

Reply of the European Commission to a recommendation from the European Ombudsman regarding the European Commission's refusal to grant access to personal data

- Complaint by Mr [REDACTED] ref. 1794/2019/EWM

I. BACKGROUND / SUMMARY OF THE FACTS / HISTORY

On 16 July 2019, the complainant, [REDACTED], journalist for Netzpolitik.org, submitted an initial application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')¹.

In its application, addressed to the Directorate-General for Communications Networks, Content and Technology, the complainant requested access to 'invitations to Commission officials and all other documents relating to an event called "Internet of things: fast forward to the future" organised by Vodafone on 29 April 2019 in Brussels'.

In its initial reply of 26 August 2019, the Directorate-General for Communications Networks, Content and Technology identified 21 documents (12 documents with annexes) containing invitations, agendas, presentations, reports and briefings. It granted full access to three of the documents and partial access to 18 documents, based on the exception of Article 4(1)(b) (protection of privacy and integrity) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

On 26 August 2019, the complainant submitted a confirmatory application to contest the reply of the Directorate-General for Communications Networks, Content and Technology, in which he specifically requested access to the personal data contained in the document. In his confirmatory application, the complainant argues that it is necessary to have the personal data transmitted in the public interest, claiming the existence of a possible conflict of interest in a Commission official, currently on leave on personal grounds and working for Vodafone, which he wishes to expose.

After balancing the necessity to have the personal data transmitted to a third party with the legitimate interests of the data subjects, the Commission concluded that legitimate interests of the data subjects might be prejudiced by their transmission. The Commission concluded that there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

On 26 September 2019, the European Commission confirmed² the initial decision taken by the Directorate-General for Communications Networks, Content and Technology to

¹ OJ L 145 of 31.5.2001, p. 43.

² C(2019)7069 final.

refuse access to the personal data present in the documents, based on the exception of Article 4(1)(b) (protection of privacy and integrity) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 26 September 2019, the complainant turned to the European Ombudsman complaining that the European Commission wrongly refused to disclose the personal data of the staff member.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND RECOMMENDATION

In the course of the European Ombudsman's inquiry, the European Commission provided a copy of the documents concerned to the former.

On 12 November 2019, the European Ombudsman issued a proposal for a solution in which she concluded that the European Commission should 'provide the complainant a copy of the requested document without redacting the name of [the staff member]'. The European Ombudsman considered that the complainant has demonstrated the necessity to have the personal data of the staff member transferred for a specific purpose in the public interest and that the circumstances of the case were such that the interests of the staff member cannot be described as legitimate, thus there was no need to conduct a proportionality assessment in accordance with Article 9(1)(b) of Regulation (EU) 2018/1725.

On 30 March 2020, the European Commission replied to the proposal for a solution reiterating the decision taken at confirmatory level on 26 September 2019. The European Commission considered that the complainant did not establish the necessity to have personal data transmitted for a specific purpose in the public interest and that the data subjects' legitimate interests might be prejudiced by their transmission. Moreover, the Commission considered that the interests of all data subjects remain legitimate, and reiterated that the disclosure of personal data in these circumstances could undermine the legitimate interests of the persons concerned by creating a non-proportionate interference with the right to privacy and integrity which are protected by the exception in Article 4(1)(b) of Regulation (EC) 1049/2001.

On 8 July 2020, the European Ombudsman issued her recommendation after analysing the reply of the European Commission to the proposal for a solution. The Ombudsman found that the Commission's refusal to provide public access to the requested documents without redacting the name of the former head of unit constituted maladministration and concluded that '[t]he European Commission should provide the complainant with a copy of the requested documents without redacting the name of the former Commission head of unit'.

In her recommendation, the European Ombudsman considers that the complainant had demonstrated the necessity to have the personal data of the staff member transferred for a

specific purpose in the public interest, since the complainant provided specific reasons for the need to have the personal data of the former head of unit transferred, in line with the case law of the General Court³. These specific reasons include specific evidence of an event which was attended by the former head of unit, and current officials who had worked with that person when he was still at the Commission.

Furthermore, the European Ombudsman also believes that there is no more appropriate and less intrusive means to verify whether the rules set to avoid conflicts of interest in this specific case were and are effectively complied with and, consequently, that this objective passed the proportionality test set out by the General Court⁴. In fact, the Ombudsman considers that an EU official at a certain level of seniority must accept that he or she would be subject to public scrutiny after leaving the EU civil service to take up a public affairs role in a private sector company which is active in an area related to his or her former responsibilities as an EU official.

Last, referring to an earlier decision⁵, the Ombudsman emphasises that the way in which an institution deals with ‘revolving door’ moves, including the enforcement of its own rules, must itself be subject to public scrutiny.

IV. THE REPLY OF THE EUROPEAN COMMISSION

The European Commission takes note of the recommendation of the European Ombudsman. Nonetheless, as explained in the confirmatory decision C(2019)7069 final and in the subsequent exchanges with the European Ombudsman in the context of the inquiry 1794/2019/EWM, the European Commission is required to follow the rules and principles provided for in the relevant legislation concerning the protection of personal data.

First, the European Commission believes that the evidence provided by the complainant to support the necessity of the transmission is unconvincing to meet the strict legal test of Article 9(1)(b) of Regulation (EU) 2018/1725. The European Commission considers that the complainant did not show how the transmission of personal data at issue was or is necessary to ensure adequate public review of the alleged conflict of interests, in particular to remedy the alleged inadequacies of existing Commission scrutiny mechanism for the review of that alleged conflict of interests.

Second, even if it were to be considered that the applicant had satisfied the necessity test, which in the Commission’s view he did not, the proportionality test needs to be conducted before any transmission of the personal data. The provisions of Article 9(1)(b) of Regulation (EU) 2018/1725, currently in force, are more restrictive than those of

³ Cases T-639/15 to 666/15 and T-94/16, *Psara and Others v European Parliament*, paragraph 94.

⁴ *Idem*, paragraph 72.

⁵ Decision of the European Ombudsman in her strategic inquiry OI/3/2017/NF on how the European Commission manages ‘revolving doors’ situations of its staff members, available at <https://www.ombudsman.europa.eu/en/decision/en/110608>.

Article 8(b) of Regulation No 45/2001 in force at the time of the *Psara* judgment, as the current Article 9(1)(b) explicitly further requires the institution to establish that it is proportionate to transmit the personal data after having demonstrably weighed the various competing interests. Thus, the institution is required to examine whether the legitimate interests of the data subject might be prejudiced by the transmission and to determine in that examination whether the applicant's objective is likely to have this effect⁶.

The Court recognised that the 'requirement must lead the EU institution or body in receipt of the application to refuse to transfer the personal data if it is found that there is the slightest reason to assume that the data subjects' legitimate interests would be prejudiced'⁷. In the case at hand, there is no doubt that the data subject's legitimate interests might be severely prejudiced by disclosure as it might risk a serious reputational damage being subject to journalistic public scrutiny with conclusions drawn based on a limited number of given documents rather than on the basis of an overall picture allowing the extraction of safe conclusions. While the likelihood that the legitimate interests of the individual concerned might be prejudiced would be smaller in the case of public figures⁸, it can be hardly sustained that a former middle manager is a public figure within the meaning employed by the Court.

Therefore, the European Commission, when 'demonstrably weighing the competing interests', still has reasons to believe that it is not proportionate to transfer the personal data at the expense of the privacy and the integrity of the person concerned and, thus, the legal requirements of Article 9(1)(b) of Regulation (EU) 2018/1725 are not met also for the proportionality element.

⁶See judgment of the General Court of 15 July 2015 in case T-115/13, *Dennekamp v Parliament*, paragraph 54.

⁷Idem, paragraph 117.

⁸Idem, paragraphs 119-121.

The European Commission reiterates therefore its position, as expressed in the above-mentioned decision and in its reply to the proposed solution, and consequently, it does not see the possibility to follow the recommendation of the European Ombudsman to provide the name of the person concerned in the confirmatory decision without infringing the rules on the transfer of personal data.

For the Commission
Maroš ŠEFČOVIČ
Vice-President

