European Ombudsman

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European Ombudsman

Ms Kirsten Fiedler

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Strasbourg, 14/04/2016

Complaint 292/2016/PMC - Access to documents related to the EU Internet Forum

Dear Ms Fiedler,

On 17 February 2016, you submitted, on behalf of European Digital Rights (hereinafter 'the complainant'), a complaint to the Ombudsman concerning the European Commission's handling of various requests for access to documents related to the launch of a "Forum with the internet service providers' community" in the context of the fight against radicalisation and terrorism.

I understand that the complainant wishes to put forward the following allegations and related claims.

Allegations:

1. The Commission systematically failed to respect the statutory deadlines set out in Regulation 1049/2001, and to provide proper explanations in this respect.

2. The Commission's decision to join the complainant's last two access requests (GestDem 2015/6363 and GestDem 2016/0095) lacks any legal basis and is wrong.

3. The Commission wrongly refused full access to the note of 10 June 2015 and to the concept note (access request GestDem 2015/3658).

Supporting arguments

As regards allegation 3, the complainant argues that the Commission is wrong in relying on the exception listed under Article 4(3), first sub-paragraph of Regulation 1049/2001 in order to protect its on-going decision-making process 'from external pressure', as the EU Internet Forum discusses the underlying topic with online service providers, that is, with external

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stakeholders. Relying on that exception to access also contradicts the Commission's announced intention to include civil society in its discussions.

Claims:

1. As regards future cases, the Commission should fully observe the deadlines set out in Regulation 1049/2001 and limit the extension of the relevant time-limits only to truly exceptional cases and subject to the provision of detailed reasons in this regard.

2. The Commission should proactively make directly accessible its non-confidential documents, as provided for in Article 12 of Regulation 1049/2001.

3. The Commission should provide full access to the note of 10 June 2015 and to the relevant concept note.

4. The Commission should open the EU Internet Forum to civil society and other affected actors and not only to industry.

Concerning the third allegation and the third claim

I hereby inform you that I have decided to open an inquiry concerning the complainant's **third allegation and the third claim by carrying out an inspection of the relevant documents**.

I have therefore asked the Commission to facilitate, in accordance with Article 3(2) of the Statute of the European Ombudsman, my o **inspection of the Commission's note of 10 June 2015 and the related concept note** (to which only partial access was granted in the context of access request GestDem 2015/3658).

A copy of the inspection report will be forwarded to you with an invitation to make comments in due time. I would like to underline that, in accordance with Articles 5(2), 13(3) and 14(2) of the Implementing Provisions of the European Ombudsman, the Ombudsman's inspection will not result in you or any other third person outside of my Office obtaining access to any documents which the Commission identifies as confidential during the inspection, or to any information contained in such documents.

Please note that **I do not, at the present stage of my inquiry, ask the Commission to provide an opinion on the matter**. I will, after having examined the results of the inspection, assess what next step to take in my inquiry and inform you accordingly.

Should you have any questions concerning your case, you could consider contacting the Legal Officer responsible for your case, Mr Philipp-Maximilian Chaimowicz (tel: +32 2 284 67 68; e-mail: p.chaimowicz@ombudsman.europa.eu). Mr Chaimowicz is a member of Inquiries Unit 4, headed by Ms Tina Nilsson.

As regards the second allegation and the second claim, as well as the forth claim

Article 2(4) of the Ombudsman's Statute requires complainants to have made prior administrative approaches concerning their grievance before turning to the Ombudsman with a complaint. The rationale of this condition is that the institution concerned should have an opportunity either to correct its

behaviour and thus avoid a complaint to the Ombudsman, or, at least, to explain itself before the Ombudsman's inquiry starts. The explanation provided by the institution concerned will serve as a starting point for the Ombudsman's inquiry. The Ombudsman, therefore, does not deal with any grievances to which the Institution concerned has had no opportunity to answer.

After a careful assessment of the material submitted to me, I have concluded that the complainant has not contacted the Commission concerning the second allegation (regarding the decision to join the last two access requests); the second claim (which concerns proactive publication, that is, an issue separate from the Commission's handling of requests for access); and the fourth claim (that the Forum should be open to civil society). Hence, these aspects of the complaint are inadmissible. I therefore regret to inform you that I am not (yet) entitled to deal with these aspects of the complaint.

In addition, I note that the complainant's (second) claim concerning the proactive publication of non-confidential documents refers to the institutions' obligation to make documents directly accessible to the public, as provided for in Article 12 of Regulation 1049/2001. As this claim arguably addresses a systemic issue which gave rise to the complainant's first two allegations, I considered whether it would be useful to address this claim in the context of an inquiry into the present case. However, following a careful assessment of the issue, it was not entirely clear to me what the added-value would be at this point in time in pursuing, in the context of the present case, the issue of proactive disclosure of documents in accordance with Article 12 of Regulation 1049/2001 by the Commission. Rather, I find it more appropriate for you to raise the matter with the Commission first and possibly to come back to me should you not receive a satisfactory reply within a reasonable amount of time.

In relation to the first allegation and the related claim

In accordance with her mandate, the Ombudsman conducts inquiries for which she finds grounds.[1]

The Commission did indeed repeatedly fail to reply within the deadlines set out in Regulation 1049/2001. The EU Court has held that Regulation 1049/2001 does not allow for the possibility of derogating from the time-limits laid down in Articles 7 and 8 thereof and that those time-limits are determinative as regards the conduct of the procedure for access to the documents held by the institutions concerned, which aims to achieve the swift and straightforward processing of applications for access to documents (see, to that effect, judgment in *Internationaler Hilfsfonds v Commission*, C-362/08 P, paragraph 53). Hence, it is clear that an institution's (repeated) failure to respect the said deadlines constitutes, generally speaking, maladministration.

This conclusion does not, however, imply that the Ombudsman should automatically open an inquiry as regards this underlying matter each time a delay occurs. In the present case, the Commission appears to have made an effort to find practical solutions to a situation where access requests relate to documents that are continuously being drawn up. In fact, the Commission has generally informed the complainant in advance when not being able to reply within the statutory deadlines and it has apologised to the complainant in this respect. Moreover, it is, at this point in time, not possible to remedy this shortcoming. The Commission has also repeatedly explained to the complainant

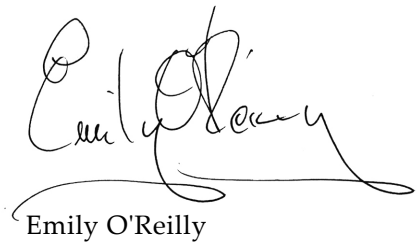
[1] Article 228 of the Treaty on the Functioning of the European Union.

that its failures to reply within the deadlines were due to the need to conduct internal consultations.

In this context, it has to be noted that, in my own-initiative inquiry OI/6/2013/KM[2], I examined whether problems (on the part of the European Commission, the European Parliament and the Council of the EU) of a systemic kind exist in respecting the time limits provided for in Regulation 1049/2001 and, if so, how they might best be tackled. I concluded that there are problems in abiding by the time limits prescribed in the Regulation and that these problems appear to be systemic in nature. I thus proposed, firstly, that Regulation 1049/2001 should be amended and expanded in order to create a more comprehensive access to documents/freedom of information regime. Secondly, decision makers handling access applications in EU institutions could benefit from much greater guidance and support from a central source.

Against this background, I consider there to be insufficient grounds to justify the opening an inquiry into this matter in the context of this specific case.

Yours sincerely,



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[2] Available online on the Ombudsman's website: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59280/html.bookmark