

European Ombudsman

Complaint about maladministration

Please read the section entitled 'How to complain' before filling out this complaint form. Please continue on a separate sheet if necessary and enclose all the documents necessary to support your complaint.

First name: Helen

Surname: Darbshire

On behalf of (if applicable): The persons listed in the complaint

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Against which European Union (EU) institution or body do you wish to complain?

European Commission Secretariat General, Transparency Unit

What is the decision or matter about which you complain? When did you become aware of it?

Between Wednesday 25 January 2017 - Friday 27 January 2017, 120 individuals submitted 189 access to EU documents requests for the 2016 travel expenses of European Commissioners, as contained in the relevant mission summary fiches/settlement of mission expenses, via the AsktheEU.org website.

The requests, which were submitted as part of an initiative coordinated by Access Info Europe, can be found here: <https://www.asktheeu.org/en/search/tag:travelexpensescampaign>

The persons submitting this complaint are among those requesters. **FULL LIST TO BE ADDED**

To date, the Commission has acknowledged receipt of only 37 requests and registered them with GESTDEM reference numbers. The Commission has not, to date, answered these registered requests.

A further 152 requests were not registered and did not receive a GESTDEM reference number.

The Commission has since been sent over 20 follow-up messages from requesters relating to these requests, 38 appeals under the Code of Good Administrative Behaviour, and 13 confirmatory applications.

Between Wednesday 15 February and Thursday 9 March 2017, Mr Martin Kroeger from the European Commission Transparency Unit corresponded by email with Helen Darbishire, Vice-President and Executive Director of Access Info Europe, on the handling of the requests.

The correspondence was published on line by Access Info, and can be found here:

https://www.access-info.org/wp-content/uploads/CommExpCamp_EUComm-AIE_Emails.pdf

The first email, received on 15 February 2017, states that the Commission “is currently examining” the appropriate way of handling the requests “triggered by your campaign” and notes that the “complexity” of the situation means that an extension will be needed, although the amount of time required was not specified.

After Access Info asked it to confirm whether or not it planned on registering all the requests submitted, the Commission stated on 22 February 2017, that it “does not intend to send individual communications on the handling of the requests to the applicants”. The Commission went on to suggest Access Info Europe take on the role of informing requesters about the status of their requests.

In the reply sent to the Commission on 24 February 2017, Access Info said that it would not accept a role as intermediary to inform requesters on the status of their requests.

The Commission responded with a proposal for a “fair solution” on 27 February 2017.

The 27 February 2017 email from the Commission containing the “fair solution” stated that the 189 requests would be treated as one request since they “emanate” from Access Info Europe, and as such constitute a “*disproportionate administrative burden*” to handle.

The Commission stated it had no way to automatically search and extract the information requested, and that as such, handling requests manually would be equal to a full-time employee working “75,5 full working days”. Their calculations stated that it would need to take the following steps:

- “1. Gathering preliminary contributions and consultations of the relevant services (PMO, President's Cabinet) regarding the line to be taken: 4 working days;
2. Preparation of the redacted version of 1573 missions cost statements: 56 working days: o identification and listing of the individual fiches and representation costs files falling under the temporal scope of the request: 2 minutes per document, o extraction and printing: 2 minutes per document, o in depth scan of the document's content: 5 minutes per document, o redaction of the information falling out of the scope of your request and personal data: 8 minutes per document;
3. Double-checking of the final verification of the documents to be released: 5 working days;
4. Preparation of the reply/ies: 4,5 working days;
5. Formal approval by PMO and dispatch of the replies: 6 working days.”

Following receipt of this “fair solution”, Helen Darbishire submitted a complaint under the Code of Good Administrative Practice and/or a confirmatory application under Regulation 1049/2001 via email on Thursday 9 March 2017, repeating that it is “*simply not the case*” that Access Info is the sole applicant for access to documents. As such, Access Info is “*not in a position to agree to the ‘fair solution’*” since it does not act on behalf of all the requesters. The email stated that the Commission should not conflate Access Info’s campaign with the organisation actually having submitted all 189 requests, as 120 individuals have submitted requests “*of their own free will*”. Concerns were raised in the complaint about the timeframes outlined by the Commission to find the information, consult, and answer the requests, as well as the “*ad hoc and even illogical*” up-front refusal to provide access to five Commissioners’ expenses without reasons.

For three months, Access Info Europe had not received a response to this 9 March 2017 message. On 8 June 2017 the Commission contacted Access Info Europe by email to inform that it would need more time to answer the requests. There has been no direct communication with any of the requesters from the Commission. Access Info replied to this message on 9 June 2017 stating that it would be submitting a joint complaint with requesters to the Ombudsman.

What do you consider that the EU institution or body has done wrong?

The European Commission has committed a series of serious breaches of the right of access to documents Article 15 of TFEU and Article 42 Charter of Fundamental Rights of the EU, as well as of Regulation 1049/2001 and of the Code of Good Administrative Practice.

1) Failure to register access to EU documents requests

The Commission is in breach of Article 7.1 of Regulation 1049/2001 which requires that: “*An acknowledgement of receipt shall be sent to the applicant.*”

The Commission has failed to acknowledge/register the receipt of 152 requests for access to documents and did not communicate with the requesters as to the reason for not registering these requests.

2) Failure to process registered requests

The Commission has failed to process the 37 requests submitted on 25 and 26 January 2017 for which it did provide GESTDEM numbers, and has done so without communicating directly with the requesters about the status of their requests.

3) Failure to process confirmatory applications and complaints under the Code of Good Administrative Behaviour

The Commission has failed to carry out its obligations under Article 8 of Regulation 1049/2001 by failing to respond to the 13 confirmatory applications that were submitted by requesters. Confirmatory applications should be “*handled promptly*” and at a maximum within 15 working days. The most recent was submitted on 21 April 2017, so now over 30 working days have passed without response.

The Commission has also failed to acknowledge 38 appeals made under the Code of Good Administrative Behaviour and over 20 follow-up messages from requesters relating to their requests. Hence it is in violation of Section 6 of the Code, which gives the Commission one month to respond to such complaints.

4) With regards the ‘fair solution’ sent to Access Info Europe

4.1) Error in concluding the Access Info Europe is the requester

The Commission has incorrectly assumed that the 189 requests for access to EU documents emanate solely from Access Info Europe.

A campaign to encourage the public to submit requests for Commissioners’ travel expenses should not be conflated with Access Info having directly exercised the right of access to documents via these requests. Access Info has merely exercised its fundamental rights to freedom of expression and association, rights protected by the EU treaties. In any case, and regardless of the context in which the requests were submitted, there is no doubt that the requesters have done so because they are interested in obtaining this information on the spending of EU funds on official business.

Furthermore, it is clear that these requests were presented by 120 identifiable individuals who are EU citizens and/or residents who have, of their own free will, exercised their right of access to EU documents. These are also individuals who provided (or if not done so yet, are able to provide) the European Commission with their postal addresses, despite the arbitrary need to provide this extra and unnecessary information. Access Info Europe has clarified this in our correspondence with the Secretariat General. For those requesters that did not provide a postal address, the normal Commission practice would be to ask for it; this was not done.

4.2) Breach of right to request documents and failure to base a refusal to provide documents on one of the exceptions in Regulation 1049/2001

Even if Access Info Europe were to be considered representing the 120 requesters, the Commission has arbitrarily decided that it will not answer some of the requests under its “fair solution” proposal, without giving reasons.

The Commission stated in its communication containing a fair solution, that, *“I note that in reply to other request [sic] for access to documents, the Commission released in December 2016 a series of documents regarding five Commissioners (President Juncker, the First Vice President Timmermans and the Commissioners M. Cañete, C. Stylianides, G. Oettinger). As the documents disclosed covered various two-month periods in 2015 and 2015 [sic], the present fair solution relates only to the remaining Commissioners.”*

To assert that a requester is not permitted to ask for certain documents, even as part of a negotiation for a “fair solution”, is a direct violation of the right of access to documents which, prima facie, applies to all documents held by any EU institution.

The upfront refusal to disclose documents without justifying the reasons for denying access and without basing it in on the legitimate exceptions in Article 4 of Regulation 1049/2001, but rather, merely because similar documents had been provided to other requesters in the past, is a violation of the Regulation and of the established case law in the CJEU.

The institution must always provide reasons stemming from Article 4 of Regulation 1049/2001 in order to deny access to EU documents. Any possible harm to an identified protected interest must be foreseeable and not purely hypothetical. In this case, the Commission has failed to establish any

foreseeable harm to any possible protected interest in its flat refusal to provide access to the travel expenses of certain Commissioners.

In addition, we note that the travel expenses previously released for the five Commissioners for which the Commission is refusing to process any more requests is predominately for data for 2015, rather than for 2016 which is the scope of the requests submitted in January this year. It seems perfectly legitimate for the European public to be interested in travel expenses data for more than one year.

4.3 Failure to keep an adequate record storage system and exaggerated time calculation

We also contend that, were the fair solution to be considered, the time calculation provided by the European Commission is lengthy enough to raise serious concerns about the Commission's information management and internal communications systems.

The Commission states that it would take four (4) working days for "Gathering preliminary contributions and consultations of the relevant services (PMO, President's Cabinet) regarding the line to be taken" and then, in addition to the time for redacting the original documents (56 working days), there would be a full five (5) working days for verifying the documents to be released, as many as 4.5 working days for preparing replies (which is slightly confusing given that the "fair solution" is to reply only to Access Info), and then a further six (6) working days for approval of the reply ("replies") and sending them.

Without, at this point, questioning the amount of time necessary for the mechanical processes involved, it seems highly problematic that so much time is required for finding the information and for consulting on it – for defining the "line to be taken", particularly given that responses to previous requests has established the principle that such documents can be found and released. When it is hard to find documents in order to respond to requests, this points to the possibility of room for improvement in records management systems so as to bring them into line with the principles of an efficient and effective administration.

What, in your view, should the institution or body do to put things right?

- The Commission should register and process all 189 requests.
- The Commission should inform requesters of the state of their requests.
- Where appropriate, the Commission should process and respond to the confirmatory applications and appeals
- The Commission should withdraw its proposal for a "fair solution".
- Access to the documents requested by each requester should be provided as it has already been established by previous requests that documents containing the Commissioners' mission expenses can be disclosed to the public. Disclosure could be done in a manner that would reduce the administrative burden in this case, such as bulk access or proactive publication.
- Furthermore, the Commission should consider publishing the data requested in full, in a searchable and machine readable format, ideally in an online database which automatically updates itself and that

would be completely open to the public. To the extent that this requires digitisation of previous and future mission expenses, this should be done.

- The Commission should review the manner in which it processes and stores mission expenses and similar expenditure information in order to improve its record-keeping so that it is able, easily and rapidly, to respond to requests of this nature.

Have you already contacted the EU institution or body concerned in order to obtain redress?

® Yes, I have submitted a confirmatory application and have received a reply that I wish to complain about.

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

® Yes (please specify)

Has the object of your complaint already been settled by a court or is it pending before a court?

No

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

® Yes

Date:

Information note on data processing and confidentiality

Data processing

Complaints to the Ombudsman and related correspondence often contain personal data, such as names, contact details and other information relating to identifiable individuals.

There are rights and obligations under European law (Regulation 45/2001(1)) as to how personal data is handled by EU institutions, including the European Ombudsman. These include an individual's right to

obtain access to his or her own information held by this Office. To exercise these rights or to find out more, please contact our Office.

If a person considers that the Ombudsman has not handled his or her personal data properly, he or she may contact the European Data Protection Supervisor.

Confidentiality of your complaint and information

Complainants are requested to identify clearly any document or information that they consider to be confidential immediately on sending it to the Ombudsman.

Confidentiality can only apply if there would be some adverse effect if the information were to be disclosed. It might, for example, apply to financial information, commercially sensitive information or personal information about a private individual. Confidentiality cannot always be guaranteed. In particular, if you submit to the Ombudsman documents that contain the personal data of someone other than yourself, that person will most likely be able to obtain it from the Ombudsman, exercising their data protection rights. In any event, you should expect your complaint and any supporting documents to be shared in full with the institution or body you are complaining about, so that they can properly understand it and respond to the Ombudsman.

(1) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1).

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