



COURT OF JUSTICE
OF THE
EUROPEAN UNION

The President

Luxembourg, 8 November 2018

Ms Emily O'Reilly
European Ombudsman
1 avenue du Président Robert Schuman
CS 30403
F-67001 Strasbourg Cedex

Re : Complaint 2006/2017/CEC

Dear Ombudsman,

Thank you for your letter of 5 October 2018 regarding the above complaint.

Please find attached, taking into account the scope of your inquiry as defined in your letters of 27 August 2018 and 5 October 2018, the reply of the Court of Justice of the European Union to the complainant's arguments concerning (i) the alleged extension, on 1 January 2017, of the Code of Conduct for Members and former Members of the Court of Justice of the European Union to cover not only judicial but also administrative matters and (ii) the alleged maladministration in the handling of certain of his requests for access to documents.

I hope this information will assist your inquiry. Should you have any further questions, I remain fully at your disposal to answer them.

Yours sincerely,

Koen Lenaerts

Reply to Complaint 2006/2017/CEC

Preliminary Remarks

Scope of the reply

1. In her letter of 5 October 2018, the European Ombudsman asked the Court of Justice of the European Union (CJEU) to give a written reply to the above complaint and “[i]n particular, [...] to the complainant’s arguments concerning (a) the extension on 1 January 2017 of the Code of Conduct for Members and former Members of the Court of Justice of the European Union [OJ 2016, C 483/1, ‘2016 Code of Conduct’] to cover not only judicial but also administrative matters (hereafter “part I of the complaint”); and (b) the CJEU’s handling of the complainant’s requests for access to documents 0007/2017D and 0007/2017C as well as 0011/2017D and 0011/2017C, resulting in the confirmatory decisions 0007/2017C of 25 August 2017 and 0011/2017C of 17 January 2018 (hereafter “part II of the complaint”) respectively”.
2. It follows from the documentation provided by the European Ombudsman that the said arguments of the complainant are set out, in their latest version, in the complainant’s “report to the Ombudswoman about various problems of bad administration in the Court of Justice of [the] European Union” (“complainant’s report”), sent to the European Ombudsman’s services by email on 20 March 2018, and in particular in point 6 of chapter B of that report, entitled “Unjustified extension of ethical rules”, insofar as part I of the complaint is concerned, and in chapter E (points 14 to 22), entitled “Access to documents”, insofar as part II of the complaint is concerned.
3. Therefore, and taking into account the decision of the European Ombudsman communicated to the CJEU by letter of 27 August 2018 not to inquire into the other issues raised by the above complaint for the reasons explained in that letter, this written reply constitutes a response to the arguments raised in chapter B, point 6, and chapter E of the complainant’s report.

Issues of principle

4. In relation to part I of the complaint, the elaboration of the 2016 Code of Conduct is considered to be a “judicial activity”. As indicated in its preamble, the Code of Conduct “defines the obligations arising under the provisions of the Statute of the Court of Justice of the European Union and of the Rules of Procedure which are applicable to Members and former Members of the Court of Justice of the European Union”. Those obligations are intrinsically and inextricably linked to the (current or former) exercise by those Members of their judicial functions. For the CJEU, defining obligations whose sole *raison d’être* is the exercise of a judicial activity is a part of the “judicial activity” itself. Furthermore, the question whether the elaboration of the 2016 Code of Conduct is a “judicial activity” is

covered by the complainant's action pending before the General Court in Case T-433/17. A question of competence under Article 228(1) TFEU therefore arises.

5. In relation to part II of the complaint, in accordance with Article 15(3), fourth subparagraph, TFEU, access to documents held by the CJEU as part of the exercise of its administrative functions is governed by its Decision of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ 2016, C 445/3, "Decision of 11 October 2016"). The Decision of 11 October 2016 distinguishes between initial and confirmatory applications to access such documents and sets out rules for their processing. In relation to the confirmatory decisions cited in paragraph 1 above, the CJEU replied to the complainant's initial and confirmatory requests for access to documents within the time limits prescribed by the Decision of 11 October 2016 and gave reasons for its decision to refuse, in part, access to the requested documents. In so doing, the CJEU complied with the right of the complainant to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union ("Charter"). In any event, since the said confirmatory decisions were not challenged before the General Court within the time limit provided for in Article 263 TFEU, they acquired a definitive character. By virtue of the principle of legal certainty, the legality of the reasons put forward in them can therefore no longer be called into question (Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90, paragraph 25; Case C-135/16, *Georgsmarienhütte and Others*, EU:C:2018:582, paragraphs 14 and 15).
6. This written reply is without prejudice to those issues of principle.

Reply to chapter B, point 6, of the complainant's report

7. The complainant argues that, by adopting the 2016 Code of Conduct, the CJEU has "extended the secrecy [of the deliberations of the Court] to all administrative and even legislative decisions taken by the institution".
8. The complainant's argument is unfounded.
9. First, the complainant confuses the secrecy of deliberations with the duty to exercise discretion. In the 2016 Code of Conduct, the secrecy of deliberations, imposed by Article 35 of the Statute of the Court of Justice of the European Union, is mentioned in Article 7(1), whereas the duty to exercise discretion in dealing with judicial and administrative matters is mentioned in Article 7(2). There is no extension whatsoever of the secrecy of deliberations to administrative matters.
10. Secondly, insofar as the complainant suggests that the duty to exercise discretion has been "extended" by the 2016 Code of Conduct to administrative matters, the complainant's argument is equally unfounded. Indeed, although formulated in more general terms, the provisions of the 2007 Code of Conduct (OJ 2007, C 223/1) were also applicable to administrative matters. This is, in particular, the case of Article 1(3) of the 2007 Code of Conduct according to which "Members shall refrain from making statements outside the Court which may harm the reputation of the Court [...]". This general obligation does not

distinguish between the kinds of statements made and their subject-matters and therefore covers both judicial and administrative matters.

11. Thirdly, insofar as the complainant argues that the “extension” by the 2016 Code of Conduct of the duty to exercise discretion to administrative matters “contradicts [several provisions of the TFEU and the Charter, including] Article 43 [of the Charter] (right of reference to the European Ombudsman)” and “goes totally against the protection allegedly recognized by the [CJEU] for whistleblowers”, the complainant’s argument is also unfounded.
12. The obligation for discretion covering both judicial and administrative matters reflects the fundamental principle of respect for the Rule of Law which should govern the behaviour of any (former) Member of the CJEU and of the judiciary as a whole. If a (former) Member publicly criticises the functioning of the Court of Justice and/or of the General Court, he/she undermines the authority of these courts, whatever the subject-matter of his/her criticism may be. As a result of the prestige attached to the judicial functions that he/she exercises or exercised, the public and the press will not be inclined to verify the veracity of the assertions made. Moreover, the courts, which are themselves bound by the duty to exercise discretion in order to safeguard their independence, are in no position to respond to public criticism of their functioning.
13. The duty to exercise discretion incumbent upon (former) Members of the CJEU thus aims to safeguard the authority and the independence of the courts to which they belong(ed). It should be recalled that the requirement that courts be independent forms part of the essence of the fundamental right to a fair trial guaranteed by Article 47 of the Charter since it is inherent in the task of adjudication (Case C-216/18 PPU, *LM*, EU:C:2018:586, paragraph 63 and the case-law cited).
14. It is not therefore surprising that a similar general duty of discretion also applies, for instance, to the (former) judges of the European Court of Human Rights. Point VI of the Resolution on Judicial Ethics (https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf) states that “Judges [...] shall refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality”.
15. Contrary to what the complainant argues, the duty to exercise discretion in no way prevents (former) Members of the CJEU from reporting any illegalities allegedly occurring, or having allegedly occurred, at the CJEU. On the contrary, if they become aware of any such alleged illegalities, they can and must report them through the formal channels available. Internally, (former) Members can bring the matter before the President, the Registrar and/or the internal auditor of the CJEU. Externally, (former) Members should avail themselves of the mechanisms provided for by the Treaties (European Ombudsman, European Parliament, European Court of Auditors) or by EU legislation (European Anti-fraud Office). Only those formal channels offer sufficient guarantees that the authority of the judiciary and its independence – essential in a Union based on the Rule of Law – will remain unaffected by unsubstantiated assertions.

Reply to chapter E of the complainant's report

16. By way of a preliminary remark, the complainant received 190 documents (1 686 pages in total) in reply to his requests for access to documents 0007/2017D and 0007/2017C and 557 documents (2 960 pages in total) in reply to his requests for access to documents 0011/2017D and 0011/2017C. His requests were sufficiently clear. There was, therefore, no need to apply Article 4(3) of the Decision of 11 October 2016 and to ask the complainant to clarify his request.

Chapter E, point 14, entitled “A very restrictive 2016 decision on public access to documents”

17. In chapter E, at point 14, the complainant argues that the Decision of 11 October 2016 restricts transparency as compared to the Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ 2012, C 38/2, “Decision of 11 December 2012”).
18. The complainant's argument is unfounded.
19. The reason for modifying the Decision of 11 December 2012 was to centralise the competence to reply to initial applications (cf. Article 8 of the two decisions). Furthermore, the exceptions to the right to access documents are substantially the same in the Decision of 11 December 2012, the Decision of 11 October 2016, and in 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 145/43).

Chapter E, point 15, entitled “Changing motivations behind decisions”

20. The argument developed in chapter E, at point 15, of the complainant's report is a compilation of separate arguments.
21. All those arguments are unfounded.
22. In the first subparagraph of chapter E, at point 15, the complainant argues that a third person would have received a different reply to his or her request for access to documents compared to the reply he received to the same request.
23. First, insofar as the complainant criticises the reply given to a request for access to documents filed by a third person, his argument is ineffective since the reply given to that request, which that person has not contested, is not the subject-matter of the European Ombudsman's inquiry (see, to that effect, point 2b of the European Ombudsman's letter of 27 August 2018 to the CJEU).
24. Secondly and in any event, in so far as the grounds for refusal to give access to the documents requested were applicable to both the third person and the complainant, they received the same reply, namely that the requested documents do not fall within the scope of application of the Decision of 11 October 2016 and, alternatively, that the requested documents are covered by the exception relating to the decision-making process (see

confirmatory decision 0011/2017C, paragraphs 52 to 73). Any difference in the replies is explained by the fact that certain additional grounds for refusal to give access to the documents requested applied either to the complainant (application of the Statute of the Court of Justice of the European Union, see confirmatory decision 0011/2017C, paragraphs 44 to 51) or to the third person (exception on data protection, since the requests were for access to documents of which the complainant was the author). Furthermore, contrary to what the complainant alleges, access was not refused to the third person “because this represented too much work”.

25. In the second subparagraph of chapter E, at point 15, the complainant argues that he received documents in reply to his confirmatory request for access to documents 0029/2016C of 16 March 2017, but that he did not receive similar documents in reply to his initial request for access to documents 0011/2017D.
26. First, the confirmatory decision 0029/2016C of 22 May 2017 is covered by the complainant’s action pending before the General Court in Case T-433/17. A question of competence under Article 228(1) TFEU therefore arises.
27. Secondly, the situation regarding both requests was different because of the number of documents involved (2 compared to 84). In any event, the complainant eventually received all 84 documents, duly redacted, in reply to his confirmatory request for access to documents 0011/2017C.
28. In this respect, it should be stressed that it is inherent to the double-stage procedure (initial application / confirmatory application) that a request for access to documents is examined twice and that the decision and/or the motivation in the first and second stage can be different. The second examination of the request would make no sense if it needed to be identical to the first.
29. In the third subparagraph of chapter E, at point 15, the complainant argues that an issue of admissibility was raised in reply to his initial request for access to documents 0011/2017D, but not in reply to his confirmatory request for access to documents 0011/2017C.
30. This argument calls for the same reply as in paragraph 28 above.
31. In the fourth subparagraph of chapter E, at point 15, the complainant argues that he previously received documents in which comments of judges concerning legislative and administrative matters had not been redacted, whereas such comments have subsequently been redacted in similar documents.
32. The justification for redacting the comments of judges is an issue relating to the scope of application of the Decision of 11 October 2016 and, as such, is covered by the complainant’s action pending before the General Court in Case T-433/17. A question of competence under Article 228(1) TFEU therefore arises. In any event, if certain passages of a document have erroneously not been redacted, it does not follow that similar passages of other documents should not be redacted.

Chapter E, point 16, entitled “Absence of transparency in transparency answers”

33. In chapter E, at point 16, the complainant argues that the “CJEU does not provide even a detailed list of the requested documents to indicate what is provided and what is refused”. He refers in this respect to “a request for some of [his] memos and some connected administrative documents (some minutes of general meetings and committees)”. Furthermore, it is claimed that these documents were refused “without any justification”.
34. The complainant’s argument is unfounded.
35. First, as to the documents to which the complainant refers in support of his argument (“some of [his] memos and some connected administrative documents”), he himself provided a detailed list of the documents to which he wanted to have access. It is unclear what further list the CJEU could usefully have provided to the complainant.
36. Secondly, access to those documents was refused for several reasons explained in detail in the confirmatory decision 0011/2017C (paragraphs 44 to 77). Furthermore, insofar as the reasons were not identical for each category of document, the reasons applicable to each category were clearly explained. Again it is unclear what additional information could have been given to the complainant in order to explain the reasons why the documents concerned could not be divulged.

Chapter E, point 17, entitled “Absence of or wrong motivation”

37. The argument developed under chapter E, point 17, of the complainant’s report is a compilation of separate arguments.
38. All those arguments are unfounded.
39. After an introductory sentence/subparagraph, in the second subparagraph of chapter E, point 17, the complainant contests the reply given to a request for access to documents filed by a third person.
40. This argument, regardless of its substantive merits or otherwise, is, in any event, ineffective for the same reasons as set out in paragraph 23 above.
41. In the third subparagraph of chapter E, point 17, the complainant argues that a specific document was not divulged in reply to his request for access to documents 0007/2017D.
42. Already at the stage of the reply to his initial request for access to documents 0007/2017D, the complainant had received five documents (+ annexes) which corresponded to the subject-matter of his request in this respect. A sixth document, to which the complainant now refers, was divulged to him in reply to his confirmatory request for access to documents 0007/2017C. Furthermore, as explained in confirmatory decision 0007/2017C, no other documents corresponding to his request could be identified.
43. The complainant’s argument therefore calls for the same reply as set out in paragraph 28 above.

44. In the fourth subparagraph of chapter E, point 17, the complainant argues that requests for access to documents were erroneously qualified as requests for information.
45. Certain requests were clearly formulated by the complainant as requests for information. It is settled case-law that requests for information fall outside the scope of the rules on transparency (Case T-264/04, *WWF European Policy Programme v. Council*, EU:T:2007:114, paragraph 76). Furthermore, the issue is covered by the complainant's action pending before the General Court in Case T-433/17 as the complainant included several requests for information in his requests for access to documents. In any event, the complainant's requests were also rejected for reasons other than that they were requests for information (see confirmatory decision 0011/2017C, paragraphs 9 to 32).

Chapter E, point 18, entitled "Late motivation"

46. In chapter E, at point 18, the complainant argues that the CJEU "does not provide any explanation in its initial answer, or adopts a blanket refusal [which] obliges citizens to present a confirmatory request".
47. The complainant's argument is unfounded.
48. First, regarding the requests for access to documents 0007/2017D and 0007/2017C, the complainant already received 189 documents at the stage of the reply to his initial request 0007/2017D and received one more document in reply to his confirmatory request 0007/2017C. Furthermore, a substantial part of the motivation in confirmatory decision 0007/2017C consisted of explaining that no other documents corresponding to the complainant's request could be identified and of guiding the complainant through the documents he had received in reply to his initial request. This cannot be considered as "late motivation".
49. Secondly, regarding the requests for access to documents 0011/2017D and 0011/2017C, both the initial and the confirmatory reply to those requests were substantially motivated insofar as access to certain documents was refused. This again cannot be qualified as "late motivation".
50. Furthermore, the complainant's argument calls for the same reply as set out in paragraph 28 above.

Chapter E, point 19, entitled "Excessive invocation of workload"

51. In chapter E, at point 19, the complainant refers to a reply to a request for access to documents filed by a third person.
52. The complainant's argument, regardless of its substantive merits or otherwise, is, in any event, ineffective for the same reason as set out in paragraph 23 above.

Chapter E, point 20, entitled "Excessive invocation of private life"

53. In chapter E, at point 20, the complainant argues that the invocation of the protection of personal data "appears unjustifiable" in many cases.

54. The complainant's argument is unfounded.
55. It is settled case-law that "personal data" means any information relating to an identified or identifiable natural person (see, e.g., Joined Cases T-639/15 à T-666/15 and T-94/16, *Psara and Others v. Parliament*, EU:T:2018:602, paragraph 45).
56. Several of the complainant's requests were requests for access to documents relating to a person identified by him by name. Since, according to the above case-law, all information relating to an identified or identifiable person are personal data – even the mere existence of a document can be personal data (see the European Ombudsman's decision of 6 March 2018 in Case 1976/2017/THH, paragraph 17) –, all the documents so requested by the complainant had to be qualified as personal data.
57. A transfer of personal data is subject to two cumulative conditions being satisfied. Whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the person concerned. (Joined Cases T-639/15 à T-666/15 and T-94/16, *Psara and Others v. Parliament*, EU:T:2018:602, paragraphs 70 and 71 and the case-law cited).
58. In relation to the first condition, the applicant must, therefore, show that the transfer of personal data is the most appropriate of the possible measures for attaining the applicant's objective and that it is proportionate to that objective, which requires the applicant to provide express and legitimate reasons to that effect (Joined Cases T-639/15 à T-666/15 and T-94/16, *Psara and Others v. Parliament*, EU:T:2018:602, paragraph 72 and the case-law cited).
59. In none of his requests for access to documents did the complainant provide express and legitimate reasons for a transfer of personal data being necessary, within the meaning of the case-law. Since the conditions for a transfer of personal data were not therefore fulfilled, the CJEU was obliged to refuse access to such data.
60. Furthermore, by arguing that the protection of private life could not justify the refusal to give access to the documents requested (chapter E, point 20, second subparagraph), the complainant confuses the distinct concepts of personal data and private life (see, to that effect, Joined Cases T-639/15 à T-666/15 and T-94/16, *Psara and Others v. Parliament*, EU:T:2018:602, paragraph 50 and the case-law cited).
61. In any event, the scope of the exception on data protection is an issue covered by the complainant's action pending before the General Court in Case T-433/17. A question of competence under Article 228(1) TFEU therefore arises.
62. Finally, in the first subparagraph of chapter E, at point 20, the complainant again refers to a reply given to a request for access to documents filed by a third person. His argument in this respect, regardless of its substantive merits or otherwise, is, in any event, ineffective for the same reason as set out in paragraph 23 above.

Chapter E, point 21, entitled “Excessive definition of judicial activity”

63. In chapter E, at point 21, the complainant argues that the CJEU “tends to consider many administrative documents ‘judicial’”.
64. This argument, regardless of its substantive merits or otherwise, is, in any event, intrinsically linked to the question of the scope of application of the Decision of 11 October 2016 and the inherent question of the distinction between the CJEU’s judicial and administrative tasks. This is an important issue covered by the complainant’s action pending before the General Court in Case T-433/17. A question of competence under Article 228(1) TFEU therefore arises.

Chapter E, point 22, entitled “Conclusion: the ECJ has built for itself an exceptional status outside the Treaties where transparency and good administration generally do not apply”

65. Chapter E, point 22, does not contain any arguments other than those developed in chapter E, points 14 to 21.
66. Furthermore, no proof whatsoever of any of the allegations is given.

Conclusion

67. Without prejudice to the issues of principle raised in paragraphs 4 and 5 above, it is respectfully submitted that the complainant does not demonstrate the existence of any maladministration.