

Reply of the European Commission to a request for information from the European Ombudsman

- Complaint by Mr [REDACTED], ref. 787/2020/DL

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 9 December 2019, the complainant, an academic, submitted five initial applications¹ for access to ‘all replies to confirmatory applications based on Regulation (EC) No 1049/2001 adopted by the European Commission in 2014, 2015, 2016, 2017 and 2018’.

The applications were dealt with by Directorate C of the Secretariat-General of the European Commission, responsible for ‘Transparency, Efficiency & Resources’ (hereafter the Secretariat-General). On 9 December 2019, it proceeded to estimate the workload associated with the handling of the five initial applications, as they concerned the same type of documents, i.e., decisions on confirmatory applications adopted by the European Commission on the basis of Regulation (EC) No 1049/2001. On the same date, the Secretariat-General informed the applicant that his applications concerned a very large number of documents, which needed to be assessed individually. Such a detailed analysis could not be carried out within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001. Therefore, the Secretariat-General conferred with the applicant informally with a view to finding a solution. This meant that the scope of the request had to be reduced in a way that would enable its treatment within the extended deadline of 15 + 15 working days. The Secretariat-General asked the applicant to limit his requests to a certain number per year, possibly to include only the policy area that is of interest to him².

On 13 December 2019, the applicant replied to the Secretariat-General that the proposed solution ‘would defeat the purpose of my request altogether, which relies on a large and complete dataset of Commission confirmatory applications. [...] I cannot but conclude that the administrative burden caused by my request is the result of a policy choice made by the Commission itself³.’

In its solution proposal of 23 December 2019⁴, the Secretariat-General described in detail the actions needed in order to handle these requests and concluded that the handling of the applicant’s five simultaneous requests could not be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001. Furthermore, it asked the applicant to narrow down the scope of the applications and to reduce them to a more manageable number.

In his counter-proposal of 28 December 2019⁵, the applicant proposed to reduce the scope of his initial applications to all the confirmatory decisions adopted in 2018 (in total 288 confirmatory decisions) and to exclude their annexes from the scope of his request.

¹ Registered under references GESTDEM 2019/7132, GESTDEM 2019/7134, GESTDEM 2019/7136, GESTDEM 2020/7137 and GESTDEM 2020/7138.

² Ares(2019) 7568721.

³ Ares(2019)7671727.

⁴ Ares(2019)7908517.

⁵ Ares(2020)7945576.

In its further solution proposal of 7 January 2020⁶, the Secretariat-General informed the applicant that, notwithstanding the substantial reduction of documents, his proposed solution would still require the treatment of a total number of 288 documents, the individual assessment of which could not be completed within the normal time limits prescribed in Article 7 of Regulation (EC) No 1049/2001. It therefore proposed to deal with an overall number of 30 confirmatory decisions adopted in 2018 for the reasons stated in its said proposal. In his reply of 13 January 2020⁷, the applicant rejected the further solution proposed by the Secretariat-General.

Consequently, the Secretariat-General came to the conclusion that handling the full scope of the applicant's five initial applications, or of the applicant's proposal of 28 December 2019, would involve an excessive administrative burden that would be disproportionate to the applicant's possible interest in obtaining the requested documents.

Therefore, the Secretariat-General has proceeded to the unilateral restriction of the scope of the applicant's initial applications, so as to bring it down to a more manageable number of documents. It has decided, per the Secretariat-General's second solution proposal of 7 January 2020, to handle 30 documents covered by the applicant's requests, namely the 30 confirmatory decisions, excluding their annexes (as proposed by the applicant), which were last adopted in the year 2018. The European Commission understands that this could provide the applicant with a representative set of confirmatory application decisions for purposes of his research into the Commission's implementation of Regulation (EC) No 1049/2001 in the year concerned.

In its initial reply of 30 January 2020, the Secretariat-General granted wide partial access to the 30 identified documents, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and of the first indent of Article 4(2) (commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

In the confirmatory decision C(2020)2690 final of 4 February 2020, the European Commission confirmed the initial decision of Directorate C of the Secretariat-General of the European Commission to grant wide partial access to those documents, based on the same exceptions.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 4 May 2020, the complainant turned to the European Ombudsman.

In his complaint, the applicant argues that:

- ‘the Commission offered an implausible estimate of the workload required to deal with the access to documents request (it suggested that approximately 3800 working days would be required);
- the Commission failed to seriously engage with the complainant's counter-offer and counter-arguments, and;
- the Commission misquoted a key passage of the complainant's confirmatory application in such a way that it made it appear that the complainant had

⁶ Ares(2020)54028.

⁷ Ares(2020)184949.

accepted the Commission's unilateral decision to release only 30 documents.'

III. THE EUROPEAN OMBUDSMAN'S INQUIRY

Based on the complaint, the European Ombudsman opened an inquiry and raised questions concerning the handling of the above-mentioned applications for access to documents. She understands that:

- 'the amount of time it takes to handle it will depend on two factors, namely i) the number of the documents requested and ii) the extent of review needed to examine those documents.
- The documents requested are confirmatory decisions. Would the Commission agree that the only possible confidential information that might be contained in confirmatory decisions would be any personal data of the person seeking access, such as their name and contact details, and possibly the name and signature of the Commission official signing the decision. We have examined the documents released by the Commission to the complainant, and we have noted that this was the only type of information redacted. The examination and redaction of confirmatory decisions would therefore appear to be limited and routine. Rather than taking up to three days per document, as was suggested by the Commission, the examination and this exercise would take a skilled administrative assistant who had been given clear instructions only a few minutes.'

As a first step, the European Ombudsman asked the European Commission to give its view on the matter.

IV. THE REPLY OF THE EUROPEAN COMMISSION

The European Commission's confirmatory decision C(2020)2690 final contains an extensive reasoning why the European Commission unilaterally restricted the scope of the five above-mentioned applications at the initial stage.

1. The European Commission comments on the applicant's allegations

On 23 December 2019, the Secretariat-General informed the applicant that as indicated in the annex to the report from the Commission on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, the European Commission provided the following numbers of replies to confirmatory requests based on Regulation (EC) No 1049/2001 in the years concerned by his applications:

- 272 in 2014;
- 230 in 2015;
- 220 in 2016;
- 259 in 2017;
- and 288 in 2018⁸.

This resulted in 1269 decisions on confirmatory applications, enclosing their annexes, namely the documents forming part of these decisions and to which full or partial access

⁸ COM(2019)356 final.

was granted. The exact number of annexes could not be determined without a very detailed assessment of all these decisions. With a view of providing the applicant, by way of analogy, with an estimate of the volume of documents, the applicant was informed that, in a recent case of an initial application requiring the assessment of 8 identified decisions on confirmatory applications relating to trilogues, the resulting number of documents actually assessed, including the annexes to the confirmatory decisions, reached a total number of 73 documents.

Notwithstanding the substantial reduction of the number of requested documents by the applicant to all confirmatory decisions handled in 2018, excluding their annexes, which amounted to 288 documents, the individual assessment of these could not be completed within the normal time limits set out in Article 7 of Regulation (EC) No 1049/2001 without entailing a disproportionate administrative burden for the Secretariat-General. The administrative burden facing the Secretariat-General can be illustrated by the fact that, at the same period of time, another seven similar initial applications for access to confirmatory decisions were handled by the same service.

On 13 January 2020, the applicant stated that he could not agree with the further solution proposed by the Secretariat-General. Unfortunately, despite its efforts, the Secretariat-General has not been able to agree on a solution as regards the handling of the applicant's initial applications.

Taking into account the time that elapsed since the registration of the concerned initial applications and with a view to safeguarding the interests of good administration, the European Commission consequently saw itself obliged to balance the applicant's possible interest in access against the workload resulting from the processing of his applications. This was in line with the case-law of the EU Courts⁹.

The Secretariat-General came to the conclusion that handling the full scope of the five initial applications, or of the applicant's proposal of 28 December 2019, would have involved an excessive administrative burden that would be disproportionate with the applicant's possible interests in obtaining the requested documents.

Therefore, the Secretariat-General proceeded to the unilateral restriction of the scope of the initial applications registered under GESTDEM 2019/7132, 2019/7134, 2019/7136, 2019/7137 and 2019/7138, so as to bring it down to a more manageable number of documents. It has decided, per the Secretariat-General's second solution proposal of 7 January 2020, to handle 30 documents covered by the applicant's requests, namely the 30 confirmatory decisions, excluding their annexes, which were last adopted in the year 2018.

The final precise estimates took also into account:

- past experience with handling of similar wide scope requests for access to documents;
- the time that has elapsed since the registration of the concerned initial applications;
- other applications for access to documents

⁹ Judgment of the Court of Justice of 2 October 2014, *Guido Strack v Commission*, C-127/13, EU:C:2014:2250, paragraphs 26-28.

- and other tasks that the European Commission staff concerned would have to deal with during the period of handling the applicant's initial applications.

In the same period of time, the Directorate C of the Secretariat-General handled 79 confirmatory applications including 13 newly registered confirmatory applications and 16 initial applications for access to documents, among others 5 applications submitted by Mr [REDACTED]. The estimated number of documents identified by the Secretariat-General as falling within the scope of these 16 initial requests and 79 confirmatory applications was more than 1600 documents.

The Secretariat-General therefore concluded that the workload relating to the disclosure of the documents requested under the concerned initial applications would be disproportionate as compared to the objectives set by the applications for access to these documents, and that the corresponding resources could not be allocated to handle these requests, so as to safeguard the interests of good administration and to ensure the proper handling of applications originating from other applicants.

2. The European Commission comments on the European Ombudsman questions

Firstly, the European Commission would like to underline that 'the amount of time it takes to handle' the excessive workload of initial and confirmatory applications depends on the volume of documents to which access is sought or the volume of passages (number of pages) to be examined by the institution¹⁰.

In order to treat such applications, the European Commission would have to carry out a certain number of tasks listed below:

- preliminary assessment of the content of the documents in light of the exceptions of Article 4 of Regulation EC (No) 1049/2001;
- assessment of the further procedural steps to undertake, for example whether third party consultations should be made;
- (possibly) third-party consultations under Article 4(4) of Regulation (EC) No 1049/2001 and (possibly) a further dialogue with the third party originators of documents falling within the scope of the requests;
- final assessment of the documents in light of the comments received, including the possibility of granting (partial) access;
- redactions of the relevant parts falling under exceptions of Regulation (EC) No 1049/2001;
- preparation of the draft replies;
- (possible) consultation of the Legal Service;
- finalisation of the replies at administrative level and formal approvals of the draft decisions;
- final check of the documents to be (partially) released (if applicable) (scanning of the redacted versions, administrative treatment) and dispatch of the replies.

Secondly, the European Commission disagrees with the statement of the European Ombudsman that 'the only possible confidential information that might be contained in confirmatory decisions would be any personal data of the person seeking access, such as

¹⁰ Ibid, paragraph 27.

their name and contact details [...] and the examination and redaction of confirmatory decisions would therefore appear to be limited and routine.’

Confirmatory decisions are formal European Commission acts adopted via the delegated procedure¹¹. It is important to mention that the term ‘confirmatory decision’ in this case includes both the confirmatory reply, in which the European Commission explains its reasoning for granting or (partially) refusing access to documents and, if applicable, the documents disclosed to the applicant. Therefore, the handling of applications for access to documents including drafting and redacting of initial replies and confirmatory decisions is done by dedicated members of staff of the European Commission having a solid legal background.

Confirmatory decisions may contain information other than personal data which would require protection under Regulation (EC) No 1049/2001. For instance:

- names of the clients of the law firms associated with the applicants;
- areas of business activity of the client represented, which could allow the identification of the organisation concerned;
- business information of the companies involved, which is then reproduced in the confirmatory decision;
- quotation from third parties when consulted in accordance with Article 4(4) of Regulation (EC) No 1049/2001.

In some cases, personal data, including information which could indirectly allow the identification of the applicant, are indeed found in many different parts throughout confirmatory decisions. It needs, however, to be highlighted that a careful assessment of each confirmatory decision is necessary to strike the right balance between transparency and public scrutiny, on the one hand, and the protection of personal data and other potentially sensitive information included in the decisions, on the other hand.

V. CONCLUSION

Given the context described above, the European Commission considers that the unilateral restriction of the scope of the applicant’s initial applications was justified. Consequently, the decision of the Secretariat-General to unilaterally restrict the scope of those initial applications was in line with the principle of proportionality and consistent with the applicable case law of the EU Courts.

The European Commission is of the view that the said confirmatory decision was legally and factually correct at the point in time when it was taken, and that there was no manifest error in the European Commission's assessment. According to settled case law, the legality of a Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. Subsequent events may not affect that assessment.

For the reasons set out above, the European Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the EU

¹¹ In accordance with Article 14 of the European Commission’s Rules of Procedure, the power to take decisions on confirmatory applications is delegated to the Secretariat-General of the European Commission.

Court, was fully in line with the applicable legislation and the relevant case-law on access to documents at the point in time it was taken.

For the Commission
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