

Reply of the European Commission to the Recommendation from the European Ombudsman regarding the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID-19

- Complaint by Mr Alexander Fanta, ref. 1316/2021/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 4 May 2021, the applicant, Mr Alexander Fanta, a journalist, submitted a request for access to documents under Regulation (EC) No 1049/2001, for:

- '[t]ext messages and other documents relating to the exchange between President Ursula von der Leyen and Albert Bourla, the chief executive of Pfizer, since January 1, 2021.' According to the applicant, the exchange had been reported in the New York Times on April 28 in the story "How Europe Sealed a Pfizer Vaccine Deal With Texts and Call;
- An internal European Commission assessment of the EU's vaccine needs over the next two years, as referenced in the same story'.

On 26 May 2021, the initial reply was sent to the applicant. Full access was granted to a read-out of a videoconference between the President and the CEOs of pharmaceutical companies and wide partial access subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 was granted to two other documents (email correspondence).

On 28 May 2021, the applicant submitted a confirmatory application. In his application, the applicant stated that the initial decision failed to address his "request for text messages exchanged between President Von der Leyen and Pfizer CEO Bourla, as mentioned in the New York Times report published April 28, 2021", and requested that the Commission produce the documents in question.

On 21 July 2021, the European Commission issued a confirmatory decision. It replied to the applicant that the European Commission does not hold any documents corresponding to the description given in the application. In its reply, the European Commission referred to its document management rules, notably Article 7(1) of Commission Decision of 6.7.2020 on records management and archives¹ according to which '[d]ocuments shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments'.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN AND THE FINDING OF MALADMINISTRATION

Dissatisfied with the confirmatory decision, the complainant turned to the European Ombudsman (hereafter 'EO'). The EO opened an inquiry in September 2021 into the complainant's concern that the Commission had not identified and disclosed any text messages to which he is seeking access.

¹ OJ L 213, 6.7.2020, p. 12–22.

In the course of the inquiry, the EO team met with representatives of the Commission and reviewed relevant documents, provided by the Commission, detailing how it had handled the request. The EO published a report following the meeting between its services and the representatives of the Commission².

On 28 January 2022, the EO issued a decision whereby it considered that the way in which the Commission handled the request by the complainant constituted maladministration³. In the EO's opinion, the Commission did not explicitly ask the President's personal office (the Cabinet) to look for text messages. Instead, it asked the Cabinet to look for documents that fulfil the Commission's "internal recording criteria", thereby excluding text messages, which do not fulfil these criteria.

In the EO's view the Commission handled the request in a 'narrow way'⁴ and made no attempt to identify if any text messages existed. The EO argued that 'if text messages concern EU policies and decisions, they should be treated as EU documents and the EU administration needs to update its document recording practices to reflect this reality.'

In points 15 and 16 of her recommendation, the EO argues that '[i]t is equally clear that Regulation 1049/2001 applies to all documents held by an EU institution, that is, "documents drawn up or received by it and in its possession, in all areas of activity of the European Union".

In point 17, the EO further explained that '[w]hether text messages are subsequently registered in the document management system of the institution concerned is, as a matter of law, not relevant for the purpose of the definition of a 'document' under Regulation 1049/2001. Registering a document is a consequence of the existence of a document and not a pre-requisite for its existence'.

Finally, point 21 of the recommendation states that '[w]hether the text messages were part of a formal procedure or whether they committed the Commission in any way, may have a bearing on whether or not they should have been registered in the Commission's document management system but has no bearing on whether they fall within the scope of the public access rules'.

The European Ombudsman recommended "that the Commission should ask the President's Cabinet to search again for the relevant text messages making it clear that the search should not be limited to registered documents that fulfil the recording criteria". If any text messages are identified, the Commission should then assess whether public access can be granted to them in line with Regulation (EC) No 1049/2001.

III. THE COMMISSION'S REPLY TO THE EO'S RECOMMENDATION

As a preliminary remark, it should be underlined that the Commission and the Ombudsman do not disagree regarding the notion of what constitutes a 'document' under Regulation (EC) N°1049/2001. Article 3(a) of the regulation defines a document as 'any content whatever its

² <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/150175>.

³ <https://www.ombudsman.europa.eu/en/press-release/en/151740>.

⁴ See the EO press release n° 2/2022: <https://www.ombudsman.europa.eu/en/press-release/en/151740>

medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institutions' sphere of responsibility.'

The Commission and the Ombudsman agree that what matters is the content of a document.

According to Article 2(3) of the regulation, the document has to be 'in the possession' of the institution. In order to enhance transparency and facilitate the effective application of the rules on access to documents, the Commission has created a document management system for content that meets the definition of 'document' according to the regulation. The creation of the document management system is instrumental for handling the significant number of documents drawn up and received by the Commission and the significant number of requests for access to those documents the Commission receives.

Therefore, the registration of a document in the Commission's document management system is relevant, because all documents drawn up or received by the Commission that relate to its policies, activities or decisions, which contain important information, are not short-lived and fall within the institution's sphere of responsibility, are registered.

In this context, it is worth mentioning that should the Commission find that a relevant document in its possession has erroneously not been registered in the corporate document management system, such registration can take place ex-post if the document meets the relevant criteria.

This is the reason why the Secretariat-General refers to 'registered' documents in its email exchange with the President's cabinet during the handling of the specific access to document request to which the Ombudsman refers in point 22 of her recommendations. It also sent the original request of the applicant to the Cabinet.

Following the same logic, when a document drawn up or received by the Commission does not contain important information, and/or is short-lived and/or does not fall within the institution's sphere of responsibility, it does not fulfil the registration criteria and is therefore not registered. Such short-lived, ephemeral documents are not kept, and, as a consequence, are not in the possession of the institution pursuant to Article 2(3) of the regulation.

Consequently, the European Commission is of the opinion that it has not treated this request in a 'narrow way' and that the search and handling of documents for the purpose of public requests for access to documents under Regulation (EC) N° 1049/2001 is justified and follows the established practice.

In the light of the above, the Commission can confirm that the search undertaken by the President's cabinet for relevant text messages corresponding to the request for access to documents has not yielded any results.

More generally, as explained by the Commission in its reply to the Ombudsman's Strategic Initiative SI/4/2021/TE (document C(2021) 8252 final of 25.11.2021), due to their short-lived and ephemeral nature, text and instant messages in general do not contain important information relating to policies, activities and decisions of the Commission, nor are they in the possession of the institution.

However, in an effort to ensure greater certainty for the Commission in the application of Regulation (EC) N°1049/2001, the Commission intends to issue further guidance on modern communication tools such as text and instant messages.

In order to ensure consistency, the Commission will reach out to all the other institutions of the Union and propose that they draw up together guidance for their staff on the use of modern communication tools such as text and instant messages.

In this context, the guidance provided by the Secretariat-general of the Council to its staff (note SMART 21/0021 of 28 January 2021) is particularly relevant, since it asks its staff to use messaging apps in a professional context in a restrictive manner, e.g. using text and instant messages only for short-lived, ephemeral chat about public or non-sensitive content; text and instant messages are not to be used for sharing substantive content on sensitive matters. This could be a starting point for such a joint inter-institutional approach. The Ombudsman could equally be invited to participate in those discussions, if she wishes to do so.

IV. CONCLUSIONS

The European Commission considers that its confirmatory decision was in line with the applicable legislation and the relevant case law on access to documents at the point in time it was taken.

For the Commission

Věra JOUROVÁ
Vice-President

