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Brussels, 11 JUL. 2019

Subject: *Request of the European Ombudsman for a reply in the inquiry into complaint 129/2019/MIG against the European Commission*

Dear Ms O'Reilly,

Thank you for your letter of 6 May 2019 regarding the above-mentioned case.

I am pleased to enclose the reply of the Commission to this proposal for a solution.

The Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosure: Reply of the European Commission to the proposal for a solution from the European Ombudsman in case 129/2019/MIG regarding the European Commission's refusal of public access to documents concerning the expenses incurred in relation to the official visit of a Commissioner to the United States of America

*Ms Emily O'REILLY
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Reply of the European Commission to the proposal for a solution from the European Ombudsman in case 129/2019/MIG regarding the European Commission's refusal of public access to documents concerning the expenses incurred in relation to the official visit of a Commissioner to the United States of America

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 2 November 2017, the complainant submitted an initial application for access to documents under Regulation (EC) No 1049/2001¹. In his application, the complainant requested access to '[a]ll documents related to the official visit of Commissioner Günther Oettinger to the United States (7-11 October 2016)'; including 'travel expenses, travel plans, official calendar, minutes of meetings, memo drafted by the Commission and the EU embassy to the US to prepare the visit.'

In its initial reply of 2 October 2018, the Directorate-General for Communications Networks, Content and Technology identified 18 relevant documents. More specifically, the Directorate-General for Communications Networks, Content and Technology:

- clarified that three documents had already been published by the European Commission and provided the corresponding Internet links;
- refused access to two documents on the basis of Article 4(1)(a), third indent² and Article 4(3) of Regulation (EC) No 1049/2001, which provide for the protection of, respectively: international relations and the decision-making process; and
- granted partial access to 13 documents on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001, which provides for the protection of privacy and the integrity of the individual. In addition, eight of these 13 documents were redacted on the basis of Article 4(1)(a), third indent and Article 4(3) of Regulation (EC) No 1049/2001.

On 12 October 2018, the complainant submitted a confirmatory application against the reply of the Directorate-General for Communications Networks, Content and Technology. In his confirmatory application, registered on 15 October 2018, the complainant did not contest the partial/full refusal opposed by the Directorate-General for Communications Networks, Content and Technology; but disputed the proper identification of all documents falling under the scope of his request.

In particular, the complainant reiterated that his request encompassed documents related to the Commissioner and his team's travel expenses from Europe to the United States and back, as well as within the United States. Moreover, he clarified that the requested documents included plane(s) tickets, taxi(s) and other means of transportation receipts, meal bills, and hotel bookings. He further indicated that the documents could be in the form of receipts, but also invoices, certification of bank payments or transfers.

¹ Official Journal L 145 of 31.5.2001, p. 43.

² Due to a clerical error for which the European Commission subsequently apologised, the initial reply referred to the 'second' indent of this provision instead of 'third' indent.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 16 January 2019, the complainant turned to the European Ombudsman complaining about i) the European Commission's alleged failure to comply with the statutory time-limits under Regulation (EC) No 1049/2001, and ii) the European Commission's alleged failure to provide a full reply to his request.

On 18 January 2019, the European Commission adopted a decision on the complainant's confirmatory application. In the context of its confirmatory review, the European Commission identified additional documents relating to the travel expenses of Commissioner Oettinger as falling within the scope of the complainant's request and refused access to them based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001, read in conjunction with Regulation (EC) No 2018/1725³. The European Commission also apologised for the delay in the handling of the request.

The complainant maintained his complaint before the European Ombudsman, notwithstanding the receipt of the confirmatory reply of the European Commission.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

The European Ombudsman opened an inquiry on the following allegations:

- i) the European Commission's alleged failure to deal with the complainant's request for public access in a timely manner;
- ii) the European Commission's alleged failure to identify all documents relevant to the complainant's request; and
- iii) the European Commission's refusal to grant public access to the further identified documents in relation to the business trip in question.

On 6 May 2019, the European Ombudsman issued a proposal for a solution regarding the present case (hereafter, the 'Proposal for a solution').

As regards the third allegation (the European Commission's refusal of public access to the further identified documents concerning the expenses incurred in relation to the mission trip), the European Ombudsman confirmed, after inspection of the withheld documents, that they contain information 'which relate to separate individuals [and which is] likely to constitute personal data as the persons concerned have been identified (Mr Oettinger) or might be identifiable (the staff members who accompanied him to the U[nited] S[tates])'⁴.

Moreover, the European Ombudsman acknowledged that the European Commission's 'refusal of public access to these documents was in line with European Union law on the protection of personal data'⁵. The European Ombudsman noted, *inter alia*, that '[t]he complainant ha[d] not put forward any specific need which would justify granting public access to the documents that he requested'; and that '[n]o automatic priority can be conferred on the objective of

³ Official Journal L 205 of 21.11.2018, p. 39.

⁴ See paragraph 11 of the Proposal for a solution.

⁵ See paragraph 13 of the Proposal for a solution.

transparency over the right to protection of personal data’ under the case law⁶.

Nevertheless, the European Ombudsman proposed that the European Commission discloses ‘in addition to the breakdown of the Commissioner’s own costs, [...] the overall amounts spent on the trip, including those of the accompanying staff, broken down into certain categories of costs’⁷.

The European Ombudsman also noted that she might return to the other aspects of the complaint later in her inquiry⁸.

IV. THE EUROPEAN COMMISSION’S POSITION ON THE PROPOSAL FOR A SOLUTION

The European Commission welcomes the European Ombudsman’s conclusion that the refusal to grant public access to documents concerning the expenses incurred in relation to the official visit of Commissioner Oettinger to the United States of America from 7 to 11 October 2016, complied with European Union law.

Moreover, the European Ombudsman confirmed that the institution abided by its ‘policy in the present case, by publishing details of the expenses incurred by Commissioner Oettinger.’⁹ Indeed, the European Commission provided retroactively the aggregated data pertaining to Commissioner Oettinger’s expenses notwithstanding the fact that the specific mission in which the complainant expressed an interest, took place in 2016, namely, two years before the institution started, proactively, publishing Commissioners’ mission expenses and before December 2017.

The European Commission would like to underline that ‘the aggregated data’ pertaining to the expenses of the accompanying staff, which the complainant did not request in the framework of his application, are not covered under the policy of proactive publication of the institution. The proactive publication policy, which was commended by the European Ombudsman herself,¹⁰ is in accordance with the Code of Conduct for the Members of the European Commission, which entered into force on 1 February 2018. Since then, the European Commission has implemented its policy of proactive publication of mission costs of Members of the European Commission by means of a specific tool, the Application for Transparent Meetings with Organisations and Self-employed individuals (‘ATMOS’).

As regards missions of staff members accompanying Members of the European Commission, it is to be noted that their mission expenses are not linked, from a legal point of view, to those of the Member of the European Commission they accompany. Indeed, under the European Union Staff Regulations, expenses incurred by an official in the course of his/her duties are reimbursed on an individual and separate basis. In particular, Article 71 of the Staff Regulations and Articles 11 to 13 of Annex VII thereto provide for the reimbursement of mission costs on the basis of an individual travel order.

⁶ *Ibid.*

⁷ See paragraph 21 of the Proposal for a solution.

⁸ See paragraph 22 of the Proposal for a solution.

⁹ See paragraph 16 of the Proposal for a solution.

¹⁰ See European Ombudsman decision in cases 562/2017/THH and 1069/2017/THH.

Consequently, when several staff members travel together their respective mission expenses are managed separately and several individual files are opened. Given that, for efficiency and practical reasons, staff members accompanying Members of the European Commission often attend other meetings and/or conferences at the place of the mission, identifying the part of mission expenses which is linked to a mission of a Member of the European Commission would often prove difficult or arbitrary.

Indeed, since the reimbursement of mission expenses is calculated individually for each staff member, there are no documents which give an aggregated view of all costs incurred by all staff members accompanying a Commissioner on an official visit.

The European Commission also notes that the systematic publication of details of mission expenses of its staff members (other than Members of the Commission) would entail a substantial administrative burden, in view notably of the need to ensure that any publication complies with Union law on the protection of personal data.

Against this background, the European Commission considers that the handling of the complainant's request was done in accordance with the relevant rules on public access to documents and the Code of Conduct for the Members of the European Commission. The European Commission is also of the view that it has acted in line with appropriate standards of transparency and public accountability in the context of the present request.

Finally, the European Commission would like to note that the text of the confirmatory decision clearly indicated that the disclosed 'aggregated data [...] [were] in relation to the expenses incurred by Commissioner Oettinger during his official visit to the United States from 7 to 11 October 2016'.¹¹ The latter statement from the confirmatory decision quoted by the European Ombudsman, per which the European Commission indicated that 'the aggregated expenses of the trip in question are hereby disclosed', referred to the expenses of the Commissioner. This statement cannot be taken out of the context of the detailed explanation as to why the documents pertaining to the mission in question could not be disclosed.

V. CONCLUSIONS

The European Commission considers that in the case at hand, it correctly applied the provisions of Regulation (EC) No 1049/2001, read in conjunction with Regulation (EC) No 2018/1725 and as construed by settled case law.

Moreover, the European Commission has complied with its policy of publication of aggregated data pertaining to Commissioners' travel expenses, as acknowledged by the European Ombudsman. This policy which was commended by the European Ombudsman, results from the Code of Conduct for the Members of the European Commission, and covers aggregated data from Commissioners only. It responds to the higher level of accountability and, thus transparency, which is required from the position as Member of the College.

¹¹ See page 3 of the confirmatory decision of 18 January 2018, C(2019) 590 final.