



Decision

in case 292/2016/AMF on the European Commission's handling of a request for access to documents related to the launch of the EU Internet Forum

The case concerned the European Commission's handling of a request for access to documents related to the launch of a forum with the internet services providers community in the context of the fight against radicalisation and terrorism - the EU Internet Forum. The Commission gave only partial access to two internal notes, arguing the need to protect both public security and its ongoing decision-making process. The Ombudsman found no maladministration by the Commission in refusing to give full access to the documents at the time the request was made.

The background to the complaint

1. In January 2014, the European Commission published its Communication 'Preventing Radicalisation to Terrorism and Violent Extremism'¹. This said that countering extremist propaganda on the internet means more than just prohibiting or removing illegal content. The European Commission announced the creation of 'forum with the internet service providers' community' ("the EU Internet Forum" or "the Forum") with key players in the industry. Its purpose was to discuss the magnitude of the problem, the steps interested parties are taking and opportunities for closer cooperation. According to the Communication, the Forum participants would discuss a broad range of issues, including ways to make it easier for the public to flag offensive or potentially illegal material, ways to promote the creation of online counter-narratives and ways to provide easily accessible alternative messages that stimulate critical thinking. The EU Internet Forum would have regular high-level and technical

¹ COM(2013) 941 final https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/crisis-and-terrorism/radicalisation/docs/communication_on_preventing_radicalisation_and_violence_promoting_extremism_201301_en.pdf



meetings and would report back on its activities to the European Commission. The Forum was officially launched on 3 December 2015.

2. The complainant made several requests for public access to documents related to the creation of the Forum, the first in April 2015. In response, the European Commission disclosed a number of documents such as the draft agendas for preparatory meetings and awareness raising sessions, the minutes of preparatory meetings and background papers. It also gave partial access to the lists of participants in meetings.

3. In November 2015, the Commission also granted partial access to two notes:

(i) A note of 10 June 2015 addressed to the Commissioner asking for endorsement and further guidance.

(ii) A concept note in view of the preparation of the high level event for the launch of the Forum at the end of the year 2015.

4. Dissatisfied with the Commission's decision to grant only partial access to the two notes, the complainant turned to the European Ombudsman in February 2016.

The inquiry

5. The Ombudsman opened an inquiry into the complainant's concern that the Commission was wrong not to grant full access to the note of 10 June 2015 and to the concept note.

6. In the course of her inquiry, the Ombudsman received the Commission's reply to the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. The Ombudsman's services also carried out an inspection of the relevant documents. In concluding her inquiry, the Ombudsman has taken into account all the relevant arguments put forward by the parties.

The decision of the European Commission not to grant full access to the two notes

Arguments presented to the Ombudsman

7. In its final decision on the complainant's access request, the Commission relied on two exceptions to public access, provided for in the EU public access rules².

8. The Commission relied on the provision which states that public access to documents shall be refused where disclosure would undermine the protection

² Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at www.europarl.europa.eu/RegData/PDF/r1049_en.pdf



of the public interest as regards **public security**³. According to the Commission, the redacted parts of the two notes express concerns and explore possibilities to overcome the challenges of on-line terrorist propaganda. They contain references to specific initiatives, topics to be discussed and steps to be implemented with a view to reducing the on-line accessibility of terrorist material. Revealing which potential initiatives are being explored would alert those engaged in, or supporting, terrorist activities to the Commission's internal reflections, which in turn would risk undermining the Commission's efforts to effectively tackle terrorist propaganda. In addition, releasing details about the Commission's engagement and cooperation with industry would potentially expose industry representatives to threats from terrorists.

9. The Commission also relied on the provision which states that access to a document shall be refused if its disclosure would seriously undermine the institution's (on-going) **decision-making process**, unless there is an overriding public interest in disclosure⁴. The Commission argued that, at the point in time when it decided to grant merely partial access to the two notes, it was still reflecting both on substantive aspects relating to the Forum, such as its remit and focus, and on organisational aspects of the initiative, such as the involvement of various stakeholders. Public release of the Commission's internal reflections would have seriously undermined the Commission's margin of manoeuvre in exploring, free from external pressure, all possible options in the framework of the (then) ongoing decision-making process. Public disclosure of the redacted information in the notes would have informed the public of internal reflections and preliminary considerations before they had been shared with, and endorsed by, the stakeholders of the EU Internet Forum. This would have severely undermined the stakeholders' confidence in the Forum, thereby jeopardising the goodwill of those stakeholders and their readiness to participate in ongoing or future consultation processes.

10. When providing its reply in the context of the Ombudsman's inquiry, the Commission noted that several months had passed since the establishment of the EU Internet Forum and that it took its decision on the complainant's access request over a year ago. In the meantime, it had made public additional information relating to the Forum. However, this did not mean that the assessment of the complainant's access request was not correct at the time it was taken.

11. The Commission also pointed out that the complainant has made additional requests for access to documents concerning the EU Internet Forum, following which the Commission has granted access to further documents. The complainant is free to make a new access request, which the Commission will assess in light of the factual circumstances applicable at the time of the new request.

12. The complainant commented on the Commission's reply, arguing that citizens' communications are affected by the measures discussed in the EU Internet Forum. The Commission's initiatives in this area have a broad impact on human rights and on the fundamental right to freedom of expression in particular. The complainant therefore considers there to be an overriding public interest in the full disclosure of the two notes.

³ Article 4(1)(a), first hyphen of Regulation 1049/2001.

⁴ Article 4(3) first paragraph of Regulation 1049/2001.



13. The complainant adds that the blocking or filtering of online communications has been considered as highly problematic by the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. One outcome of the EU Internet Forum has been a non-binding Code of Conduct for industry, taking the lead in deleting communications with unproven “hate speech”, which is not assessed on the basis of law.

14. The complainant also argues that there cannot be a perception of a real threat towards industry representatives, given that their participation in the Forum (illustrated by photographs published on their corporate websites) was publicly known before the Commission took the decision to grant only partial access to the two notes.

The Ombudsman's assessment

15. The Ombudsman is not entirely convinced by the Commission’s arguments that the release of the documents would have interfered, in any significant way, with the Commission’s internal decision-making processes. However, having inspected the documents in question, she is satisfied by the Commission’s argument that releasing the redacted parts of the notes could have undermined the protection of the public interest as regards public security. The Ombudsman notes that the rule whereby access to documents can be denied to protect public security encompasses situations where public access to particular documents could obstruct the efforts by public authorities to prevent criminal activities⁵.

16. The Ombudsman finds that it is at least reasonably foreseeable, and not purely hypothetical, that information in those documents, if released at an inappropriate time, could have allowed those persons and groups seeking to place terrorist propaganda on-line to develop counter strategies. Such disclosure could have revealed the various options being explored at that time to overcome the very serious threat from on-line terrorist propaganda, as well as the specific initiatives and steps to be implemented to deal with that threat. It is also not purely hypothetical that the release of the notes could have exposed industry representatives to certain risks, for example the risk of receiving threats from those concerned by on-line counter-terrorism measures.

17. The Ombudsman welcomes the fact that the Commission has shown its willingness to disclose more documents with the passage of time. She encourages the Commission to review the continuing need to withhold previously undisclosed documents, or parts of documents, where it is aware of an ongoing demand for public access.

18. As regards the complainant’s argument that there is an overriding public interest in the disclosure of the two notes, the Ombudsman notes that there is no possibility, under EU public access rules, for any wider public interest to override the need to protect the public interest as regards **public security**.

⁵ See judgement of the Court of First Instance of 17 June 1998, *Svenska Journalistförbundet v Council of the European Union*, Case T-174/95 ECLI:EU:T:1998:127 paragraph 121.



Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion⁶:

There was no maladministration by the European Commission.

The complainant and the European Commission will be informed of this decision.

Emily O'Reilly
European Ombudsman

Strasbourg, 05/07/2017

⁶ Information on the review procedure can be found on the Ombudsman's website:
<http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark>