José Manuel Barroso
President of the European Commission

Brussels, 24 JUIL. 2014

Subject: ***Complaint by Ms Helen DARBISHIRE on behalf of Access Info Europe, ref. 682/2014/JF***

Dear Ms O'Reilly,

Thank you for the letter of 20 May 2014 regarding the above-mentioned case.

I am pleased to enclose the comments of the Commission on this complaint.

Naturally, the Commission remains at your disposal for any further information you may require.

Yours sincerely,

José Manuel BARROSO

Enclosure

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FINAL

Comments of the Commission on a request for information from the European Ombudsman
- Complaint by Ms Helen DARBISHIRE on behalf of *Access Info Europe*, ref. 682/2014/JF

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1. THE ALLEGATION AND CLAIM

On 20 May 2014, the Ombudsman informed the Commission that she had opened an inquiry into the complaint from Ms Helen DARBISHIRE, acting on behalf of *Access Info Europe* (hereafter *'the complainant'*), and invited the Commission to submit an opinion thereon.

The complainant alleges that:

> *The Commission wrongly refused to register the application of 14 November 2013.*
>
> *In support of this allegation, the complainant argues that the Commission (i) is imposing unlawful and unreasonable conditions for the registration of applications for access to documents and (ii) failed to take proper account of the applicant's reply of 2 December 2013.*

The complainant claims that:

> *The Commission should register the application or clearly explain why it cannot do so having particular regard to the detailed arguments set out in the applicant's reply of 2 December 2013.*

2. THE BACKGROUND

The present complaint relates to the Commission's refusal to register an access to documents application submitted by Ms Agnieszka Kubiak (hereafter *'the applicant'*).

On 14 November 2013, the applicant wrote to the Commission's Secretariat-General to request access to documents relating to the application of Article 19 of Directive 2008/115/EC. She submitted her request via the AskTheEU generated, anonymised e-mail address and signed it as *'Agnieszka'*.

On 15 November 2013, the Commission's Secretariat-General informed the applicant that it needed the following information in order to be able to register this request in the Commission's database: *'your name, your surname, your country, your activity sector'*.

On the same day, the applicant replied that she is *'an intern in Access Info Europe – a human rights organization dedicated to promoting and protecting the right of access to information in Europe and globally as a tool for defending civil liberties and human rights'*. She added that *'according to Regulation 1049/2001, Art. 6.1 there is no requirement for the requestor to provide the information you've mentioned, in order for the institution to process and access for documents requests'*.

On 22 November 2013, and in reply to the above email from the applicant, the Commission's Secretariat-General explained that *'in order to be able to ensure the legal right of the applicant to receive an answer we need to know the basic details of this person'*. The Commission's official clarified further that the Commission's access-to-documents registration system requires this information in order to be able to process requests for access, and reiterated that the Commission will only be able to register this request once the applicant provides the above-mentioned information.

On 2 December 2013, the applicant sent detailed arguments in support of her view that the Commission is not entitled to ask her to provide the requested information.

On 11 December 2013, the Commission's Secretariat-General again reiterated its request to the applicant to provide her name, surname, the country and the activity sector, referring also to AskTheEU's recommendations, published on the AskTheEU website, concerning names and family names of applicants and the use of pseudonyms.

On 12 December 2013, the applicant informed the Commission that she will appeal the Commission's refusal to register her request before the Ombudsman, which she did by submitting the present complaint.

3. THE COMMISSION'S POSITION

3.1. As regards the information required by the Commission for the registration of access to documents requests

The first question raised in the present complaint is whether the Commission should accept applications from applicants who refuse to identify themselves, i.e. anonymous applications and/or applications such as the one in question, where the applicant provides only the name, but not the surname and as a consequence does not also reveal his/her identity.

The applicant considers it sufficient that she had provided her first name and an email address. As regards the surname, she mentions that she did not have any problems in providing it, but she was unable to see how this information would help the Commission to process her request. She adds in this regard that *'there is nothing in Regulation 1049 which specifically requires me to identify myself more fully'*... and *'given that access to documents is a fundamental human right, it is a right which can be exercised by any person (legal or natural, citizen or resident). It does not matter if it is me, a friend, a relative, a colleague or another person unknown to me who files this request. Hence the information about who the requestor is not strictly necessary to comply with the requirements of the treaties...'*

In response to these statements, the Commission refers to Article 2(1) of Regulation 1049/2001, which provides that *'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation'*. The following paragraph provides that *'the institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State'*.

Article 1 of the Commission's Implementing Decision reiterates that *'citizens of the Union and natural or legal persons residing or having their registered office in a*

Member State shall exercise their right of access to Commission documents... '. As for the *'citizens of third countries not residing in a Member State and legal persons not having their registered office in one of the Member States'* the Implementing Decision lays down that they *'shall enjoy the right of access to Commission documents on the same terms as the beneficiaries referred to in Article 255(1) of the Treaty* [now Article 15 TFEU]'.

The purpose of the above provisions is to clarify who are the beneficiaries of the right to access under Regulation 1049/2001. This right belongs first and foremost to the EU citizens and legal entities residing or registered in an EU country. For the institution to be able to verify whether the applicants fall within this category, certain minimum information, such as the name, surname, and a complete address should be provided. The same consideration applies for the identification of the applicants coming from third countries.

Before 1 April 2014, the Commission was asking applicants to specify mandatorily only their first name, surname, e-mail and country of residence (in case of natural persons) or registration (in case of natural persons). Since 1 April 2014, the Commission requires also that a valid and complete postal address is provided, covering also the street of residence, postal code and city. The Commission's electronic form for access to documents requests[1] specifies that the institution reserves the right to refuse registration of a request in case of incomplete or incorrect data in that form.

The Commission's decision not to accept anonymous requests and requests containing an incomplete name and – since 1 April 2014 – requests that do not include a valid and complete address was triggered by the following considerations:

- The need to obtain legal certainty as regards the date of receipt of the reply by the applicant under Regulation 1049/2001. Indeed, as foreseen by Article 297 of the Treaty on the Functioning of the European Union (TFEU), [...] *decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.* Replies triggering the possibility for administrative or judicial redress are therefore transmitted to the relevant addressees via registered mail with acknowledgement of receipt. This requires an indication of a name, surname and a valid postal address by the applicant. In the absence of an acknowledgement of receipt it is not possible to ascertain whether the legal deadlines for redress had been respected.

- Knowing whether the applicant is an EU resident in the sense of Article 2(1) of Regulation 1049/2001 is a precondition for the purpose of correctly applying the exception in Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual), which has to be interpreted in accordance with Data Protection Regulation 45/2001[2]. Article 9 of Regulation 45/2001 requires

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[1] The Commission's electronic form for submission of access to documents request is available on-line on the Commission's Transparency portal: http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb

[2] Judgment of the Court of Justice of 29 June 2010 in case C-28/08 P, *Commission v Bavarian Lager*, paragraphs 56-63.

the adequacy of the level of protection afforded by the third country or international organisation when transmitting personal data to third-country residents or legal persons. It follows that, in case of requests for documents which include personal data, the correct application of the data protection rules cannot be ensured in the absence of a name, surname and a postal address enabling the Commission to ascertain that the minimum data protection standards will be respected.

- The need to direct the Commission's scarce resources first of all to those requests which have been filed by "real" applicants. Anonymous requests cannot be considered to be submitted by "real" applicants. With no requirement to provide a name, surname and no compulsory indication of an address, applicants can easily introduce requests under an invented identity, unclear identity or under the identity of a third person. Asking for a name, surname and a postal address helps the Commission to protect the administration, as well as other citizens and legal persons from abuse.

- For similar reasons, asking for a compulsory indication of the applicant's identity and a postal address enables the Commission services to verify whether Article 6(3) of the Regulation, on voluminous requests, is being evaded by introducing several requests under different identities or unclear identities. Indeed, in its Ryanair judgment, the General Court confirmed that Article 6(3) cannot be evaded by splitting the application into a number of applications[3]. The Commission would like to point out that, in 2012/2013, it received some 57 confirmatory requests from what it suspects to be one single applicant operating under 13 different identities.

In her e-mail of 2 December 2013, the applicant argues that in order to establish an identity with a degree of certainty, the Commission would need copies of passports and residence documents, and that *'the request to declare this information without any means of verification seems to be rather pointless'*. She adds that if the Commission were to require this information *'this would create an overly burdensome bureaucratic process'*.

The Commission agrees that asking systematically applicants to provide a proof of identity would create unnecessary difficulties for the applicants and would be disproportionate both vis-à-vis the beneficiaries of the right to access and the EU administration. This is why the Commission does not normally ask applicants to submit a proof of identity, nor does it intend to do so on a regular basis. Nevertheless, in exceptional cases, where the Commission were to have strong, legitimate doubts whether the applicant has filed a request under his/her true identity, the institution reserves the right to ask for a proof of identity. The Commission refers the Ombudsman to the comments provided by the Commission in pending case 2310/2013/VL in this regard.

In support of her view that applicants should not be required to identify themselves, the applicant refers also to the Council of Europe Convention on Access to Official Documents - which is not yet in force and is not binding on the EU - which suggests that *'parties may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request'*. The applicant adds that according to the Convention's Explanatory Report, the rationale behind this is that requiring the

[3] Judgment of the General Court in case T-494/08, *Ryanair Ltd v Commission*, paragraph 34.

applicant's identity is deemed unnecessary *'when there is no obligation for the applicant to declare any reasons for the request'.*

The Commission would like to point out that, when exercising the right to access under 1049/2001, applicants ask the Commission to adopt a decision. When triggering the Commission's decision-making process, the institution is entitled to know who the requestor is and is obliged to notify its decisions accordingly. Further to Article 297 TFEU referred to above, the Commission's Code of Good Administrative Behaviour provides that *'a Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned'*. The reference to *'the persons and parties concerned'* is a reference to a particular recipient and not to an anonymous addressee.

It thus appears evident that for the institution to be able to comply with its legal obligations and with the principles of good administration in its relations with the public, it should be given at least minimum information on who are its interlocutors. As explained above, this enables it to obtain legal certainty as regards the date of receipt of the reply by the applicant, to ensure the correct applications of the data protection rules and to devote its scarce resources to *'real'* applicants.

Furthermore, pursuant to Article 8(3) of Regulation 1049/2001, the Commission's confirmatory decisions could be challenged either in the context of judicial proceedings and complaints to the Ombudsman. These means of redress would not, however, be available if the applicant has not revealed his/her identity and has not respected the applicable legal deadlines for submitting an appeal. Therefore, the Commission's mandatory requirement for the applicants to provide a valid name, surname and an address not only allows the Commission to deal with the requests and to duly notify its decisions, but also allows applicants to further challenge the Commission's decisions if they wish to do so.

The Commission finally notes that the other institutions, such as the Court of Justice, already ask for the full name and address in their respective electronic forms for access to documents requests.

To sum up, before 1 April 2014, the Commission required applicants to duly identify themselves and to provide an email address and a country of residence or registration. Following 1 April 2014, the Commission also requires applicants to provide a valid postal address.

3.2. As regards the complainant's allegation and claim

In the present case, the applicant provided her first name and a generated, anonymised email address via the AskTheEU website. She has not, however, provided her surname. In the absence of this element, the unit dealing with the registration of access to documents applications explained that it needed the information for the registration of her request. Despite the fact that the Commission had asked the applicant to provide the required information on several occasions - as explained in the background section above - the latter refused to reveal her full identity by providing also a surname. Consequently, the institution did not register her request for access.

In light of the explanations provided under point 2 above, the Commission does not consider that the information it requires for the registration of initial and confirmatory

applications constitutes an imposition of *'unlawful and unreasonable conditions for the registration of applications for access to documents'*.

For the sake of completeness, the Commission wishes to clarify why it had also asked the applicant to provide information about the sector of activity. The Commission collects statistical information for the purposes of its Annual Report on Access to Documents. Although the identification of the applicant's sector of activity is not mandatory and the submission of this information is not considered as a precondition for the registration of access to documents requests, the applicants are systematically given the possibility to provide it on a voluntary basis in order to allow the Commission to prepare the relevant statistics for its Annual Report in an accurate and complete manner, for the sake of transparency. In the present case, the complainant did specify her *'sector of activity'* already in her email of 15 November 2013. It is however important to note in this regard that, even if she had not done that and provided that she had given her name and surname, her request for access would have been duly registered.

3.3. Other issues pertaining to the Commission's online form raised in the applicant's letter of 2 December 2013

Access to documents requests can be submitted to the Commission via the Commission's electronic form for submission of requests or by email or letter.

The Commission recently updated its electronic form for submission of requests in order to be able to collect all the information it needs for the registration of initial and confirmatory applications, which are submitted via the form.

The respective mandatory fields in the form are:

'First name, Surname, Email, Address, Postal Code, City and the Country'

There is a further mandatory field in the form called *'Business Domain'*, next to which a drop-down menu with the following options appears: *'Lawyers; Academia; Civil Society; Public Authority; Other Institutions; Citizen; Journalist*[4]. These elements are collected for the purpose of elaborating statistics for the Commission's Annual Report on Access to Documents relating to the social and occupation profile of applicants[5]. If applicants are not willing to provide more specific information they have the option of choosing the general category *'citizen'* from the drop-down menu. The Commission does not share the view that collecting this information, which is included in its Annual Report to ensure transparency on its activities, is *'irrelevant'* and *'inappropriate'*. Moreover, and as explained above, requests which are submitted via email or postal letters and which do not provide any information about the business domain or the sector of activity, are duly registered by the Commission. For such cases, the relevant part of the Annual Report dealing with the profile of applicants includes a line *'not specified'*.

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[4] The Commission's electronic form for submission of access to documents request is available on-line on the Commission's Transparency portal: http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb

[5] See point 8 on page 11 of the last Annual Report published on: http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-515-EN-F1-1.Pdf

Finally, the applicant submits that the Commission asked in its electronic form information about the documents requested that was impossible to provide without having the relevant documents and hence the reference information. The applicant suggests that *'this should not be an obligatory requirement as it places a disproportionate burden on the requestor'*.

The Commission wishes to clarify that in order for the Commission to be able to identify the documents requested in a rapid and complete manner, applicants should, in accordance with Article 6(1) of Regulation 1049/2001, submit applications *'in a sufficiently precise manner to enable the institution to identify the document'*. This could be done either through a description of the document(s) requested and/or by providing specific information about the type of document(s) and the relevant references such as the year and the number. Despite the requirement of Article 6(1), many of the applicants do not have any specific details of the document(s) requested and are only able to provide a general description of the content and the subject-matter, and sometimes the authors and addressees. In most cases, their requests are nevertheless registered and processed (although in some cases it is necessary to ask for further clarifications pursuant to Article 6(2) of Regulation 1049/2001 in order to enable the documents to be identified).

In light of the above clarifications, the Commission is unable to see how the information requested in its electronic form places a disproportionate burden on the requestors and how it could discourage less experienced requestors from introducing access-to-documents requests.

4. CONCLUSION

- The Commission's refusal to register the application of 14 November 2013 was legitimate, as the applicant refused to provide a surname and thus to identify herself, despite the Commission's reiterated invitations to that effect;

- The applicant is free to re-submit her application by providing all the information required by the Commission for registering access-to-documents requests, namely a name, surname and a full address;

- The Commission acknowledges that it had not addressed the detailed arguments raised by the applicant in her email of 2 December 2013 and apologises for that. The institution trusts, however, that the present reply to the Ombudsman fully clarifies the Commission's positions on the issues raised by the applicant.