

## **Décision rendue dans l'affaire 1569/2016/DR concernant le refus de la Commission européenne d'accorder un plein accès à un courrier électronique qu'elle avait reçu d'une société informatique au cours de l'élaboration de la directive relative aux dossiers passagers (PNR)**

Décision

**Affaire** 1569/2016/DR - **Ouvert le** 28/10/2016 - **Décision le** 19/12/2017 - **Institutions concernées** Commission européenne ( Pas d'acte de mauvaise administration constaté ) | Commission européenne ( Affaire réglée par l'institution ) |

La plaignante, un membre du Parlement européen, a allégué que la Commission européenne avait refusé à tort de lui accorder un plein accès à un courrier électronique qu'elle avait reçu d'une société informatique pendant qu'elle élaborait la directive relative aux dossiers passagers (PNR). Seul un accès partiel à ce courriel lui avait été accordé. La plaignante a également invoqué le fait que la Commission ne lui a pas donné l'occasion de demander un réexamen de sa décision de refuser le plein accès au courriel, lequel a été jugé pertinent uniquement au stade du réexamen, non à celui de la prise en considération de sa demande originale.

La Médiatrice a demandé à la Commission si elle était disposée à revenir sur son refus de divulguer l'intégralité d'une phrase qu'elle avait rédigée. La Commission a finalement accepté de divulguer davantage de portions rédigées de ladite phrase, sans toutefois la divulguer en entier. La Médiatrice a décidé que la Commission avait pris des mesures adéquates afin de régler cet aspect de la plainte.

En ce qui concerne la deuxième question, la Médiatrice a conclu qu'il n'y avait pas eu de cas de mauvaise administration de la part de la Commission.

## **The background to the complaint**

1. The complainant, a Member of the European Parliament, wanted information about the contacts the European Commission had with private IT companies in preparing its proposal for the EU Passenger Name Record (PNR) Directive [1] . To that end, she requested, under the EU's Access to Documents Regulation (Regulation 1049/2001) [2] , “ *all Commission documents corresponding to meetings and lobby contacts of Commissioners and Commission*



*officials with (...) companies specialised in the setting-up and maintenance of Passenger Name Records (PNR) and/or Advanced Passenger Information (API) systems between 2010 until present*”.

2. The Commission granted partial access, after redaction of personal data [3] , to three letters between it and a company, and to two reports on meetings with industry stakeholders organised by the Commission’s Directorate for Migration and Home Affairs (DG HOME).

3. The complainant sought a review [4] of the Commission’s decision and pointed out that the Commission had not identified any e-mails as falling within the scope of the request.

4. Following a renewed, focused search for e-mails, the Commission identified a further 19 documents falling within the scope of the complainant’s request, namely e-mails exchanged between DG HOME and a number of companies. After consulting the authors of some of the e-mails [5] and having carried out its own examination, the Commission granted wide partial access to the newly identified documents, subject to the redaction of personal and commercially sensitive data.

5. For one particular e-mail, dated 9 February 2015, from an IT company to a DG HOME staff member, the Commission redacted some of the content. The redacted sentence in the released e-mail reads as follows: “ *We recently signed a deal to provide [redacted]*”. The Commission claimed the redaction was justified under the exception for the protection of commercial interests in Regulation 1049/2001 [6] .

6. The Commission explained that “ *the redacted parts referr [ed] to the clients*” of that company “*and to its contacts*”. It considered that “ *this information ha [d] indeed commercial value, in particular in the competitive context in which several firms compete for a contract*”, and that its disclosure would undermine the company’s “*commercial interests as regards its clients and its commercial strategy, which are instrumental in its commercial operations*”.

7. The Commission said it had examined whether there was a public interest in disclosure which could override the commercial interests protected by the exception, and justify the release of the complete e-mail. The Commission said that the complainant had not identified any such public interest in her request for review and neither was the Commission able to identify any such public interest. Thus, the Commission concluded that, “ *in this case, the public interest is better served by keeping the parts of documents [...] undisclosed in conformity with the interests protected by the exception of Article 4(2) first indent of Regulation 1049/2001*”.

8. On 24 October 2016 , the complainant turned to the Ombudsman.

## The inquiry

9. The Ombudsman opened an inquiry into the following issues:



(i) The Commission wrongly refused to give full public access to an email it received from an IT company during the preparation of the Commission's proposal for the PNR Directive.

(ii) The Commission, having identified additional relevant documents on review, did not provide the complainant with the opportunity to request a further review of its decision to refuse full access to the e-mail in question.

10. The Ombudsman's inquiry team carried out an inspection of the Commission's file and held two follow-up meetings with the Commission. The Ombudsman subsequently asked the Commission whether it would consider disclosing some of the redacted information. The Commission replied to this request and, subsequently, the complainant sent comments on the Commission's reply.

11. The Commission initially refused to disclose more of the sentence in question. However, after having re-consulted and obtaining the agreement of the relevant IT company, the Commission eventually agreed to disclose some of the redacted information. This concerned the company's contractual partner and the purpose of the deal mentioned in the parts already disclosed. The Commission reiterated that the remaining undisclosed part of that sentence, which concerned the commercial strategy of the company, could not be disclosed for the reasons set out in its decision.

12. The Ombudsman's decision takes into account the arguments and views put forward by the parties at all stages of the inquiry.

## **Commission's refusal to give full public access to an e-mail it received during the preparation of the Passenger Name Record Directive**

13. The Ombudsman acknowledges that the Commission has disclosed, after her intervention, more parts of the sentence to which the complainant requested full access. Having inspected the document, the Ombudsman can confirm that the remaining undisclosed information is related to the company's commercial strategy. She accepts the reasons put forward by the Commission to justify its view that disclosure of this information would undermine the company's commercial interests.

14. Therefore, the Ombudsman considers that the Commission has taken adequate steps to settle the first issue raised by the complainant and has satisfied this aspect of the complaint, namely the non-disclosure of part of the e-mail.

## **Opportunity to request a further review of the decision refusing access to documents**

15. The complainant argued that, whenever the Commission identifies new documents following



a request for review and refuses full or partial access to them, it should provide the applicant with the opportunity of a further review of its decision regarding those documents.

## The Ombudsman's assessment

16. Regulation 1049/2001 lays down a two-stage procedure. Where the institution's initial response to a request for access to documents does not result in full disclosure, the applicant has the right to request that the institution reconsider its position [7] . The definitive position taken then may be subject to external review, by the EU Court of Justice or by the Ombudsman.

17. It is possible, as in this case, that, on reconsideration of its initial response, the institution identifies more documents within the scope of the initial access request. In the complainant's view, in such cases, requesters should have the opportunity of another review in respect of the newly withheld documents or parts of documents.

18. The Ombudsman notes that Regulation 1049/2001 makes no such provision. While the complainant's point of view is understandable and logical, it does not reflect the clear provisions of the Regulation. The availability of external review, as taken up by the complainant in her approach to the Ombudsman, provides complainants with an opportunity to challenge and comment on the institution's refusal. The external review process requires the institution to justify its position, which implicitly prompts the institution to review its decision to withhold the relevant document or any part of it.

19. In these circumstances, the Ombudsman does not find maladministration on the part of the Commission for failing to offer the complainant a further review of the withheld parts of the newly found documents. In different circumstances, the adequacy of the original search for documents within the scope of the initial request under Regulation 1049/2001 could potentially be the subject of a complaint, but in this case an inquiry into that aspect is not warranted.

## Conclusions

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

**The Commission has taken adequate steps to settle the first issue raised by the complainant, following the Ombudsman's intervention.**

**There was no maladministration by the Commission as regards the second issue raised by the complainant.**

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



Emily O'Reilly European Ombudsman

Strasbourg, 19/12/2017

[1] 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, OJ L 119, 4.5.2016, p. 132–149.

[2] 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 L 145, 31.5.2001, p. 43–48.

[3] In accordance with Article 4(1)(b) of Regulation 1049/2001.

[4] By making a "confirmatory application" under Regulation 1049/2001.

[5] As required by Article 4(4) of Regulation 1049/2001.

[6] Article 4(2) first indent.

[7] Article 7(2) of Regulation 1049/2001 gives the applicant the right to request a review of the institution's decision by making a 'confirmatory application'.