



Decisione nel caso 2004/2013/PMC - Gestione, da parte della Commissione europea, di una richiesta di accesso a documenti relativi alla sorveglianza di Internet da parte dei servizi segreti britannici

Decisione

Caso 2004/2013/PMC - Aperto(a) il 12/11/2013 - Raccomandazione su 02/10/2014 - Decisione del 05/11/2015 - Istituzioni interessate Commissione europea (Osservazione critica) | Commissione europea (Progetto di raccomandazione parzialmente accettato dall'istituzione) |

Il caso riguardava il rifiuto della Commissione di rendere accessibili al pubblico documenti riguardanti la sorveglianza di Internet da parte dei servizi segreti britannici. La Mediatrice ha raccomandato alla Commissione di rendere accessibile uno specifico documento (una lettera del ministro degli Esteri britannico all'allora vicepresidente della Commissione) e di rendere pubblici gli altri documenti richiesti oppure motivare adeguatamente il rifiuto di renderli pubblici.

La Commissione ha deciso di rendere pubblica la lettera del ministro degli Esteri britannico, accettando quindi la prima parte della raccomandazione della Mediatrice. Si è invece mantenuta sulla propria posizione in relazione agli altri documenti, decidendo di non renderli noti. Ha motivato la propria posizione facendo presente che sta ancora indagando per appurare se i programmi britannici di sorveglianza di massa violino la normativa UE, in particolare per quanto riguarda il diritto delle persone fisiche alla protezione dei dati. La Commissione ha fatto valere che fino alla chiusura definitiva della propria indagine, la divulgazione anticipata degli altri documenti in questione avrebbe effetti negativi sul dialogo tra le autorità britanniche e la stessa Commissione. Più in generale, ha osservato che la possibilità di condurre le proprie indagini in modo efficace e di decidere una risposta appropriata dovrebbe essere posta al riparo dal rischio di pressioni esterne. Infine, ha fatto notare che non riteneva vi fosse un interesse pubblico prevalente alla divulgazione dei documenti.

La Mediatrice non ritiene che la Commissione abbia motivato adeguatamente la decisione di rifiutare di rendere pubblici i documenti rimanenti che non sono stati divulgati. Poiché la Commissione non ha né reso pubblici tali documenti, né fornito motivazioni adeguate a sostegno del rifiuto di renderli pubblici, è evidente che ha respinto la raccomandazione della Mediatrice relativa a tali documenti. Inoltre, la Mediatrice osserva che dal 2013 la Commissione non sembra aver intrapreso alcuna azione nell'ambito della propria indagine. La Mediatrice rileva quindi che nell'operato della Commissione in questo caso è ravvisabile un caso di cattiva amministrazione e addirittura una grave forma di cattiva amministrazione,



vista l'importanza che la questione specifica riveste per i cittadini dell'UE.

The background

1. In June 2013, a German journalist asked the Commission for access to documents, in accordance with EU transparency rules [1] , regarding the surveillance of the internet by UK state agencies [2] . In its role as Guardian of the Treaties, the European Commission has a particular responsibility for ensuring that Member States comply with EU law. The complainant feared that the UK authorities' mass surveillance programmes were in breach in particular of the individual's right to data protection provided for by EU law.

2. The Commission identified the following documents as falling within the scope of the complainant's access request, namely *(i) a letter from Mrs Viviane Reding, Vice-President of the Commission, to Mr William Hague, UK Foreign Secretary; (ii) Mr Hague's reply letter to Mrs Reding; (iii) a follow-up letter from the Director-General of the Commission's Directorate-General (DG) Justice to the UK Permanent Representative to the EU; and (iv) several citizens' complaints asking the Commission to investigate the matter .*

3. The Commission refused to give access to these documents, arguing that it needed to protect the purpose of inspections, investigations and audits. [3] In its view, disclosure would undermine the dialogue between itself and the UK authorities, which requires a climate of mutual trust until the negotiation phase has been completed. In this respect, the Commission made reference to the case-law of the Court of Justice [4] , arguing that there is a general presumption that disclosure of documents in the administrative file in principle undermines the protection of the objectives of investigations for as long as an investigation is on-going. Investigations which could potentially lead to the opening of infringement proceedings could be covered by this exception. [5]

4. As regards the question of whether there was an overriding public interest in disclosing the requested documents, the Commission acknowledged the importance of the freedom of the press as well as of the interest of the public in transparency. However, it also observed that the exercise of freedom of expression and of the right to information (recognised by Article 11 of the EU's Fundamental Rights Charter) can be limited [6] . In particular, the Commission argued that in this case it was entitled to rely on the general presumption that disclosure of the particular documents would undermine the protection of the purpose of investigations and that there was no overriding public interest served by the disclosure of the. [7]

5. In his complaint to the Ombudsman, the complainant alleged that the Commission wrongly rejected his request for public access to documents and claimed that the Commission should grant him access to the documents sought. Allegation that the Commission wrongly rejected the complainant's access to documents request

The Ombudsman's recommendation

6. In her recommendation, the Ombudsman noted that it was not in dispute that all the



documents requested by the complainant relate to an investigation which could potentially lead to the opening of infringement proceedings. In such circumstances, the Commission is entitled to presume that disclosure of the requested documents would undermine the purpose of investigations. The Commission was thus, in principle, not required to carry out a specific and individual examination of each of these documents. [8] However, the presumption is rebuttable and a person interested in obtaining access to the documents concerned may seek to rebut the presumption in relation to a specific document or documents or may seek to argue that there is an overriding public interest justifying the disclosure of the documents. [9]

7. The Ombudsman found that the complainant had put forward a number of reasons why the general presumption should not apply to most of the documents. However, in the case of the letters sent by the Commission, the Ombudsman found that the general presumption had not been rebutted. In the case of the complaints received by the Commission from third persons, the Ombudsman took the view that the general presumption was rebutted. In any event, even if the general presumption was not rebutted, it remained for the Commission to show that there was not an overriding public interest which requires disclosure of the documents. The Ombudsman took the view that the Commission had failed to explain properly why there was no overriding public interest in disclosure.

8. In early October 2014, the Ombudsman therefore made the following recommendation to the Commission:

(i) The Commission should grant access to the UK Foreign Secretary's letter of 3 July 2013 to the Commissioner.

(ii) The Commission should grant access to all the other documents requested by the complainant concerning the mass surveillance of the internet by UK state agencies, or properly justify why, in its view, disclosure has to be refused.

9. The Commission replied that it is, in principle, not required to carry out a specific and individual examination of each of the documents concerned and that its refusal to grant access was based on the applicable general presumption that disclosure of the requested documents would undermine the purpose of the investigation.

10. The Commission maintained its view that, until its investigation is definitively closed, disclosure of the related documents would affect the dialogue between the UK authorities and the Commission. Disclosure would also affect the Commission's ability to effectively carry out its investigation and to decide on the appropriate response, without being subject to undue external pressure. The Commission thus reiterated that access to the two letters that it had sent to the UK authorities could not be granted.

11. However, given that the UK Foreign Secretary's letter contains, in essence, information that has been made publicly available by the UK authorities in a speech, the Commission agreed to disclose it.



12. As regards the complaints submitted by citizens, the Commission argued that the fact that these complaints merely contain general points does not, in itself, justify the granting of public access.

13. However, the Commission has said that as soon as it decides how to proceed further with the investigation, it will examine any possible new applications for access in light of those developments.

14. Concerning the possibility of there being an overriding public interest in disclosure, the Commission acknowledged that there is indeed a widespread political and international debate on this topic, in particular on mass surveillance programmes and the individual's right to data protection. The Commission said it is actively following up on allegations of violation of the fundamental right to data protection. This is a very sensitive issue. In this particular context, Member States can rely on an exemption, based on national security concerns, to disregard EU law. However, this exemption has to be interpreted strictly. A Member State seeking to apply such an exemption has to prove that an exemption is necessary in order to protect its essential security interests.

15. The Commission reiterated its view that the public interest in this case is best served by not disclosing its correspondence. Disclosing the Commission's correspondence with the UK authorities at this point in time would lead to unwarranted and premature conclusions about the extent to which the processing and collection of information by the UK's security and intelligence agencies complies with EU law. It is therefore in the public interest that the Commission's investigations, covering a very sensitive topic, are carried out effectively and efficiently, without any premature involvement of the public.

16. The complainant did not submit any observations on the Commission's reply.

The Ombudsman's assessment after the recommendation

17. The Ombudsman welcomes the Commission's change of position as regards the letter it received from the UK Foreign Secretary. By disclosing it, the Commission has accepted the first part of the Ombudsman's recommendation. The Ombudsman understands that the Commission agreed to disclosure essentially because the letter contained information that was already publicly available, thus implicitly recognising that disclosure of this document could not adversely affect its on-going investigation.

18. The Ombudsman notes that, in light of the recent judgment in Case C-612/13 P *Client Earth* [10], it is now clear that the Commission could not in fact rely on any general presumption that disclosure would undermine the purpose of its investigation, as long as it has not sent the UK authorities a letter of formal notice. Against this background, the Ombudsman regrets that the Commission continues to rely on a general presumption as a reason for not granting access to the citizens' complaints, as well as to the Commission's letters to the UK authorities. The Ombudsman acknowledges, however, that the said



judgment was delivered *after* the Commission had replied to her recommendation in this case.

19. Even if it is clear now that the Commission cannot rely on any general presumption that the documents cannot be disclosed, it still has the option of arguing, on the basis of an individual and specific assessment of the content of the requested documents, why disclosure would undermine the purpose of its investigation. In this respect, the Ombudsman is not convinced by the line of reasoning that the Commission put forward in its reply to her recommendation. The Commission contends that disclosure of the documents would affect the dialogue between the UK authorities and the Commission. Moreover, it states that it wishes to carry out its investigation effectively and efficiently without any unwarranted and premature conclusions about the extent to which the processing and collection of information by the UK's security and intelligence agencies complies with EU law. It is evident, however, in relation to these specific documents, that the UK authorities take a different view to that of the Commission. The UK authorities do not seem to share the Commission's view that the negotiations should be conducted in a confidential manner in order to foster and maintain a climate of mutual trust between the Commission and the UK. The UK authorities did not object to the Commission, while the negotiations were still on-going, disclosing to a journalist the UK Foreign Secretary's reply to the Commission. This context, which is specific to the present case, must be taken into consideration when determining if the documents concerned should be released by the Commission.

20. While the specific *context* of the present case leads to the conclusion that the interest put forward by the Commission for non-disclosure, namely the need to foster mutual trust, is not convincing, the Ombudsman notes that the *content* of the documents in question also leads to the same conclusion. In fact, the Ombudsman has examined the documents in question and considers that they do not contain information which, if released in a context where the UK authorities have already agreed to the release of their Foreign Secretary's letter to the Commission, would undermine the need to foster and maintain a climate of mutual trust between the Commission and the UK authorities. [11]

21. The previous paragraph concerns whether harm to the purpose of an investigation would arise from the public disclosure of the requested documents. While the Ombudsman is not convinced, as noted above, that any such harm will result from the disclosure of the documents in the present case, notwithstanding this conclusion, she considers that there are important overriding public interests which would be served by the disclosure of the documents. First, the subject matter of the documents relate to a fundamental right of EU citizens, namely the right to data protection. Second, it is evident from the letter of the UK Foreign Secretary that the UK authorities are not concerned by this situation. Third, while the letter of the UK Foreign Secretary dates from July 2013, the Ombudsman is not aware, nor has the Commission informed her, of any concrete investigative steps which the Commission might have taken in the meantime as regards the matter. All of these factors must be taken into consideration when determining if there is an overriding public interest in the disclosure of the documents.

22. It is, having due regard to all the matters outlined above, the Ombudsman's view that the



public interest is best served by granting access to the Commission's letters, as well as to the citizens' complaints. The Ombudsman does not doubt that the Commission is seeking to pursue the public interest by addressing this sensitive matter with the UK authorities. However, she is of the firm belief that the citizens of Europe have a right to know in what way the EU seeks to uphold their fundamental rights. It is very likely that the Commission can expect wide public support in its transparent pursuit of the matter.

23. On the basis of the above, the Ombudsman thus maintains her finding that the Commission has failed to provide valid reasons for not granting public access to the citizens' complaints and its letters to the UK authorities. This constitutes maladministration and, in fact, serious maladministration given the high importance of the issue for EU citizens generally.

24. Given that the complainant did not submit any observations challenging the Commission's reply to the Ombudsman's recommendation, the Ombudsman does not consider it justified to pursue this matter further. She will therefore close the case with a critical remark as regards the Commission's decision not to grant public access to the citizens' complaints and its letters to the UK authorities.

Conclusion

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

Accepted recommendation

By disclosing the letter it had received from the UK Foreign Secretary concerning the sensitive topic of the surveillance of the internet by UK intelligence services, the Commission has accepted the first part of the Ombudsman's recommendation.

Critical remark

The Commission has failed to provide valid reasons for not granting public access to the citizens' complaints and its letters to the UK authorities. This constitutes maladministration, which is particularly serious given the importance of the underlying subject matter.

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

Emily O'Reilly

Strasbourg, 06/11/15

[1] 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, 31.5.2001, p. 43.

[2] Mainly the intelligence service 'Government Communications Headquarters', known as 'GCHQ'.

[3] Art. 4(2), third indent of Regulation 1049/2001.

[4] Cases T-191/99 *Petrie v Commission* [2001] ECR II-3677, para. 68; C-139/07 P *Technische Glaswerke Ilmenau v Commission* [2010] ECR I-5885, para. 58; and T-29/08 *LPN v Commission* [2011] ECR II-6021.

[5] Case T-111/11 *Client Earth v Commission*, para. 80.

[6] In accordance with Article 52(1) of the Charter.

[7] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please see the Ombudsman's recommendation available at: <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/57367/html.bookmark>

[8] Case T-29/08 *LPN v Commission* [2011] ECR II-6021, paragraph 127.

[9] Case T-29/08, *LPN v Commission* [2011] ECR II-6021, paragraph 128, and Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 62.

[10] Case C-612/13 P *Client Earth v Commission* [2015], not yet reported, para. 79.

[11] As regards the letters of citizens which led the Commission to contact the UK authorities, the Ombudsman considers that such letters can be released provided they can be anonymised to protect the identity of the citizens concerned.