

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

- Complaint by M [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 a total of 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 against the reply of the Directorate-General for Communications Networks, Content and Technology in which he specifically requests 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 might be prejudiced by their transmission and 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 confirmed the initial decision taken by the Directorate-General for Communications Networks, Content and Technology to 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.

¹ OJ L 145 of 31.5.2001, p. 43.

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 THE PROPOSAL FOR A SOLUTION

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

On 12 November 2019, the European Ombudsman issued the following proposal for a solution:

‘that the European Commission provides the complainant a copy of the requested document without redacting the name of [the staff member]’.

In support of her position, the European Ombudsman provides the following arguments.

Firstly, the European Ombudsman considers that there is a broader public interest in disclosing the documents, including the personal data of the staff member, as this will allow the complainant to scrutinise whether i) there was a possible conflict of interest and ii) the Commission respects the rules it set in regard to the staff member's contacts with the Commission. Consequently, the European Ombudsman believes 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.

Secondly, the European Ombudsman considers that the present circumstances of the case are such that the interests of the staff member cannot be described as legitimate, thus there is no need to conduct a proportionality assessment in accordance with Article 9(1)(b) of Regulation (EU) 2018/1725.

IV. THE EUROPEAN COMMISSION'S REPLY TO THE PROPOSAL FOR A SOLUTION

The European Commission has underlined in its above-mentioned decision of 26 August 2019, whereby it confirmed the refusal of access to the personal data present in the requested documents, pursuant to Article 4(1)(b) of Regulation (EC) 1049/2001 in conjunction with Article 9(1)(b) of Regulation (EU) 2018/1725, that i) the applicant needs to establish that it is necessary to have the personal data transmitted for a specific purpose in the public interest and ii) the Commission, as controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, needs to establish that it is proportionate to transmit the personal data after weighing the interest of the applicant with the legitimate interests of the data subject.

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 the data subjects' legitimate interests might be prejudiced by their transmission, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

First, the European Ombudsman considers that the complainant demonstrated the necessity to have the personal data of a staff member transmitted under Article 9(1)(b) of Regulation (EU) 2018/1725, ‘as this will allow the complainant to scrutinise whether there was a possible conflict of interest [...]’.

However, according to the case law in the *Psara*² judgment, a general reference to the purpose of a journalistic investigation does not show the necessity of a transmission of personal data in the light of the applicants’ objective to ensure public scrutiny. Moreover, abstract and general references to possible wrongdoings cannot justify the need for the transmission of the personal data, let alone its proportionality. In fact, the scrutiny of the activities of former Commission staff or staff on leave on personal grounds falls in the remit of the respective Appointing Authority. Regarding the public scrutiny of the Commission as to the respect of its rules, the Court also notes that ‘no automatic priority can be conferred on the objective of transparency over the right to protection of personal data’³.

Second, the European Ombudsman believes that the interests of the concerned persons and in particular the interests of a staff member in the case at hand cannot be considered legitimate.

Nevertheless, the Commission considers that the interests of all data subjects remain legitimate and reiterates the fact that it believes that disclosure of personal data in these circumstances could undermine the legitimate interests of the persons concerned and in particular of the staff member 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.

In the light of the above, the European Commission considers that the transfer of personal data included in the document requested (through its public disclosure), could not have been considered as fulfilling the requirements of Article 9(1)(b) of Regulation (EU) 2018/1725. In consequence, the use of the exception under Article 4(1)(b) of Regulation (EC) No 1049/2001 was justified.

² Cases T-639/15 to 666/15 and T-94/16, *Psara and Others v European Parliament*, paragraphs 79 and 84.

³ *Idem*, paragraph 91.

V. CONCLUSIONS

The European Commission considers that in the case at hand, it correctly applied the provisions of Regulation (EC) No 1049/2001, read in conjunction with Regulation (EU) 2018/1725 and as construed by settled case law.

In this context, the Commission would like to underline that it takes its responsibilities under the Staff Regulations very seriously and actively ensures the respect of the relevant rules where necessary. The Commission attaches great importance to the issue of occupational activities of its staff members outside the Commission, as well as after leaving the Commission.

For the Commission
Ursula VON DER LEYEN
The President