounds.

19. As to the rights of EU citizens following the UK's withdrawal from the EU, the Ombudsman notes that negotiations between the UK and the EU are ongoing. Disclosing the requested documents would not meet the public interest of clarifying the rights of EU citizens living in the UK following the UK's withdrawal from the EU.

20. The Ombudsman therefore finds that there is no clear, overriding public interest to displace the general presumption and justify disclosing the requested documents. Thus, she concludes that the Commission's decision to refuse access to the requested documents was not in breach of Regulation 1049/2001.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion :

There was no maladministration by the European Commission in refusing to give public access to the documents related to two infringement procedures against the United Kingdom on how it applies the Free Movement Directive.

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

Emily O'Reilly European Ombudsman

Strasbourg, 19/12/2017

[1] NIF/2011/2054 and NIF/2012/4106

[2] Directive on on the right of EU citizens and their family members to move and reside freely within the territory of the member states

[3] EC Press Release from 26 April 2012,



http://europa.eu/rapid/press-release_IP-12-417_EN.htm [Link].

[4] Regulation (EC) No 1049/2001 on public access to EU documents enables EU institutions to refuse access to documents for the purpose of protecting 'inspections, investigations and audits', Article 4(2) third indent of Regulation (EC) No 1049/2001, OJ 2001 L 145, p. 43.

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

[6] Judgement of 4 May 2012, *Sophie in 't Veld, v Council*, Case T-529/09, ECLI:EU:T:2012:215.

[7] Judgment of 14 November 2013, *LPN and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

[8] See judgment of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486 ('ClientEarth'), paragraph 77 and the case-law cited.

[9] The pre-litigation stage in an infringement procedure is when the procedure has neither been closed by the Commission nor brought before the Court of Justice.

[10] See 'LPN and Finland v Commission' paragraph 45, and the case-law quoted.

[11] See footnote 6