

# Access Info Europe

Calle Cava de San Miguel 8, 4c  
28005 Madrid, Spain



## **Reply by Access Info Europe to the Opinion of the Commission on the European Ombudsman's Recommendation regarding the Complaint by Ms Helen DARBISHIRE, on behalf of Access Info Europe, ref. 682/2014/JF**

### Preliminary Observations

Access Info Europe welcomes the Ombudsman recommendation that Commission should register the application and deal with it promptly; and no longer require all applicants to provide their postal address, if a suitable alternative address for correspondence is supplied.

Access Info Europe also welcomes the Ombudsman suggestion that the Commission consider alternative online systems or electronic means of communicating its decisions on access requests.

We also welcome that this process is finally moving forward after receiving the Opinion of the Commission to the Ombudsman's recommendations.

Below we outline our response to the Commission's Opinion.

In response to the Commission's point 2.2 Point (i) - Registration of the request for access to documents

The Commission stated in its 9 March 2017 Opinion to the Ombudsman that "the applicant has refrained from providing a postal address in response to the Commission's request thereto, dated 15 November 2013."

This statement is incorrect because a postal address was not asked for on 15 November 2013.

Rather, the Commission asked for the requester's 'name', 'surname', 'country' and 'activity sector'. They did so even when all the relevant information was provided on 2 December 2013 - namely the full name of the organisation that was requesting the information (Access Info Europe), our country and activity sector, as well as indeed information about the country of origin, residence and place of work of the requester.

The failure – to this day – of the Commission to acknowledge that the requested information was provided, along with its repetition of asking for information that had already been provided, and its refusal therefore to process the request, forms the essence of our initial complaint to the European Ombudsman and we assert that this was maladministration.

At the time the Commission was focused on the surname of the applicant, which became a moot point the moment it was clarified (2 December 2013) that Access Info Europe was asking for the information. We believe that the Commission erred here and that there was maladministration because we made clear that Access Info Europe (a legal person) was asking for the documents.

If an obstacle had been the postal address (which it was not at the time) the Commission could have asked for it. Indeed, the Commission is well aware of Access Info Europe's postal address but it could have asked us to confirm it (as it often does when processing other requests).

Hence the Commission has had since December 2013 all the elements necessary to process this request.

Access Info Europe is indeed interested in the requested documents. We would not have either asked for it or complained to the European Ombudsman if we had not had a genuine interest in the information.

The requested document – which we recall are the documents that the European Commission has to report every three years to the European Parliament and the Council on the application of Article 19 of Directive 2008/115/EC of 16th December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, in particular any documents on the provisions on detention in article 15 of this Directive – remain of interest in the context of our ongoing work on migration and we hereby confirm we would be delighted if they could be provided to us immediately.

We note that the European Court of Human Rights has stated that “news is a perishable commodity” and we note that the delay in providing us with this information in a timely manner has a negative impact on our work in collaboration with other organisations working on detention of migrants.

In response to the Commission's 2.3 Point (ii) - Requirement to provide a postal address

The issue of the need for applicants to provide a postal address was raised by the Commission in the course of this complaint, so it is a supplementary line of argument. Access Info Europe does, however, welcome the European Ombudsman's consideration of this policy by the Commission.

In its Opinion, the Commission states that it, “respectfully points out that it is not reasonable to expect the Commission to adapt its formal notification practice to the set-up, and possible inconveniences, of a private website [AsktheEU.org].”

We stress that Access Info Europe is not asking for the Commission to adopt a special procedure for access to documents requests submitted via AsktheEU.org. Indeed, we are in favour of uniform procedures for requesters and one of our concerns has been that different methods of asking for information require different data to be provided (such as the varying online forms on the websites of various EU bodies and agencies).

What we do assert however, is that, by insisting on the provision of postal addresses the Commission is breaching the requirement in Article 1 of Regulation 1049/2001 to “to establish rules ensuring the easiest possible exercise of this right”

The Commission argues that, “the requirement to provide a postal address flows directly from the obligation, established in Article 297 of the Treaty on the Functioning of the European Union (TFEU), to formally notify decisions to those to whom they are addressed” and uses Case T-167/10 concluded in 2012 and Case T-411/06 from 2008 to defend its position.

Evidently there are varying interpretations of the treaties in the European Union as not all EU institutions, bodies, and agencies oblige individuals to provide a postal address in order to register requests. Those which do not include bodies such as the European External Action Service, the European Parliament, the Council of the EU, the European Central Bank, EFSA, the European Environment Agency, among others.

As we have previously pointed out, the Commission also did not require a postal address until April 2014, after more than 10 years of implementation of the access to EU documents Regulation, and many years after the two court cases cited, which would imply an arbitrary application of these two cases without a proper legal analysis or opinion provided. Indeed, when asked for documents used in the decision making process that lead to the adoption of the postal address requirement, the Commission stated it “has not drawn up minutes of these meetings nor are there any other documents drawn up by the Commission that would be linked to the preparation of this guidance note.”<sup>1</sup> It is unclear therefore how the Commission was able to decide it needed to apply Article 297 and the Cases cited without a legal opinion or advice from its Legal Services.

- The Commission states that “the provision of a name, surname, and a complete address, are a minimum requirement in order to enable the Commission to verify whether applications for access to documents are submitted by “real” beneficiaries of Regulation 1049/2001.”

---

<sup>1</sup> [https://www.asktheeu.org/en/request/decision\\_making\\_procedure\\_in\\_com#incoming-5612](https://www.asktheeu.org/en/request/decision_making_procedure_in_com#incoming-5612)

As explained before in Access Info's 30 September 2014 Comments on the European Commission Response, unless an individual were to present a request in person to the Commission with accompanying official photo identification, it is impossible for the Commission to have any legal certainty that a 'false' identity has not been used. If the Commission were to adopt such a policy, it would be overly-cumbersome for the administration and for citizens to exercise their fundamental right of access to EU documents.

The provision of a postal address therefore in no way guarantees that the beneficiary of Regulation 1049/2001 is 'real', but rather that the requester has access to a postal address. That does not necessarily stop the person using a false identity (name and surname) to make such a request, even though they provide a postal address.

- The Commission states that, "a system whereby the Commission would ask each applicant to confirm receipt by replying to its notification e-mail would not only be inadequate to ensure the legal certainty referred to above, but also impracticable." It continues that, "[t]he increased human resources needed for administering such a system, and the reduced legal certainty that would result from it, would therefore not weigh up against the alleged gain, in terms of reduced 'administrative burden', for applicants."

The arguments provided by the Commission in this respect are not logical. Firstly, if the Commission receives a request via email, then they do not need to ask the requester for an email address as they already have it, whereas they do have to specifically ask for a postal address. Secondly, if following the Commission's logic that the provision of a postal address provides legal certainty, surely it takes longer for the Commission to check receipt of answers to 7000 requests and 300 confirmatory applications when made via post, than it would via an automatic digital system in which the recipient clicks on a link confirming receipt of the mail. Needless to say, it is a large waste of Commission resources to be sending messages via certified mail when almost certainly in all cases, the requester would have received their response already via electronic means.

In any case, given that the Commission has stated that "the provision of a name, surname, and a complete address, are a minimum requirement [to verify] "real" beneficiaries of Regulation 1049/2001," it is still not clear that the postal system in use currently, is the appropriate way to "protect[s] the administration, as well as other citizens and legal persons, from ... abuse," let alone then looking at whether it is proportionate or not.

In response to: Alternative means of corresponding with applicants

The Commission states that, "requests for access to documents are administrative requests and it is normal practice, in most Member State jurisdictions, for citizens to provide their name and address when submitting an administrative request to the administration."

Whilst the Commission has not given examples of countries where providing a postal address is obligatory to submit a request (even via email), Access Info Europe can confirm that the provision of a postal address it is not obligatory in order to submit a request in many EU member states including but not limited to Austria, Bulgaria, Denmark, Estonia, Finland, Greece, Ireland, Poland, Slovenia, Sweden, and United Kingdom.

The Commission also argues that it, "does not exclude the possibility that new means of notifying Commission decisions could be developed in the future."

Access Info welcomes this possibility and encourages the Commission to pursue discussions as soon as possible with civil society and European Information Commissioners to come to a long-term solution that is proportionate and that meets international standards.

The Commission, "also points out that it uses e-mail in all its communications with applicants leading up to the final decision on access and for which it is not necessary to establish a date of formal notification."

This again shows the inconsistency in needing to provide a postal address in order to register and process requests, as the Commission is happy to communicate with requesters via email as part of the processing of requests, all of which are related to the exercise of the fundamental right of access to documents by the requester

#### In response to: The Commission's Conclusions

- The Commission should now process the request.
- As set out above, it is unclear if the Commission's system for requiring postal addresses in order to register requests based on the justification of the need to notify access-to-documents decisions is in line with Article 297 TFEU and the case law of the EU courts as the Commission. We assert that this should be clarified through a consultation with the Legal Services on the issue. Until such a legal review has been carried out, this remains an arbitrary practice which puts obstacles in the way of requesters, and hence constitutes a form of maladministration and should be halted immediately
- The Commission appears to have not considered alternatives ways of ensuring legal certainty, avoiding abuse of the right to public access and making sure that the institution's limited resources are used as efficiently as possible, whilst safeguarding personal data. As such, Access Info Europe asks the European Ombudsman to encourage the Commission to explore alternatives as soon as possible, with participation from citizens and civil society, before continuing with the current system or adopting a new more appropriate system for processing access to EU documents requests.