



European Ombudsman

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European Ombudsman

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Decision in case 1011/2015/TN concerning the refusal of the Council of the European Union to give access to opinions on candidates' suitability to perform the duties of Judge and Advocate-General at the Court of Justice and the General Court of the EU

Dear Mr Alemanno,

On 16 June 2015, you submitted a complaint to the European Ombudsman against concerning the above matter.

After a careful analysis of all the information submitted to me, I have decided to close my inquiry with the following conclusion:

The Council has taken steps to resolve the issue complained about.

Please find enclosed my decision on your complaint.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure:
Decision on complaint 1011/2015/TN



Decision

in case 1011/2015/TN concerning the refusal of the Council of the European Union to give access to opinions on candidates' suitability to perform the duties of Judge and Advocate-General at the Court of Justice and the General Court of the EU.

Access Info Europe and the EU Public Interest Clinic asked the Council of the European Union to give them public access to the opinions on the suitability of Member State candidates to perform the duties of Judge and Advocate-General at the Court of Justice and the General Court of the EU. Such opinions are drawn up by a panel of experts and are used by the Member States when they deliberate on whether to appoint a candidate. The Council refused access to the opinions because, it argued, Regulation 1049/2001, the Regulation governing public access to documents held by the Council, does not apply to the requested documents. It sought to justify this assertion by arguing that the procedure for appointing judges and Advocates General is not within the Council's "sphere of responsibility".

The Ombudsman opened an inquiry into the matter, setting out her preliminary view that Regulation 1049/2001 does indeed apply to this request for public access to documents.

In its response, the Council announced that it had reassessed its practice and decided to apply Regulation 1049/2001 to documents held by its General Secretariat in relation to tasks of support to various intergovernmental bodies and entities, such as the relevant panel. The Ombudsman welcomes the Council's policy change. She notes that the complainants have now made a new access request to the Council to be dealt with under Regulation 1049/2001. She therefore considers the Council to have taken steps to resolve the immediate matter. In concluding, the Ombudsman commented on an important issue raised in this case. This is the issue of how to strike the correct balance between the need to protect the personal data of persons being assessed for high public office with the need to ensure maximum transparency in relation to the process of making appointments to high public office. The Ombudsman noted that in such cases the balance to be struck, between the need to protect personal data relating to professional experience and the requirements of transparency, tilts generally in favour of greater openness. She encourages the Council to deal with any future requests for public access to such documents with this approach in mind. Finally, the Ombudsman asked the Council to inform her of the outcome of its decision on the new access request by the complainants. She commented that she will, at that stage, assess whether the Council should be proactive in publishing panel opinions rather than await individual public access requests.



The background to the complaint

1. The Member States of the European Union may put forward candidates for posts as judges and Advocate-Generals to the EU Court of Justice and the General Court. Before a candidate is appointed to the EU Court of Justice or to the General Court "by common accord of the governments of the Member States"¹, a panel of experts gives an opinion on the candidate's professional ability to fill the post². The panel consists of seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The panel was established by the Lisbon Treaty and began its work on 1 March 2010.³
2. Point 8 of the panel's operating rules provides that "*[r]easons for the opinion given by the panel shall be stated. The statement of reasons shall set out the principal grounds on which the panel's opinion is based.*" The panel, in its opinions, thus describes a candidate's legal capabilities, professional experience, ability to perform the duties of a Judge (or Advocate General) with independence and impartiality, knowledge of languages and aptitude for working in an international environment.⁴ In accordance with the second paragraph of point 8 of the operating rules, the panel's opinions are "*forwarded to the representatives of the governments of the Member States*". The Member States have so far always followed the opinions of the panel.⁵
3. The panel itself considers that its opinions are intended exclusively for Member State governments, and that the positions the panel takes on the suitability of candidates may not be disclosed to the public.⁶
4. In January 2014, Access Info Europe and the EU Public Interest Clinic (the two complainants in the present case) asked the Council to give public access to all panel opinions on all candidates (including for those candidates that were eventually not appointed) or, alternatively, to the panel opinions for all current members of the Court of Justice and the General Court.
5. The Council refused to give public access to the documents. The Council argued that **Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents is not applicable** to the panel opinions. The Council argued that, although its General Secretariat is in possession of the opinions, the procedure for appointing judges and Advocates General, including the panel opinions, is not "*a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*" as referred to in Article 3(a) of Regulation 1049/2001.

¹ Article 253 Treaty on the functioning of the European Union (TFEU).

² Article 255 TFEU.

³ Immediately after the entry into force, on 1 March 2010, of two decisions whereby the Council established the panel's operating rules and appointed its members: Decisions No 2010/124/EU and No 2010/125/EU.

⁴ Third Activity Report, page 16.

⁵ Third Activity Report, page 10.

⁶ Third Activity Report, page 16.



6. The Council argued that the opinions were drawn up for the purpose of an intergovernmental conference, not for the Council. The Council was, it argued, not the recipient of the opinions. The panel is consulted by the governments of the Member States only. This conclusion, the Council argued, is not altered by the fact that its General Secretariat is responsible for the panel's secretariat and forwards the opinions to the representatives of the governments of the Member States. The role of the General Secretariat is strictly limited to providing clerical and administrative support to the panel. The assessment of the candidates' suitability and the drafting of the opinions fall entirely within the responsibilities of the panel and is therefore a task falling outside the sphere of responsibility of the Council. The opinions are thus intergovernmental in nature and do not fall within the scope of Regulation 1049/2001. According to the Council, the Member States also consider that the opinions cannot be released.

7. In June 2015, the complainants turned to the Ombudsman regarding the Council's refusal to give access to the panel opinions. The complainants maintained that Regulation 1049/2001 applies to the panel opinions, setting out very detailed reasons for their position.

The inquiry

8. The Ombudsman opened an inquiry into the following allegation and claims⁷:

1) The Council wrongly refused to grant public access to the panel opinions regarding all judicial candidates nominated for the Court of Justice and the General Court since the panel's establishment, or at least to the panel opinions for all current members of the Court of Justice and the General Court.

2) The Council should:

(i) Affirm that Regulation 1049/2001 applies to requests for access to panel opinions;

(ii) Reconsider the access request on the basis of Regulation 1049/2001 and a correct application of the exceptions to access;

(iii) Grant at least partial access (with minimal redactions) to the panel opinions, if necessary in order to protect interests covered by the exceptions to access set out in Regulation 1049/2001.

9. In the course of the inquiry, the Ombudsman received the Council's opinion on the complaint and, subsequently, the comments of the complainants in response to the Council's opinion. The Ombudsman also inspected the relevant

⁷ The complainants had also requested access to "any document held by the Council, including memo, preparatory note or e-mails, concerning the confidentiality of such documents". In response, the Council stated that its General Secretariat had notified the processing of personal data to the Council's Data Protection Officer in accordance with Regulation 45/2001 on the protection of individuals with regard to the processing of personal data. The Council argued, however, these documents do not concern the confidentiality as such of the opinions. The Ombudsman considered the Council's statement to be correct and she therefore did not find grounds to include this aspect of the request for public access in her inquiry.



panel opinions (that is, those that had been drawn up at the point in time of the complainants' request for public access). In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation of wrongly refusing access to panel opinions

The Ombudsman's preliminary assessment

10. In her opening letter to the Council, the Ombudsman noted that, in response to the complainants' public access request, the Council argued that Regulation 1049/2001 does not apply to the panel opinions. Given that this was an issue that was crucial for the subsequent analysis of a request for public access to documents, the Ombudsman provided the Council with a preliminary analysis of the issue when she opened the inquiry.

11. The Ombudsman found that the Council did not appear to have focused on the correct provision of Regulation 1049/2001 when analysing whether that Regulation applies to panel opinions. The **scope** of Regulation 1049/2001 is set out in Article 2, according to which it "*shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its **possession**, in **all areas of activity of the European Union***" (emphasis added).

12. The Ombudsman noted that the Council had acknowledged that the panel opinions are indeed in its **possession**.

13. The Ombudsman also set out the view that an opinion on a candidate's suitability to perform the duties of judge of the EU courts is clearly in the area of activity **of the European Union**.

14. The Ombudsman noted that the Council had based its analysis of the applicability of Regulation 1049/2001 on the Article in the Regulation setting out **definitions**, more specifically the definition of a 'document' (Article 3(a): "*document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;*". The Council argued that panel opinions do not "*relate to the policies, activities and decisions falling within the institution's sphere of responsibility*". The Council could thus be understood to argue that the relevant opinions are not 'documents', as defined by Regulation 1049/2001.

15. In this regard, the Ombudsman put forward the view that, in any event, the panel opinions should be considered as *relating to* activities falling within the Council's sphere of responsibility, given that these opinions clearly *relate to* Council activities. The fact that the opinions are sent to Member States' governments (to assist them when seeking to reach agreement on an appointment) has, in the Ombudsman's view, no bearing on the question of whether Regulation 1049/2001 applies to the request for access.



16. Above all, the Ombudsman pointed out that the purpose of Regulation 1049/2001 is to ensure the widest possible access to documents (Article 1(a)). It is in line with the spirit of Regulation 1049/2001 to interpret its definitions in a way that helps ensuring this purpose.

17. On the basis of the above, the Ombudsman's preliminary conclusion was thus that the Council had wrongly decided that Regulation 1049/2001 does not apply to the panel opinions.

Arguments presented to the Ombudsman

18. In its opinion, the Council informed the Ombudsman that it had reassessed its practice as regards the handling of requests for access to documents, held by its General Secretariat, in relation to tasks of support to various intergovernmental bodies and entities. The panel which provides advice on candidates' suitability to perform the duties of judge and Advocate-General of the Court of Justice and the General Court is an example of such a body. The Council now considers that the reference in Article 3(a) of Regulation 1049/2001 to "*a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*", analysed on the basis of its purpose and context, should be interpreted as material activity, rather than legal competence. It thus includes the performance of administrative tasks formally entrusted to the Council's General Secretariat to support the work of bodies or entities which deal with matters which do not fall directly inside the Council's authority as defined in the Treaties.

19. Requests for public access to this kind of documents will now, it added, be processed by the Council's General Secretariat in line with the procedural and substantive legal framework set out in Regulation 1049/2001. In that regard, the General Secretariat will, it stated, have to assess whether a disclosure of the requested documents could affect one of the interests protected by Article 4 of Regulation 1049/2001 and, if required, to determine whether an overriding public interest in disclosure nevertheless exists. In carrying out this assessment, the General Secretariat will have to consult the body or entity other than the Council that is the author of the document, unless it is clear that the document shall or shall not be disclosed (Article 4(4) and Article 4(5) of Regulation 1049/2001).

20. The Council argued that, given that it had not provided its reply to the complainants' request for access to the panel opinions on the basis of Regulation 1049/2001, with its specific substantive and procedural steps, it would not be appropriate for it to address the merits of that reply within the context of the present inquiry. However, the Council invited the complainants to make a new request for access, which would then be dealt with under Regulation 1049/2001.

21. In its observations on the Council's opinion, the complainants praised and welcomed the Council's policy change as regards the application of Regulation 1049/2001 to, among other things, the panel opinions. The complainants stated, however, that the Council's policy change is nothing more than what it is required to do under Regulation 1049/2001 and that the Council's handling of their request for public access therefore constituted maladministration. In the complainants' view, the fact that the Council refused to deal with the merits of the request for access in the context of the present inquiry also constitutes



maladministration, as it leads to unjustified delays in the complainants' legitimate demand to have the request for access assessed on the basis of the applicable legal framework, such as Regulation 1049/2001. However, in order to avoid any further delay, the complainants submitted a new application for access on 19 February 2016.

The Ombudsman's assessment

22. The Ombudsman notes that this case raised complex points of law and principle in an area which is of great importance. As set out in her preliminary assessment, the Ombudsman is of the view that the Council should have dealt with the request for access under Regulation 1049/2001. The Ombudsman thus very much welcomes the Council's decision to apply Regulation 1049/2001 to requests for access to documents, held by its General Secretariat, in relation to tasks of support to various intergovernmental bodies and entities, such as the panel providing opinions on candidates' suitability to perform the duties of judge and Advocate-General of the Court of Justice and the General Court.

23. The complainants have, as suggested by the Council, submitted a new application for access following the Council's policy change.

24. On the basis of the above, the Ombudsman considers that the Council has taken steps to resolve the immediate matter complained about. She encourages the Council to deal with any new request for access to the panel opinions in light of the purpose of Regulation 1049/2001, which is to ensure the widest possible access to documents. A key issue that may arise in the context of dealing with such requests will be the need to strike an appropriate balance between the protection of the personal data of candidates and the needs of openness and transparency. In this regard, the Ombudsman notes that personal data relating to the professional competence and activities of a public figure, especially a person **actually appointed to a high level public post**, may not require the same level of protection as might apply in other circumstances. Openness and transparency as regards such personal data will, the Ombudsman stresses, serve to generate trust and confidence in the appointment process, and in the capabilities of the persons **actually appointed to high level posts**, whilst at the same time striking the **right balance** with the need to protect personal data.⁸

25. Given the importance that the Ombudsman attaches to this issue, the Ombudsman requests the Council to inform her of the outcome of the request for access which has now been submitted by the complainant. The Ombudsman will then also assess whether proactive publication of certain panel opinions should be considered.

⁸ See also the European Data Protection Supervisor's pleading before the General Court in Case T-115/13 *Dennekamp v European Parliament*, p. 3: "*the fact that information relates to the sphere of professional activities of a public figure is an important element which should tilt the balance towards greater openness*" (https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Court/2014/14-11-17_EDPS_pleading_Dennekamp_II_EN.pdf)



Conclusion

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

The Council has taken steps to resolve the issue complained about.

The complainants and the Council will be informed of this decision.

Emily O'Reilly

Strasbourg, 04/05/2016