

ADDITIONAL VIEWS
Re. EO Complaint 2024/570
(EASE 2023/7330)

I. Facts and procedure

1. In its initial application of 11 December 2023, registered on the same day, the applicant requested access to the following documents:
 - ‘Any documents providing insights into case law on Regulation 1049/2001. This is meant to include any documents containing a case law overview, internal manuals, instructions or FAQs used by the Transparency Unit [...] [; and]
 - Any templates for replies to access to documents requests. This includes standard responses that a request has been registered or that a request has not been registered; concerning wide-scope requests; concerning "fair solutions"; "holding replies"; third party consultations. This is meant to apply to templates for both initial as well as confirmatory applications.’
2. In its initial reply of 18 January 2024, Directorate SG.C of the Secretariat-General identified **43 relevant documents, out of which 42 were fully or widely released**, subject to the redaction solely of personal data in 4 documents in accordance with Article 4(1)(b) Regulation (EC) No 1049/2001. Only one document, namely an internal case-law table (identified as Document 43) was fully withheld, based on the exceptions laid down in the second indent (legal advice) of Article 4(2) and in the second subparagraph (decision-making process) of Article 4(3) of the Regulation.
3. Following the submission of the applicant’s confirmatory application on 19 January 2024, the European Commission issued a confirmatory decision on 18 March 2024¹, whereby it maintained the initial refusal to grant access to the case-law table, based on the exceptions laid down in the second indent (legal advice and court proceedings) of Article 4(2) and in the second subparagraph (decision-making process) of Article 4(3) of the Regulation.
4. On 21 March 2024, the applicant submitted a complaint to the European Ombudsman regarding the Commission’s confirmatory decision.

II. Commission’s comments

1. Preliminary remark

As a preliminary remark, the applicant argues that the Commission’s refusal to grant access to the case-law table requested is ‘deeply ironic’, as according to him, ‘the Commission’s refusal to reveal how it uses case-law to deal with access requests evidently contradicts its claims to transparency when dealing with the very subject of transparency.’²

¹ C(2024)1894 final.

² See Complaint, p.2.

By following this line of argumentation, the Commission would not be entitled to refuse access to any documents simply because they relate to the field of transparency. As a result, exceptions provided for in Article 4 would be deprived of application simply because the matter relates to ‘transparency’. Consequently, the institution would not be able to protect, for instance, the legal advice sought in the framework of court proceedings involving access-to-documents requests.

Yet, the purpose of Regulation (EC) No 1049/2001 ‘is to give **the fullest possible effect to the right of public access to documents and to lay down** the general principles and **limits on such access**’³.

Moreover, pursuant to settled case-law, the right of access to documents enshrined in Article 42 of the Charter of Fundamental Rights of the European Union is not unconditional, but is exercised, in accordance with Article 52(2) of the Charter, under the conditions and within the limits defined by the Treaties.⁴

Furthermore, the Commission would like to stress that, in this instance, out-of-the 43 relevant documents, it provided access to 42 of them, subject to solely the protection of personal data in 4 documents. These documents included, *inter alia*, various internal guidance fiches and internal templates for replies, fair solutions, third party consultations, etc. Therefore, the Commission was very transparent as to its internal guidance in respect to its implementation of Regulation (EC) No 1049/2001.

Finally, the applicant’s misguided line of argumentation is tantamount to creating an increased threshold of transparency for the administrative area of access-to-documents *per se*, which is not provided for by Regulation (EC) No 1049/2001. Indeed, the Regulation provides for such an increased threshold only for the ‘cases where the institutions are acting in their **legislative capacity** [...]’⁵, while recalling the right of the institutions ‘to protect their internal consultations and deliberations where necessary **to safeguard their ability to carry out their tasks**’⁶.

2. Lack of foundation of the four arguments underlying the complaint

The applicant raises four main arguments in support of his complaint. The Commission’s comments are as follows.

a) Justified application of the ‘legal advice’ exception

First, the applicant disputes the application of the exception provided under the second indent of Article 4(2) of Regulation (EC) No 1049/2001 for the protection of legal advice.

Yet, in support of his challenge of this legal basis, the applicant does not refer to any relevant reasons that pertain to the legal advice exception. The only substantive point that the applicant raises is based on the judgment of the General Court in case *Pech v Council*, which held:

³ Recital 4 of the Regulation. (Emphasis added).

⁴ Judgment of 30 January 2020, *CBA Spielapparate- und Restaurantbetrieb GmbH v European Commission*, T-168/17, EU:T:2020:20, paragraph 69.

⁵ Recital 6 of the Regulation. (Emphasis added).

⁶ Recital 11 of the Regulation. (Emphasis added).

‘In that regard, as the Court of Justice has observed, it is precisely transparency concerning legal advice that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate that is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (judgments of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59, and of 21 July 2011, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 113).’⁷

The applicant concludes from this judgment that the exception provided for in the second indent of Article 4(2) for the protection of legal advice does not apply to the internal case-law table requested.

The quoted judgment is irrelevant to the matter at stake. Indeed, this judgment relates to a legal opinion concerning a proposal for a regulation and, therefore, to the legislative activity of the institutions, for which, as already stated above, a higher threshold of transparency is required by Regulation (EC) No 1049/2001. There is nothing in this judgment supporting the conclusion that a legal advice, such as the one contained in the case law table at stake, would fall outside the scope of the exception laid down in the second indent of Article 4(2) for the protection of legal advice.

b) Justified application of the ‘court proceedings’ exception

Secondly, the applicant disputes the application of the exception laid down in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 for the protection of court proceedings.

The applicant argues that no reference is made to any specific court or Ombudsman procedures. Yet, by its nature, the case-law table is intrinsically linked to such procedures and thus has a relevant link with the latter, within the meaning of the case-law already quoted in the contested confirmatory decision.

The very purpose of the case-law table is indeed to guide the case-handlers of the Directorates-General and Services of the Commission for the handling of access to documents requests and drafting of their decisions, which are eventually the subject of the actions for annulment lodged before the court.

For this reason, disclosing this internal document would force the Commission to eventually defend itself against positions taken internally concerning the legality of various options envisaged while drawing up the act in question, some of which may go against the line of defence of the institution before the court.

Moreover, as already indicated in the contested confirmatory decision, the case-law table operates a curated selection of case-law in order to flag recurrent sensitive points in Commission replies, instead of defending their legality. Therefore, the public disclosure of this document (even partially) would upset the vital balance and equality of arms between the Commission and applicants engaged in legal procedures.

The applicant also argues that the existence of divergences between the different services is inherent to the work of the Commission.

⁷ Judgment of 8 June 2023, *Council v Pech*, C-408/21 P, EU:C:2023:461, paragraph 55.

This argument is unfounded for two reasons. First, the applicant does not point to any source or authority for this assertion. Secondly, even if the complainant could establish that there are common divergences between the services, *quod non*, it would be irrelevant to the justified application of the exception for the protection of court proceedings.

c) Justified application of the 'decision-making process' exception

Thirdly, the applicant disputes the application of the exception provided in Article 4(3) of Regulation (EC) No 1049/2001, for the protection of the decision-making process.

The applicant argues that the Commission did not provide any specific reasoning as to the application of this exception.

The obligation to state reasons is a general principle of EU law enshrined in the second subparagraph of Article 296 TFEU and in Article 41(1) of the Charter of Fundamental Rights of the European Union. According to this principle, any legal act adopted by the European Union institutions must state the reasons on which it is based.

Pursuant to settled case-law, a sufficient statement of reasons requires the disclosure 'in a clear and unequivocal fashion [of] the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons'⁸ for the refusal.

Such reasoning does not, however, imply to go 'into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard, not only to its wording, but also to its context and to all the legal rules governing the matter in question'⁹.

Moreover, 'where a reply from the institution confirms the rejection of a request for access to documents on the basis of the same grounds as in the initial decision, it is necessary to examine whether the statement of reasons is sufficient in the light of all the exchanges which took place between the institution and the applicant, taking into account the information available to him as to the nature and content of the documents requested'¹⁰.

As already indicated in the contested confirmatory decision, the internal case-law table requested constitutes key legal guidance addressed to the case-handlers in Commission departments for the handling of access to documents requests and drafting of their decisions. Contrary to the applicant's allegation, the reasons provided in the confirmatory decision in question are not vague and provide a proper justification for the application of the 'decision-making' exception, which, as per settled case-law, is aimed at protecting the institution's 'space to think' from external pressure by providing the possibility of expressing views independently within an institution and encouraging internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process¹¹.

⁸ See, *inter alia*, Judgment of 27 November 2019, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, T-31/18, paragraph 107.

⁹ *Ibid.* paragraph 108.

¹⁰ Judgment of 6 September 2023, *Foodwatch eV v European Commission*, T-643/21, EU:T:2023:519, paragraph 21 (Unofficial translation).

¹¹ See judgments of 9 September 2008, *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 78 ; and 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87, already referred to in the disputed confirmatory decision.

Moreover, these reasons come to supplement the thorough justification already provided in the initial reply of the Secretariat-General. In the framework of the latter, it was already explained, *inter alia*, that the selection of case law and the internal considerations attached to each extract constitute internal guidance, not validated by the hierarchy, to enrich and inform the decision-making on how to reply to each request for access to documents.

It was also stressed that disclosing the document would undermine the decision-making of the Commission, which would then be constrained by the internal considerations and preliminary informal choice of case law that was included in the document to inform the decision-making, losing both its ability to ponder serenely and decide which case-law/course of action best suits the case at hand, and the ability to resort to case-law/courses of action which were not included in the document.

The Secretariat-General had further indicated that the public disclosure of the internal case-law table could cause confusion to the public, by placing in the public domain internal considerations made by staff members of the Commission, which do not necessarily reflect the final position of the Union.

Finally, the Secretariat-General had explained that the public release of the internal case-law table would seriously undermine the free exchange of views and carry a risk of self-censorship, as it would carry the risk that the opinions of Commission officials and unofficial interpretation of the case-law might be made public and that the latter would take it into account in the future, to the point where they might be led to practise self-censorship and to cease putting forward any views.

Additionally, the perspective of having this legal advice published would likely alter the curation criteria, discouraging the inclusion of the most critical case-law, and encouraging the selection of the case-law more favourable to the institution, thus rendering this living document unfit for its purpose of flagging to the Commission services possible deficiencies while replying to requests for public access to documents.

The Secretariat-General concluded that as a result, the Commission could no longer benefit from the frank and complete views required of its staff and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures.

Against this background, the Commission considers that, contrary to the applicant's allegation, the contested confirmatory decision provided an adequate statement of reasons in respect to the application of the exception laid down in Article 4(3) of Regulation (EC) No 1049/2001.

The applicant's additional allegation in his complaint, that the case-law table cannot be protected under the exception provided under Article 4(3), due to its nature of 'a living document that is frequently updated', cannot be followed. First, the wording of this exception, itself, does not provide any restriction as to the type of document that can be protected under it. Secondly, as per settled case-law, the decision of the institution must 'only contain tangible elements in respect to the serious risk' and is not required to submit 'evidence to establish the existence of such risk'.¹²

¹² Judgment of 14 June 2023, *Covington & Burling LLP and Van Vooren v European Commission*, in case T-201/21, EU:T:2023:333, paragraph 52. (Under appeal but not on this point).

Consequently, the contested draft decision sufficiently and duly justified the application of the exception laid down in Article 4(3) of Regulation (EC) No 1049/2001 for the protection of the decision-making process.

d) Lack of overriding public interest

Alternatively to the above-mentioned arguments contesting the application of the invoked exceptions, the applicant finally alleges the existence of an overriding public interest.

The alleged overriding public interest in the public disclosure of the internal case-law table request would consist in ‘ensuring improved public understanding of the law and how it is interpreted by the institutions.’ This argument was also invoked by the applicant in the framework of his confirmatory application, stating that an ‘improved understanding of the case-law, ultimately, would also benefit the Commission as it would likely lead to more requests being within the boundaries of the case-law, thereby streamlining the institutional response’.

Yet, the Commission maintains the position already stated in the contested confirmatory decision, that pursuant to settled case-law, such general considerations, such as a need for transparency and openness, cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the document in question¹³.

The fact that the internal case-law table relate to the administrative sphere of activity of the Commission, as opposed to the legislative one which requires wider openness, comes to support this conclusion.

Moreover, the Commission considers that the public’s proper understanding of its implementation of Regulation (EC) No 1049/2001 and the relevant case-law is already sufficiently ensured by the publication of its annual reports on access-to-documents, which summarise the main points of the relevant judgments handed down in the year under review. In addition, the Commission remains available, under the Code of Good Administrative Behaviour for further questions or information that citizens may have.

Last, but not least, the fact that the Council also refused in the framework of a parallel request of the applicant, to release the document in question, both at initial and confirmatory stages, supports even further the Commission’s position.

In conclusion, the Commission considers that none of the arguments raised by the applicant invalidate the legality of the contested confirmatory decision.

¹³ See *inter alia*, Judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.