



Recommandation concernant le refus de la Commission européenne d'accorder un accès public aux SMS échangés entre la présidente de la Commission et le PDG d'une entreprise pharmaceutique concernant l'achat d'un vaccin contre la COVID-19 (affaire 1316/2021/MIG)

Recommandation

Affaire 1316/2021/MIG - **Ouvert le** 16/09/2021 - **Recommandation le** 26/01/2022 - **Décision le** 12/07/2022 - **Institution concernée** Commission européenne (Mauvaise administration constatée) |

Le plaignant a demandé à la Commission européenne l'accès public à des SMS et d'autres documents relatifs à des discussions entre la présidente de la Commission et le PDG d'une entreprise pharmaceutique concernant l'achat de vaccins contre la COVID-19. La Commission a indiqué qu'elle ne pouvait donner accès à aucun SMS, étant donné qu'aucun enregistrement de ce type de message n'avait été conservé.

Dans le cadre de l'enquête de la Médiatrice, il est apparu que la Commission ne considère pas les SMS comme relevant généralement de ses critères internes en matière d'enregistrement de documents, du fait du caractère prétendument «éphémère» de leur contenu. Dans le cadre du traitement de la demande, elle avait demandé au cabinet de la présidente de la Commission d'identifier uniquement les documents qui répondent à ses critères en matière d'enregistrement. En conséquence, le cabinet de la présidente de la Commission n'a tenté d'identifier aucun SMS, de sorte que la Commission n'a pas évalué si ces messages devaient être divulgués.

La Médiatrice estime qu'il s'agit là d'un cas de mauvaise administration. Pour y remédier, elle a recommandé à la Commission d'inviter le cabinet de sa présidente à renouveler sa recherche de SMS pertinents, en précisant que la recherche ne devait pas se limiter aux documents enregistrés ou aux documents qui répondent à ses critères en matière d'enregistrement. Si des SMS devaient être identifiés, la Commission devrait évaluer, au regard du règlement 1049/2001, si le plaignant peut obtenir un accès public à ces derniers.

Made in accordance with Article 4(1) of the Statute of the European Ombudsman [1]
Background to the complaint

1. In April 2021, the New York Times published an article [2] in which it reported that the Commission President and the chief executive (CEO) of a pharmaceutical company had



exchanged texts and calls related to the procurement of COVID-19 vaccines and that *“that personal diplomacy [had] played a big role in a deal, to be finalized [that] week, in which the [EU] will lock in 1.8 billion doses (...)”*.

2. On 4 May 2021, the complainant, a journalist, asked the Commission for public access [3] to *“t ext messages and other documents relating to the exchange between [the Commission President] and [the CEO]”* mentioned in the New York Times article.

3. The Commission identified three documents as falling within the scope of the complainant’s request: an email, a letter and a press release. It gave the complainant wide access to those documents, redacting only limited personal data.

4. On 28 May 2021, the complainant asked the Commission to review its decision (by making a ‘confirmatory application’). Specifically, the complainant contested that no text messages had been identified by the Commission.

5. In July 2021, the Commission issued a confirmatory decision. It said that it had carried out a renewed thorough search and confirmed that it does not hold any additional documents that would correspond to the complainant’s access request.

6. Dissatisfied with the Commission’s reply, the complainant turned to the Ombudsman. The inquiry

7. The Ombudsman opened an inquiry in September 2021 into the complainant’s concern that the Commission failed to identify and disclose the text messages to which he is seeking access.

8. In the course of the inquiry, the Ombudsman inquiry team met with representatives of the Commission to obtain further information on the case. Subsequently, the inquiry team drew up a meeting report (available below) [4] that was shared with the complainant who then provided his comments. The Ombudsman’s inquiry team also reviewed documents detailing how the Commission had handled the public access request.

Arguments presented

9. The complainant said, in essence, that text messages should be considered documents under the EU’s rules on public access to documents. The complainant noted that the Commission had not disclosed whether the text messages in question exist or have existed. In light of the New York Times article, he considered it to be likely that the exchanges at issue had indeed taken place. He therefore argued that the Commission failed to identify all documents falling within the scope of his access request.

10. In its reply, the Commission said that the right of public access applies only to existing documents in the possession of the institution. The Commission also said that it was *“not obliged to preserve each and every document”*. The Commission referred to its decision on records management that sets out that *“[d]ocuments shall be registered if they contain*



important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments". The Commission took the view that "[a] text message or another type of instant messaging is by its nature a short-lived document which does not contain in principle important information concerning matters relating to policies, activities and decisions of the Commission and therefore it does not normally qualify as a document fulfilling the registration criteria. In this respect, the Commission record-keeping policy would in principle exclude instant messaging."

11. During the meeting with the Ombudsman inquiry team, the Commission said that, to date, it has not recorded any text messages in its document management system. This, it said, is logical given that texts are usually short-lived in nature and are not used in the Commission's formal decision-making and they do not commit the institution.

12. The Commission also stated that its staff that dealt with the complainant's request had consulted the President's personal office (cabinet), which had confirmed that no additional documents that fulfil the Commission's internal recording criteria exist.

13. In his comments on the meeting report, the complainant noted that it was still unclear whether there are relevant text messages, whether such text messages were deleted or never existed.

The Ombudsman's assessment leading to a recommendation

14. For the Ombudsman, it is clear that text messages fall within the scope of the EU's law on public access to documents (Regulation 1049/2001) [5] . According to the Regulation, a document is: " *any content **whatever its medium** (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*" . [6]

15. It is equally clear that Regulation 1049/2001 applies to **all** documents held by an EU institution, that is, "*documents drawn up or received by it and in its possession, in all areas of activity of the European Union*" . [7]

16. This wording makes it clear that the decisive element of a document is not its medium. Nor is it relevant whether a document has been registered in the institution's document management system. What matters is the document's *content* and whether or not it relates to the "*policies, activities and decisions*" for which the institution is responsible. As regards the existence of content, the EU Courts have found that the definition of a document, for the purpose of Regulation 1049/2001, is based essentially on content that may be '*saved, copied or consulted after it has been generated* .' [8] . Text messages therefore constitute documents and the public can request access to them, if they concern the institution's work and if the institution holds them. [9]

17. Whether text messages are subsequently registered in the document management



system of the institution concerned is, as a matter of law, not relevant for the purpose of the definition of a 'document' under Regulation 1049/2001. Registering a document is a *consequence* of the existence of a document and not a *pre-requisite* for its existence.

18. The question whether text messages should be registered is an important one, which the Ombudsman is addressing in her ongoing strategic initiative (SI/4/2021/MIG) on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity. [10] Recording information in the institution's document management system greatly facilitates public access to documents by making it easier for institutions to search for and identify documents. EU case-law has recognised that the EU institutions have a duty to draw up and retain documentation pertaining to their activities, and to do so as far as possible and in a non-arbitrary and predictable manner. [11]

19. However, this case is not about whether the text messages in question should have been or were recorded. Rather, the case concerns whether, if the messages concern the Commission's work and if it holds them, the Commission should have granted public access to them. How the Commission dealt with this matter did not allow those questions to be answered. The Ombudsman considers that this constituted **maladministration** for the reasons set out below.

20. The complainant's access request made it clear that he was requesting public access to the exchanges between the Commission President and the CEO of the pharmaceutical company. He referred to a media article that was based on an interview with the Commission President in which she is reported to have said that the exchanges at issue took place. The exchanges took place in the context of negotiations on a contract for the procurement of vaccines that was later concluded.

21. Whether the text messages were part of a formal procedure or whether they committed the Commission in any way may have a bearing on whether or not they should have been registered in the Commission's document management system but has no bearing on whether they fall within the scope of the public access rules.

22. In its request to the President's cabinet for documents falling within the scope of the complainant's public access request, the Commission asked for documents *that fulfil its internal recording criteria* only. The President's cabinet then confirmed that no such additional documents exist. Despite the complainant's explicit request for public access to 'text messages', the Commission did not clarify whether those documents actually existed. Instead, it asked only for documents that the cabinet considered to meet the recording criteria. As such, there was no assessment as to whether any other documents existed and whether they should be disclosed in accordance with Regulation 1049/2001 [12].

Recommendation

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

The Commission should ask the President's cabinet to search again for relevant text messages, making it clear that the search should not be limited to registered



documents or documents that fulfil its recording criteria.

If the reported text messages exist and are identified, the Commission should assess whether public access can be granted to them in line with Regulation 1049/2001.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 4(2) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 26 April 2022.

Emily O'Reilly European Ombudsman

Strasbourg, 26/01/2022

[1] Available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3A)

[2] Available at:

<https://www.nytimes.com/2021/04/28/world/europe/european-union-pfizer-von-der-leyen-coronavirus-vaccine.html>

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[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> .

The access request was made via *AskTheEU.org* and is available at:

[https://www.asktheeu.org/en/request/exchange_between_president_von_d](https://www.asktheeu.org/en/request/exchange_between_president_von_der_leyen_and_ombudsman) .

[4] The meeting report is available at:

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/150175> .

[5] The Ombudsman notes a recent reply by the Commission to a parliamentary question, that text messages are not covered by the EU's rules on public access to documents (Regulation 1049/2001). See:

https://www.europarl.europa.eu/doceo/document/P-9-2021-005139-ASW_EN.html . For the reasons set out in this recommendation, **the Ombudsman does not share this interpretation of the law** .

[6] Article 3(a) of Regulation 1049/2001 (emphasis added).

[7] In accordance with Article 2(3) of Regulation 1049/2001.

[8] Judgment of the General Court of 22 February 2015, *Breyer v Commission* , T-188/12,



paragraph 42:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=162573&pageIndex=0&doclang=en&>

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[9] The European Border and Coast Guard Agency (Frontex) has recently disclosed such messages following a request for public access to documents under Regulation 1049/2001: <https://fragdenstaat.de/anfrage/whatsapp-nachrichten-an-die-libysche-kustenwache/> .

[10] Strategic Initiative SI/4/2021/MIG on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity: <https://www.ombudsman.europa.eu/en/case/en/59322> .

[11] See judgment of the Court of First Instance of 26 April 2007, *WWF v Council of the EU* , paragraph 61:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=61308&pageIndex=0&doclang=en&>

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[12] The Ombudsman's assessment in paragraphs 19-23 of her decision in case 1050/2018/DL is relevant in this context. See: <https://www.ombudsman.europa.eu/da/decision/en/127386> .