

# European Ombudsman

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## Draft recommendation of the European Ombudsman in the inquiry into complaint 2004/2013/PMC against the European Commission

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- **Case: 2004/2013/PMC**
  - Opened on **12 Nov 2013** - Draft recommendation on **02 Oct 2014**
  - Field(s) of law: **Area of freedom, security and justice**
  - Types of maladministration alleged – (i) breach of, or (ii) breach of duties relating to: **Requests for information [Article 22 ECGAB]**
  - Subject matter(s): **Dealing with requests for information and access to documents (Transparency)**

*Made in accordance with Article 3(6) of the Statute of the European Ombudsman*

### The background to the complaint

1. On 25 June 2013, the complainant, a German journalist, asked the Commission for access to documents in its possession in connection with the surveillance of the internet by UK state agencies (mainly the intelligence service 'Government Communications Headquarters', otherwise known as 'GCHQ'), in accordance with EU rules on access to documents[1].

2. By letter of 14 August 2013, the Commission identified four sets of documents as falling within the scope of the complainant's access request, namely

(i) a letter of 25 June 2013 from Mrs Reding, Vice-President of the Commission, to Mr Hague, UK Foreign Secretary;

(ii) a letter of 3 July 2013 from Mr Hague to Mrs Reding;

(iii) a letter of 25 July 2013 from the Director-General of the Commission's Directorate-General (DG) Justice to the UK Permanent Representative to the EU; and

(iv) correspondence from citizens asking the Commission to investigate the matter.

3. Concerning the aforementioned letter of 3 July 2013, the Commission argued that this was a document from "a third party". Therefore, the Commission had to ask for the UK's "consent" to grant access[2]. It added that it had requested such agreement by letter of 12 August 2013 and was awaiting the UK's reaction.

4. With regard to the remaining documents, the Commission argued that access could not be granted, given that they concern its on-going investigations into the alleged breach of EU citizens' fundamental rights. The Commission added that granting access would run counter to the public interest and would have a detrimental effect on its investigation process, which requires an atmosphere of trust[3]. The Commission stated that partial access could not be granted either.

5. On 15 August 2013, the complainant submitted a confirmatory application. Not having received a reply by 21

October 2013, the complainant turned to the Ombudsman.

## The inquiry

6. In his complaint, the complainant alleged that the Commission wrongly rejected his request for public access to documents and claimed that it should grant him access to the documents identified in its letter of 14 August 2013.

7. The Ombudsman opened an inquiry and invited the Commission to provide an opinion on the complaint. Her services also inspected the documents identified by the Commission in its letter of 14 August 2013.

## Further developments

8. On 18 November 2013, the complainant gave the Ombudsman a copy of the Commission's reply of 15 November 2013 to his confirmatory request.

9. In its reply, the Commission confirmed its earlier decision to reject the complainant's access request, invoking Art. 4(2), third indent of Regulation 1049/2001 (concerning the protection of the purpose of inspections, investigations and audits). The Commission argued that disclosure would undermine the dialogue between itself and the UK authorities, which requires a climate of mutual trust until the negotiation phase has been completed. In this respect, the Commission made reference to the case-law of the Court of Justice<sup>[4]</sup>, contending that the Court acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines the protection of the objectives of investigation activities as long as these activities are on-going. Moreover, the Commission referred to the Court's ruling in *ClientEarth*<sup>[5]</sup>, according to which investigations which could potentially lead to the opening of infringement proceedings could be covered by the said exception.

10. The Commission said that it had assessed whether there was an overriding public interest in disclosing the requested documents. In this respect, it acknowledged the importance of the freedom of the press as well as of the interest of the public in transparency. However, it also observed that the exercise of the freedom of expression and of information that was protected by Article 11 of the EU's Fundamental Rights Charter could be limited<sup>[6]</sup> and that the before-mentioned general presumption outweighed the public interest as regards administrative files.

11. Additionally, the Commission considered whether partial access could be granted, but took the view that the documents requested in their entirety fell under the exception invoked.

12. The Commission informed the complainant that the UK authorities had agreed to the disclosure of the letter originating from the UK Foreign Secretary. Nonetheless, the Commission refused access to it.

13. In his letter forwarding the Commission's decision to the Ombudsman, the complainant criticised the fact that the Commission

(i) failed to explain why it did not respect the deadlines provided for by Regulation 1049/2001;

(ii) failed to disclose the letter sent by the UK Foreign Secretary, although the UK authorities agreed with its disclosure;

(iii) failed to grant access to the correspondence from third persons it received concerning the issue of internet surveillance by the UK authorities, without putting forward any arguments as to why it could not be disclosed. In any event, the protection of investigations could not be an appropriate reason, since the content of this correspondence does not represent the Commission's position and would thus not be able to influence the investigation; and

(iv) merely argued that the public interest was not sufficiently high, without, however, considering that the underlying issue is an important subject in the news and affects the fundamental rights of millions of EU citizens.

14. The Ombudsman considered that the arguments raised by the complainant were covered by the inquiry which she had opened. On 29 November 2013, she therefore forwarded the complainant's letter of 18 November 2013 to the Commission, inviting it to take its contents into account when drafting its opinion.

## Allegedly wrong refusal to grant public access

### *The Ombudsman's inspection of the Commission's file*

15. During the inspection carried out on 11 December 2013, the Ombudsman's services examined the documents

identified by the Commission as falling within the scope of the complainant's request as well as the documents pertaining to the Commission's handling of the complainant's access request.

16. It emerged from the inspection that the letter of 3 July 2013 from Mr Hague to Mrs Reding contains an annex which consists of a speech by Mr Hague given in the House of Commons. The inspection furthermore showed that the Commission had received 18 complaints from third parties each of which contained the same - or at least very similar - text.

### **Arguments presented to the Ombudsman**

17. In its opinion, the Commission commented on both the procedural and the substantive aspects of the case.

18. As regards procedure, the Commission acknowledged that it had not made a confirmatory decision on the applicant's request within the time limits prescribed by Regulation 1049/2001 and apologised for this delay.

19. As regards substance, the Commission repeated the points it had previously made in its reply of 15 November 2013 to the complainant's confirmatory application. The complainant did not submit any further observations.

### **The Ombudsman's assessment leading to a draft recommendation**

20. As regards the aforesaid procedural aspect, in its opinion, the Commission recognised that it did not reply to the complainant's confirmatory application within the deadlines set by Regulation 1049/2001 and apologised to the complainant for the delay incurred. In view of these circumstances, the Ombudsman considers that there is no need for further inquiries concerning this aspect.

21. As regards substance, the Ombudsman notes the following.

22. Article 4(2), third indent of Regulation 1049/2001 provides that institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. The exceptions to the general right of access to documents must however be interpreted and applied strictly<sup>[7]</sup>.

23. The Court has allowed a number of exceptions to the institutions' obligation to examine specifically and individually the documents to which access has been requested. In particular, the Court has ruled that it is in principle open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents<sup>[8]</sup>. This is the case in relation to procedures for reviewing State aid<sup>[9]</sup>, merger control procedures<sup>[10]</sup> and proceedings pending before the EU Courts<sup>[11]</sup>. The Court also held that a similar general presumption can be relied upon in respect of documents relating to on-going infringement procedures<sup>[12]</sup>. In *ClientEarth*, the General Court extended that presumption to documents relating to investigations which could potentially lead to the opening of infringement proceedings<sup>[13]</sup>.

24. In the present case, it is not in dispute that all the documents requested by the complainant related to investigations which could potentially lead to the opening of infringement proceedings. It follows from the general presumption recognised in the case-law that, in such circumstances, the Commission is entitled to presume that disclosure of the requested documents could undermine the purpose of investigations. Consequently, the Commission was in principle not required to carry out a specific and individual examination of each of these documents<sup>[14]</sup>.

25. However, the EU courts also made it clear that this presumption does not exclude the right of a person interested in gaining access to demonstrate that a given document is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned<sup>[15]</sup>.

26. Consequently, the Ombudsman has to assess whether the complainant has put forward any evidence or arguments capable of challenging the validity of the Commission's finding that all the documents concerned were covered by the relevant exception.

*As regards the UK Foreign Minister's letter to the Commission (set ii further above)*

27. The Commission's position is, in essence, that disclosure could negatively impact on the atmosphere of confidence between itself and the Member state concerned, as the EU courts acknowledged in the *Petrie* and *Technische Glaswerke* cases. However, the Commission itself admitted that the Member State concerned, that is to say, the United Kingdom, agreed to the disclosure of the said letter. In these circumstances, the Ombudsman is at a loss to understand how the disclosure of this letter could have the negative consequences to which the Commission has referred. In the Ombudsman's view, it is thus clear that the Commission cannot invoke the above-mentioned

general presumption in order to refuse to grant access to this letter.

**28.** Moreover, the letter contains an enclosure consisting of a speech given by Mr Hague in the House of Commons. This speech is *publicly* available on the latter's website. Therefore, the Ombudsman is puzzled by the Commission's argument that even partial access was impossible as the documents concerned were, in their entirety, covered by the relevant exception. Hence, the Ombudsman considers that the Commission's decision to refuse access to this document is entirely unconvincing

*As regards the complaints from third persons (set iv further above)*

**29.** The complainant argued that the Commission was wrong to rely on the above-mentioned general presumption, since the content of the submissions made by third parties could not be attributed to the Commission and could not influence its investigation. The Ombudsman is not convinced by this argument. The General Court has ruled that the Commission can rely on a presumption that disclosure is excluded as regards documents relating to investigations which could potentially lead to infringement proceedings. There is nothing to suggest that documents that relate to such an investigation should not be covered by this presumption merely because they emanate from a third party. Hence, the Commission was in principle correct to base its decision to refuse access on the general presumption.

**30.** However, the Ombudsman's inspection of the relevant documents revealed that these complaints were submitted *after* the Commission had already written its first letter concerning the relevant issue to the UK authorities. It is thus doubtful whether these complaints can indeed be considered as relating to the Commission's investigation. Moreover, the inspection of the Commission's file also revealed that these complaints do not contain any information which could be attributed to either the UK authorities or the Commission. In fact, they merely contain general points and questions.

**31.** Even on the assumption that the relevant documents were to be considered as being covered by the above-mentioned presumption, it would still be necessary to examine whether there is an overriding public interest in disclosure. At the time when the complainant's request for access was made, there was considerable anxiety among many citizens as to the impact on fundamental rights of the alleged activity of the UK state agencies. In its decision on the complainant's confirmatory application, the Commission did not adequately address this issue. In fact, the Commission limited itself to some fairly general statements.

*As regards the Commission's letters (set i and iii further above)*

**32.** Having inspected the Commission's file, the Ombudsman agrees with the Commission's view that the two letters it addressed to the UK were covered by the general presumption that disclosure could potentially undermine the protection of the purpose of its investigations, in line with the third indent of Article 4(2) of Regulation 1049/2001. That said, it is the case that this exception applies only where there is no overriding public interest in disclosure.

**33.** As regards the existence of an overriding public interest justifying disclosure, the Ombudsman has already observed that the Commission limited itself to some fairly general statements. However, and as the complainant correctly observed, millions of EU citizens were possibly affected, and the underlying issue had led to a wide-spread political and international debate on this topic.

**34.** In view of the foregoing, the Ombudsman is of the opinion that the Commission did not deal adequately with the question of whether there was an overriding public interest in disclosure. The Ombudsman points out that the secrecy shown by the Commission in this case can serve only to reinforce the concerns of the complainant and of citizens in general.

**35.** In light of the above considerations, the Ombudsman reaches the view that the Commission has failed properly to deal with the complainant's request for access to documents. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

## The draft recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

**(i) The Commission should grant access to the UK Foreign Secretary's letter of 3 July 2013 to the Commissioner.**

**(ii) The Commission should grant access to all the other documents requested by the complainant concerning the mass surveillance of the internet by UK state agencies, or properly justify why, in its view, disclosure has to be refused.**

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by **31 December 2014**. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Strasbourg, 2 October 2014

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- [1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, 31.5.2001, p. 43.
- [2] In accordance with Article 4(5) of Regulation 1049/2001.
- [3] In this context, the Commission made reference to the Court's judgment in Case T-191/99 *Petrie v Commission* [2001] ECR II-3677 regarding confidentiality in infringement proceedings (paragraph 68).
- [4] Cases T-191/99 *Petrie v Commission* [2001] ECR II-3677, para. 68; C-139/07 P *Technische Glaswerke Ilmenau v Commission* [2010] ECR I-5885, para. 58; and T-29/08 *LPN v Commission* [2011] ECR II-6021.
- [5] Case T-111/11 *Client Earth v Commission*, para. 80
- [6] In accordance with Article 52(1) of the Charter.
- [7] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63.
- [8] This is because the Court considers that considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, provided that the institution establishes in each case that the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose. See, in this respect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 50.
- [9] Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885.
- [10] Case C-404/10 P *Commission v Editions Odile Jacob*, not yet reported, and Case C-477/10 P *Commission v Agrofert Holding*, not yet reported.
- [11] Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and others v API and Commission* [2010] ECR I-8533.
- [12] Joined Cases C-514/11 P and C-605/11 P *LPN v Commission*, not yet reported. This judgment confirmed the earlier decision in Case T-29/08 *LPN v Commission* [2011] ECR II-6021.
- [13] Case T-111/11 *Client Earth v Commission*, para. 80
- [14] Case T-29/08 *LPN v Commission* [2011] ECR II-6021, paragraph 127.
- [15] Case T-29/08, *LPN v Commission* [2011] ECR II-6021, paragraph 128, and Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 62.

#### Related documents

- Case: 2004/2013/PMC
- Case opened: [Access to documents](#)