European Parliament

The President

Ms Emily O'Reilly
European Ombudsman
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D 309495 30.08.2023

Decision 53/2023/NK

Dear Ms O'Reilly,

Thank you for your decision in case 53/2023/NK concerning Parliament's decision to refuse public access to a management report related to the Voluntary Pension Fund for Members (VPF).

In your decision, you found no maladministration in the Parliament's refusal of access to the management report, and established that the management report did not, in any case, contain the kind of list of individual investments made by the VPF requested by the complainant.

You further concluded that it would be in the public interest to disclose a list of the individual investments made by the VPF and that the Parliament should therefore seek to provide the complainant with such a list. In this sense, you argued that, where an institution could not provide public access, it should nonetheless provide the applicant with relevant information, and that it was within Parliament's reach to obtain a list of individual investments of the VPF.

While Parliament welcomes your conclusions as to the absence of maladministration, we unfortunately consider not to be in a position to follow-up on your recommendation, for the reasons set out below.

Background

Parliament's decision to refuse public access to a management report related to the VPF was made in the specific context of an application for public access under Regulation (EC) No 1049/2001. In implementing the principle of openness, the Regulation strives to meet the public's interest in being able to follow, as closely as possible, the work and decision-making of the Union institutions. On the other hand, its scope does not extend beyond the Union's activities and it does not oblige the institutions to provide general information on any kind of topic or to conduct research on behalf of applicants.

In that sense, as has been recognised by the Court of Justice[1], the right of public access only extends to existing documents held by an institution, that is, documents that have been drawn up or received by an institution and are in its possession. As a consequence, an institution that has been solicited to grant access to a document which is, however, not in its possession, is under no obligation to procure or create such a document. For the same reasons, an institution is under no obligation to compile existing information in a new document in view of an application for public access.

As a consequence of the above-mentioned limits inherent to the scope of Regulation (EC) No 1049/2001, Parliament, when asked to provide access to information, or to provide access to documents of a third party, often finds itself obliged to inform applicants that it is unable to accede to their request. Indeed, it would constitute an excessive and unreasonable burden for Parliament, if it were obliged to provide access to content beyond that already in its possession.

Parliament does not hold in its possession a list of individual investments of the VPF and is unlikely to obtain such a list in the course of its regular activities in the future.

As an ASBL under Luxembourg law, the VPF is a private entity with which Parliament has no legal ties. In addition, Parliament shares none of its activities with the VPF and has no direct influence on its decisions or activities. However, as the VPF has been set up for the benefit of its Members, Parliament has, since 1994, provided it with certain services and facilities, including the use of rooms on Parliament's premises, interpretation facilities and other technical assistance.

While Parliament does not, therefore, systematically hold documents related to the management of the VPF, there have been instances when its services have been in copy of exchanges linked to the organisation of meetings held on behalf of the VPF. The management report to which Parliament refused access had been attached to such an exchange, and would, as it does not concern Parliament's activities, have been deleted on 7 January 2023 under the retention period for short-lived emails.

As the perhaps limited information regarding the individual investments of the VPF contained in the management report can nonetheless be seen to give a broad overview of the fund's investments, and in line with good administrative practice, that report was identified in light of the complainant's request for public access.

Parliament's position

As indicated above, Parliament welcomes that the Ombudsman has not found any maladministration and agrees with the Ombudsman's assessment that the management report does not contain a complete list of the individual investments made by the VPF.

However, Parliament does not share, as a matter of principle, the Ombudsman's suggestion that it should create or procure any document, such as a list of the individual investments of the VPF, for the sole purpose of putting itself in a position to respond positively to an application for public access to documents under Regulation (EC) No 1049/2001.

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[1] Judgment of the Court of 11 January 2017, Typke v Commission, C-491/15 P, EU:C:2017:5, paragraph 31 and 37, as well as Judgment of the Court of 2 October 2014, Strack v Commission, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 46.

First of all, the proposed solution to draw up a list of individual investments is contrary to the concept of Regulation (EC) No 1049/2001. This Regulation grants access to documents and not to information. This is a conscientious choice of the legislator, which has rejected the Anglo-Saxon approach, namely right to information, and favoured the Scandinavian approach, namely right to access to documents. If it is not possible to grant the information searched by providing partial access to a document, the setting up of such a list would undermine the protection provided for by the Regulation. According to confirmed case-law, the institutions are not obliged to create documents assembling the information searched by the citizen (e.g. judgment of the Court of 11 January 2017 in case C-491/15 P, Typke v Commission, paragraph 31).

Moreover, on the one hand, and in light of the above-mentioned case-law, Parliament considers that such an obligation is not established by Regulation (EC) No 1049/2001, and does not, at the same time, seem to have a clear legal basis elsewhere in Union law. On the other hand, it would constitute an unreasonable burden for Parliament if it had to conduct research or otherwise allocate scarce resources in order to create or obtain documents for which it has no operational need, that is, documents which do not serve to allow Parliament to exercise its activities or to perform its functions under the Treaties.

As Parliament is not, therefore, able to provide the complainant with a list of the individual investments of the VPF, it does not seem opportune to address the question of whether or not the provision of such a list would serve the public interest.

Final remarks

I would like to bring to your attention to the fact that Parliament has, in the meantime, received an application for public access to the list of individual investments to which you have referred in your suggestion for improvement.

Regardless of our different views on your suggestion for improvement in this case, Parliament wishes to emphasise its commitment to the principle of transparency as laid down in Articles 11 TEU and 15 TFEU, as well as to a continued fruitful cooperation with your Office.

Yours sincerely,

[redacted]

Roberta Metsola