



Proposal of the European Ombudsman for a solution in the above case on the European Commission's handling of a request for public access to documents related to the Commission's practice of publishing names of EU officials on the EU Whoiswho website (your reference: EASE 2023/2252)

Solution - 25/03/2024

Case 1647/2023/NH - Opened on 04/09/2023 - Decision on 29/10/2024 - Institution concerned European Commission (Solution achieved) |

President

European Commission

Dear President,

I am writing to seek a solution to this case [1] , which is based on a complaint I received on 29 August 2023.

The complaint relates to a request for public access to documents concerning the decision taken by the Commission in March 2023 to remove the names and contact details of Commission staff members who are not in a managerial position from the online directory of EU staff ('Whoiswho'). [2]

The complainant is dissatisfied with the Commission's decision to grant only partial access to six documents and to refuse access to one document in full. He also contends that more documents should have been identified, in particular documents showing “ *any evidence of undue pressure on staff, or requests for staff wanting to have their names removed* ” as noted by the Commission in the confirmatory decision.

I opened an inquiry into the complaint on 4 September 2023 and asked the Commission to provide my inquiry team with the documents at issue. Following an inspection of the documents, my inquiry team also met with Commission representatives on 24 November 2023 in order to obtain additional clarifications as regards how the Commission identified the documents.



My view is that the Commission has not explained in a convincing way why disclosure of the document to which access was refused (“document 3”) would seriously undermine its decision-making. In addition, I consider that the complainant has put forward compelling arguments that the Commission did not identify all documents falling within the scope of his request. I believe the Commission should have conducted a more thorough search for documents, beyond its document management system ARES.

A more detailed assessment is available in annex to this letter.

In light of the above, I would like to propose the following solution in this case:

The Commission should review its position on the complainant’s public access request with a view to granting the widest possible access to document 3.

The Commission should carry out a more thorough search for documents, beyond its document management system ARES, related to the complainant’s request for public access in order to identify all relevant supporting documents that informed the Commission’s decision to no longer publish the names of all EU staff members in the Whoiswho website. If new documents are identified, the Commission should assess whether access could be granted, in line with Regulation 1049/2001.

I would be grateful to receive your reply to my proposal within three months, by **20 June 2024** .

Should the Commission identify new documents as a result of implementing this solution proposal, I would be grateful if they could be sent to my inquiry team by the same date. Information or documents that your institution considers to be confidential will not be disclosed to the complainant or any other person without the prior agreement of the Commission. [3]

At this stage, the solution proposal is confidential. My inquiry team has, however, informed the complainant of my intention to seek a solution in this case. [4] Please note that our usual practice is to send a copy of the solution proposal to the complainant for comments, together with a copy of the institution’s reply to it, once we have received that reply. I would therefore ask the Commission to inform us if any information contained in the solution proposal, or in its reply, should not be shared with the complainant.

Yours sincerely,

Emily O'Reilly European Ombudsman

Strasbourg, 25/03/2024



Annex: Ombudsman's proposal for a solution in case 1647/2023/NH

[5]

Detailed assessment leading to a solution proposal

Concerning the level of access granted

In its reply to the complainant's confirmatory application, the Commission granted partial access to five documents (with personal data redactions) and refused access to one document in full ("document 3").

The Commission argued that document 3 could not be disclosed because it contained internal exchanges between the various services of the Secretariat-General regarding the publication of the names of staff on the public EU WhoisWho portal, including the security concerns regarding the publication of these personal data. The Commission said that these exchanges represent opinions for internal use of the services as part of deliberations and preliminary consultations, disclosure of which would seriously undermine its decision-making process. [6]

Having reviewed document 3, it is not clear how its disclosure would seriously undermine the Commission's decision-making. While opinions for internal use as part of preliminary consultations and deliberations can be protected even after the decision has been taken, case law has established that, "*once the decision is adopted, the requirements for protecting the decision-making process are less acute*". [7] In any case, for an institution to withhold a document, it must demonstrate that the risk of the decision-making process being seriously undermined is reasonably foreseeable and not purely hypothetical. [8] In this case, the Commission, in its confirmatory decision, did not put forward specific reasons as to why disclosure of document 3 would seriously undermine its decision-making, in particular as the decision to remove the information from the Whoiswho website had already been taken. The content of the email exchange does not appear sensitive throughout; rather it contains a useful insight into the thinking and rationale for the decision ultimately taken. The Ombudsman is not convinced that the Commission was justified in refusing full access.

Concerning the number of documents identified:

In his initial request, the complainant asked: "*can you provide me a copy of the decision that implemented this change and copies of any supporting documents that influenced the decision?*"

During the meeting with the Ombudsman inquiry team, the Commission representatives noted that the Commission had not identified any document relating to requests from staff to have their names removed from the EU Whoiswho. The Commission representatives noted that it was likely that these requests were expressed orally. The Commission also confirmed that the search for documents falling within the scope of the public access request was limited to the Commission's electronic document management system ARES. No additional steps to identify relevant documents were taken.



The Ombudsman appreciates that there is a presumption of legality where the Commission asserts that a particular document to which access has been sought does not exist.

However, in this case, the complainant put forward credible arguments to suggest that there may be additional documents falling within the scope of his request. The meeting in this case, and the Commission's reply in my parallel inquiry 1983/2023/ET [9] concerning the Commission's decision - on substance - to no longer publish the names of all EU staff members on the Whoiswho website, did not dispel these concerns. Indeed, in its reply in that parallel inquiry, the Commission said that there were:

- *“ a number of incidents reported to senior management having affected staff members in charge of sensitive files ”* as well as *“ requests that were submitted by several Commission staff members to remove their names from the EU Whoiswho directory .”*
- *“ Several cases of external undue influence on non-managerial staff (phone calls and electronic messages) [...] reported orally to the senior management of the Secretariat-General .”*
- *“ In one case, a staff member had to ask for individual assistance of the Commission central services, and in another one, with much wider ramifications, an intervention was needed to reassure colleagues who feared they might be individually targeted by undue external influence. There were also cases where Members of the European Parliament identified the individual names of staff working on specific files, asking for the colleagues in charge to be dismissed .”*

It appears unlikely that all these reports and requests were made orally only.

In view of this, the Ombudsman considers that the Commission should have conducted a more thorough search for documents, beyond its document management system ARES, given the concrete request of the complainant for reports of undue pressure on staff, or requests for staff wanting to have their names removed. As the Ombudsman has said on numerous occasions, for a document to fall under Regulation 1049/2001, it is irrelevant whether it has been registered in the institution's document management system. What matters is the document's content and whether or not it relates to the *“ policies, activities and decisions ”* for which the institution is responsible.

[1] In accordance with Article 2(10) of the Statute of the European Ombudsman (Regulation 2021/1163 of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties) available at: <https://www.ombudsman.europa.eu/en/legal-basis/statute/en> [Link].

[2] This case is about the request for public access to documents only. I am also dealing with another complaint (1983/2023/ET) related to the decision on substance, for which more information can be found at: <https://www.ombudsman.europa.eu/en/case/en/65044> [Link].

[3] Please clearly mark such material 'Confidential'. Encrypted emails can be sent to our dedicated mailbox.



[4] In line with Article 2(10) of the Statute of the Ombudsman.

[5] In accordance with Article 2(10) of the Statute of the European Ombudsman.

[6] Under Article 4(3), second subparagraph, of Regulation 1049/2001.

[7] Judgment of the Court of Justice of 21 July 2011 in case C-506/08, *Kingdom of Sweden v European Commission and MyTravel Group plc.*, para. 80, available at:

<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-506/08%20P> [Link]

[8] *Ibid.*, paragraph 76.

[9] The reply is available at:

<https://www.ombudsman.europa.eu/en/doc/correspondence/en/180308> [Link]