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Brussels, - 9 MARS 2017

Subject: *Recommendation of the European Ombudsman in the inquiry
into complaint 682/2014/JF against the European Commission*

Dear Ms O'Reilly.

Thank you for your letter of 16 December 2016 regarding the above-mentioned case.

I am pleased to enclose the detailed opinion of the Commission on this Recommendation.

I draw your attention to the fact that this file has been treated confidentially.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

Enclosure

*Ms Emily O'REILLY
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Opinion of the Commission on the European Ombudsman's Recommendation
- Complaint by Ms Helen DARBISHIRE, on behalf of Access Info Europe,
ref. 682/2014/JF

1. THE OMBUDSMAN'S RECOMMENDATION

In its letter of 16 December 2016 in the above-mentioned case, the Ombudsman recommends that:

[t]he Commission should

(i) register the application and deal with it promptly; and

(ii) no longer require all applicants to provide their postal address, if a suitable alternative address for correspondence is supplied.

The Ombudsman's letter also contains a suggestion for improvement to the Commission:

The Ombudsman invites the Commission to consider alternative online systems or electronic means of communicating its decisions on access requests.

2. THE COMMISSION'S REPLY TO THE OMBUDSMAN'S RECOMMENDATION

2.1. Preliminary observation

The Commission reiterates the content of its previous, extensive replies dated 24 July 2014 and 15 January 2016 to the various points raised by the Ombudsman.

Below, it addresses only the main aspects raised in the Ombudsman's recommendation.

2.2. Point (i) - Registration of the request for access to documents

The Ombudsman recommends that the Commission *register the application and deal with it promptly.*

The complainant has still refrained from providing the Commission with a valid postal address in response to the Commission's request thereto, dated 15 November 2013. However, as the Ombudsman informed the Commission of the applicant's address in the framework of the pending Ombudsman investigation, the Commission is exceptionally willing to register the complainant's application for access to documents on that basis. As *Access Info Europe* submitted its application more than three years ago, and its comments to the Ombudsman almost a year ago, the Commission will register the application as soon as *Access Info Europe* has expressed its continued interest in all the documents requested at the time, so as to ensure that the Commission's resources are used in the most adequate and efficient way possible.

2.3. Point (ii) - Requirement to provide a postal address

The Commission is pleased to note that the Ombudsman *agrees that the Commission is entitled to require applicants to provide their full name.*

As regards the postal address requirement, the Ombudsman recommends that the Commission *no longer require all applicants to provide their postal address, if a suitable alternative address for correspondence is supplied.* In her more detailed recommendations, the Ombudsman suggests the use of the applicant's e-mail, instead of postal address.

As a preliminary remark, the Commission understands that its procedure for formally notifying its decisions on access-to-documents requests may not be fully compatible with the set-up of the private *AskTheEU* website, run by the complainant's organisation *Access Info Europe*. That website systematically and automatically publishes, on the *Internet*, any request for public access to Commission documents which applicants submit through it, the Commission's replies thereto, as well as any intermediate correspondence exchanged between the applicant and the Commission. This includes requests for applicants' postal address and applicants' replies to such requests and any subsequent correspondence featuring that address, including the Commission's formal decision under Regulation 1049/2001¹. The Commission indeed understands that the Commission's policy of systematically requesting applicants' postal address for formal notification purposes may reduce applicants' willingness to channel their access-to-documents requests through the *AskTheEU* website, if they do not wish to make their address publicly known, as that website does not seem to provide a possibility to 'opt out' from such publication.

In this respect, the Commission 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. Instead, it would encourage *AskTheEU* to inform applicants who do not wish their postal address to appear on the *Internet*, that they remain free to submit their requests for access to Commission documents directly to the Commission, as foreseen in Article 1 of Regulation 1049/2001, by means of a simple e-mail or letter, or by filling out the 'document request form' available on *Europa*. In the latter case, the address is not made public. It is only used on a 'need to know' basis for the purpose of notifying the decision to the applicant, in accordance with the applicable data protection rules.

The Commission would like to underline that its procedure for communicating its decisions under Regulation 1049/2001 to applicants is fully in line with its standard procedure for notifying formal Commission acts to those to whom they are addressed². The introduction, in 2014, of the postal address requirement even had as one of its main objectives, to align the Commission's procedure for notifying access-to-documents decisions with the Commission's standard notification procedure for formal acts.

¹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145 of 31.5.2001, p. 43

² For instance, in the area of competition law.

Indeed, 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. The provision of a name is not sufficient for the purpose of such formal notification. As the Commission already indicated in its earlier replies, the General Court already had the opportunity to pronounce itself on the legal certainty of *simple functionalities included even in general use e-mail systems*, and ruled that they do not meet a sufficient evidential standard.

In Case T-167/10, *Evropaiki Dynamiki*³, the General Court ruled that notification by an e-mail does not have sufficient evidential value for the establishment of legal deadlines. It is true that the General Court, in that same ruling, considered the possibility of confirming a receipt of e-mail with a reply. However, in Case T-411/06, *Sogelma v. EAR*⁴, the General Court pointed to the lack of legal certainty in case of an absence of reply by the applicant in such cases.

The Commission would like to underline in this respect 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. Without a requirement to provide an address, in addition to a name and surname, applicants can easily introduce requests under an invented identity, unclear identity or under the identity of a third person, of which there have been several instances in the past. The postal address requirement is the only way to protect the administration, as well as other citizens and legal persons, from such abuse. The mere provision of an e-mail address provides insufficient legal certainty in this respect.

Furthermore, given that the Commission receives more than 7 000 initial and 300 confirmatory requests on an annual basis, 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. Indeed, such a system would entail registering the applicant's e-mail confirmation, keeping track of all confirmations received and those not received, and in the latter case possibly contacting the applicant a second time with a renewed request for confirmation of receipt of the transmission e-mail. It would carry the legal risk that some requests for e-mail confirmation would remain unanswered, as well as an additional risk of error caused by the additional procedural steps to be followed. The 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 Commission would like to point out in this respect that the submission, by applicants, of a postal address to the Commission currently does not take more than a minute and can be done by means of a simple e-mail, sent spontaneously or in reply to the Commission's request.

³ Judgment of the General Court of 6 December 2012 in case T-167/10, *Evropaiki Dynamiki v Commission*, (ECLI:EU:T:2012:651), paragraphs 47-51

⁴ Judgment of the General Court of 8 October 2008 in case T-411/06, *Sogelma v EAR*, (ECLI:EU:T:2008:419), paragraphs 77-78

For the reasons set out above, the Commission insists that its system of notifying access-to-documents decisions to applicants does not constitute an instance of maladministration. To the contrary, it is in fully line with the EU treaties, the case law of the EU courts and the Commission's established practice as regards the notification of decisions having direct and individual effect on external persons or entities and being subject to legal redress. It strikes an adequate balance between the principles of legal certainty and proportionality in processing requests for access to documents under Regulation 1049/2001.

2.4. Alternative means of corresponding with applicants

The Ombudsman *invites the Commission to consider alternative online systems or electronic means of communicating its decisions on access requests.*

The Commission respectfully points out that it is free to decide on the use of the most suitable system for notifying decisions under Regulation 1049/2001, as long as that system complies with the legal requirements, notably Article 297 TFEU and the principles of legal certainty and proportionality in processing requests for access to documents. Indeed, 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.

The Commission does not exclude the possibility that new means of notifying Commission decisions could be developed in the future. At present however, there are no satisfactory alternative ways of giving effect to Article 297 TFEU, ensuring legal certainty, avoiding abuse of the right to public access and ensuring that the institution's limited resources are used as efficiently as possible, whilst safeguarding personal data.

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.

3. CONCLUSIONS

- As the applicant's address has become clear in the framework of the Ombudsman investigation, the Commission will register the complainant's request for access to documents as soon as the complainant has expressed her continued interest in the documents which she requested more than three years ago.
- The Commission's system for notifying access-to-documents decisions to applicants does not constitute an instance of maladministration. It is in line with Article 297 TFEU, the case law of the EU courts and the Commission's established practice as regards the formal notification of decisions to those to whom they are addressed. It strikes an adequate balance between the principles of legal certainty and proportionality in processing access-to-documents requests under Regulation 1049/2001. The Commission cannot be expected to adapt its system for notifying formal Commission acts to the set-up, and possible inconveniences, of a privately run website.
- Whilst the Commission does not exclude any possible future changes in the way it notifies its administrative decisions, there are currently no satisfactory alternative

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.