

Access Info Europe

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Comments on European Commission Response

Complaint Number 682/2014/JF

Access Info has been invited by the European Ombudsman's office to provide comments on the response from the European Commission, dated 24 July 2014, in case number 682/2014/JF.

Access Info considers that it is not necessary to summarise the complaint here, and will instead focus on addressing the arguments raised by the European Commission in its letter, which are set out below.

It is important to note that the reason the initial request was refused was because the requester, in this case, Agnieszka, an intern at Access Info Europe, did not provide her surname, country, and "activity sector" when making the request. We address the Commission's arguments in response to this refusal.

In its response, the Commission itself raises the new policy, adopted as of 1 April 2014, by which it has added a further requirement for requesters. The Commission is now refusing to register requests if citizens do not provide their postal address in addition to the information listed above. As the necessity for this is interwoven with the arguments in this specific case, we have also addressed the reasons given by the European Commission for the necessity of this new policy and we ask the European Ombudsman to examine these as well.

1. Reasons for refusing to register this particular request

Access Info Europe contends that it did provide sufficient information, and that the Commission has chosen to ignore in the response to the European Ombudsman the fact that we confirmed that the request was submitted on behalf of a legal person based inside the EU.

There were three reasons given by the European Commission for refusing to register the initial request, namely that the applicant had not provided her surname, country, and activity sector.

With respect to the surname, we note that in her response to the initial refusal (15 November), Agnieszka Kubiak provided the information that she was an intern working at Access Info Europe, and stated the organisations mission and its area of work. In doing so, she provided the both the full name of a legal person entitled to make a request and responded to the question about the area of activity. This information should in fact have been enough to register the request as the Commission itself makes clear that the right of access may be exercised by legal persons and the information about the legal person for which Agnieszka was working was provided.

Furthermore, in the second follow-up (2 December), Agnieszka stated as follows:

I have already informed you that I am interning at Access Info Europe which is a legal person registered in a Member State (Spain). I can also confirm that I am an EU citizen of Polish nationality, living in Sweden and currently interning in Spain.

Hence she repeated that she was working with a legal person entitled to file a request and made clear that that legal person, Access Info Europe, is registered in Spain. She furthermore stated both her nationality and residence situation, all of the countries she listed being European Union Member States.

Access Info Europe believes that, having provided this information, the Commission had sufficient data to process the request.

In our complaint to the Ombudsman, we made clear that we believe that "*sufficient information to do so had been provided by the requester including first name, organisation, country of origin, country of residence, and details about the nature of the document being sought.*" We also note that the Commission had "*Insisted on provision of a surname when the name of a registered organisation had been given.*"

We note that this is simply not addressed by the Commission in its response. The Commission has chosen, both in its 11 December 2014 reiteration of its refusal to register the request and in the submission of 24 July 2014 to the European Ombudsman, to ignore the fact that the name of a legal person and the country of registration of that legal person were provided.

Furthermore, we note that the Commission rather oddly insisted that a country be provided even after the full nationality and residence status country of the individual who sent the request and as well as the country of registration of the organisation they were working with had been sent.

Similarly, the Commission continued to ask for "activity sector" in spite of the fact that this had been clearly stated.

This left the issue of surname, but given that it had been made clear that the request was coming from Access Info Europe, there was no need for this information as the name of a legal person had been provided.

Whilst it is true that additional arguments were made about the requirements being placed by the Commission on this requester, this does not excuse the fact that the Commission had sufficient information to register the request, even considering the requirements it is now placing on requesters, and hence was in breach of its obligations and the right of access to EU documents by refusing to register this request.

2. Additional Arguments Raise by the Commission.

The Commission provides a series of reasons for its policy of insisting on full name, country, and activity sector. To these it adds the justification, under the new policy adopted on 1 April 2014, of requiring provision of a postal address. Given the importance of these assessing the validity of these requirements for determining the future handling of access to documents requests, we welcome the opportunity to discuss them with the Commission and the European Ombudsman.

2.1 The need to know whether the applicant is an EU citizen or resident

In Section 3.1 the Commission sets out arguments as to why it was asking for the country and is now insisting upon the postal address of requesters. The first argument is about exercise of the right. This line of argument is a little confusing as the Commission notes that the right belongs to EU citizens and residents but that its own Implementing Decision requires that it treat other requesters equally.

It is not fully clear whether with the arguments now being presented and the statement that this "right belongs first and foremost to EU citizens and to legal entities residing or registered in an EU country" there is a plan to change the policy set out in the Commission Implementing Decision. (We also note that non-citizen residents are missing from the above list). This is something which we call on the Ombudsman to clarify with the Commission, and for the Commission to make clear if it is planning to revise its Implementing Decision.

Access Info Europe is also curious to know how the postal address policy would be applied if, for example, the address given were to be an address in India, Mexico, Senegal or the United States. Does the Commission plan to assess whether the person making the request is perhaps in fact a British, Spanish, French, or German citizen, for example? Should citizens of the EU living outside its territory be subject to different requirements for making requests from citizens living inside the 28 Member States? Will residents of the EU who are in fact citizens of other countries (India, Mexico, Senegal or the US, for example) also be subject to additional requirements compared with EU Citizens? Is such differential treatment, were it to occur, consistent with exercise of a right which the EU treaties establish as a fundamental right and which the UN Human Rights Committee, European Court of Human Rights and other bodies have also confirmed to be a fundamental right?

Access Info Europe is looking here for some clarity on the future policy and for it to be designed and implemented in a way which does not discriminate between requesters in an unreasonable way, given that at the end of the day, it is not really important who

makes a request but whether or not the requested information is deemed to be in the public domain.

2.2 The need to obtain legal certainty as regards the delivery and date of receipt of the decision

The European Commission argues that it is bound by Article 297 of the Treaty on the Functioning of the European Union to notify its decisions “to those whom they are addressed”, and that an acknowledgement of receipt is necessary in order to calculate whether the legal deadlines for redress have been respected.

However, the TFEU does not specify that these decisions must be sent via post, simply that they must reach the person affected by each decision. Nowadays, it is both possible and desirable that this be done via email, as it reduces the administrative burden and the costs for the requester and for the EU institutions themselves.

Email has now become a standard form of communication for citizens, and there are many technical possibilities for ensuring that the European Commission receives an acknowledgement of receipt. For example, the European Medicines Agency uses a program called “Eudralink” to ensure safe receipt of the documents they send to requesters via AsktheEU.org. Email programmes also regularly have a “confirmation of receipt” function which could be activated, and there are a myriad of other resources of this nature at the Commission's disposal. But instead of looking into these technical solutions, Access Info Europe contends that the European Commission has chosen to address the issue in a way which puts an additional barrier in the way of citizens wishing to access EU information.

Access Info Europe notes that part of the arguments for asking for a postal address is to permit delivery by registered post of decisions which might incur a legal action. The Commission has stated elsewhere that this would be mainly for refusals. In fact, however, pretty much any response to an access to documents request could result in a legal action as the requester might not be satisfied with the answer or with the information provided and seek to challenge it. To be consistent on this policy approach, the Commission should deliver all responses to access to documents requests by registered mail, something which would incur a cost and which would be an inefficient way to proceed compared with electronic delivery solutions.

Access Info would welcome a decision from the Ombudsman on the suitability or not of the new policy, dated 1 April 2014, to refuse to even register requests that are not accompanied by a postal address.

2.3 The need to know whether the requester is an EU resident for the purpose of correctly applying the exception on personal privacy and the Data Protection Regulation 45/2001

The Commission argues that, where a request for information relates to personal data, it is necessary to know where the requester lives out of considerations of the adequacy of personal data protection in the third countries.

Access Info Europe notes that, as can be observed through www.AsktheEU.org, the Commission is in fact systematically refusing to register requests that are sent by citizens without a postal address, independently of whether or not the requested information contains, or is likely to contain, personal data.

It is also worth noting that Regulation 45/2001 has been in force for the past 13 years, yet it was not until 1 April 2014 that this reasoning was put forward by the European Commission.

That said, Access Info Europe understands that there are legal issues to do with the processing of personal data, even if these do not apply to much of the information contained in documents released by the European Commission under Regulation 1049. Indeed we note that the Commission has recently shown some reluctance to release information it considers to be personal data which, whilst not ideal from a right of access to documents perspective, would obviate the concerns being addressed here.

Be that as it may, Access Info Europe believes that there is a different solution to the data protection question. This is to process requests without the check of a postal address, and then, when the information is released to the requester, to inform that person, clearly and precisely, of his or her obligations under EU data protection laws.

There are other questions which have not been clearly set out in the Commission's new policy. For example, suppose the requester is a Latvian citizen, and according to their address they are living in Vienna. Would the Commission provide that person with a document but possibly deny it to another Latvian living in Peru? What would happen if another EU citizen, someone from Austria let's say, requested the same information, but two weeks after having filed the request and provided their Vienna address, travels to Zimbabwe to work for 6 months and receives the answer by email when they are now physically located in Zimbabwe? Or what if the first Latvian actually picks up the mail when visiting their friend in Peru? Is the location of the person the biggest issue here rather than what is done with the information once received?

Data protection is clearly an important issue, but it seems to Access Info Europe that postal addresses are simply not the most effective route to addressing it and that it would be much better for an informative note to accompany any data which is might be susceptible to limits to explain how it may and may not be used. Indeed, we believe that it is overbroad and disproportionate measure which is interfering with the smooth functioning of the process by which the public requests documents from the EU.

In this respect, we invite the European Ombudsman to examine the proportionality and relevance of the new address policy even when taking the data protection concerns into account.

2.4 The need to direct the Commission's scarce resources to “real” requesters:

The Commission argues that anonymous requests cannot be considered to be submitted by “real” applicants and that a postal address as well as the name and surname are necessary for preventing requesters from using invented identities or the identities of

third persons.

Access Info Europe takes issue with this, pointing out that a requester who prefers to remain anonymous is still a "real" person and remains a person exercising a fundamental right. Anonymous requesters and those using pseudonyms may have reasons for doing so – such as that they may be a known journalist or activist or whistleblower. Whilst it is correct that the Council of Europe Convention on Access to Official Documents is not binding on the EU but it does provide useful guidance on the position taken by Member States.

In any case, it is not clear how the new policy of asking for statement of an address helps verify the identity of a requester, as it is perfectly possible for any citizen to invent their name, surname and postal address. Alternatively they have the option of asking a relative or friend to submit a request. At a practical level the point is that someone wants access to information which should, *prima facie*, be assumed to be in the public domain, barring limited exceptions.

Access Info Europe notes that some requesters submitting requests via AsktheEU.org have tried to use the Access Info Europe postal address – after we have given them permission to do so as we are mediating the requests across the website - but that this has also been refused as it is not considered to be personal residence address. This makes clear that the policy is more about identifying the requesters than delivering responses.

2.5 The need to ensure that citizens do not evade Article 6(3) on voluminous requests

The Commission argues that it needs to verify who is being requests in order to prevent requesters sending multiple requests using different identities in an attempt to evade Article 6(3) of the Regulation on voluminous requests.

Access Info Europe notes that this article is directed at the EU institutions, which are obliged to "confer with the applicant informally, with a view to finding a fair solution" in case the request is very voluminous. The article is clearly worded to bring citizens and the institutions closer together in order that the right of access to documents be fulfilled whilst at the same time respecting the need for the EU institutions to not be unduly burdened. If initial requests are not even processed, it then becomes impossible to apply Article 6(3) and "confer" with the applicant in order to find a fair solution, thus rendering the article ineffective.

Access Info Europe also notes that the cited paragraph from the Case T-494-08 *Ryanair Ltd v Commission* indicates that when a requests is split across multiple requests it may amount to a voluminous request and therefore require an extended time limit.

Access Info Europe believes that hard cases often make bad law. The particular instance cited of one applicant making multiple requests and confirmatory applications may have imposed some burden on the Commission but this does not, *per se*, make it illegitimate to have submitted the requests. It is not clear whether or not the individual suspected of

sending 57 confirmatory requests under 13 different identities provided or not his or her postal address, but it is reasonable to assume that a person such as this could be perfectly capable of inventing postal addresses. At present, however, this seems to be a suspicion rather than a proven fact. In any event, it is absurd that the behaviour of one requester should lead to a policy which negatively affects all other requesters.

There are various ways in which multiple requests on the same issue could be entirely legitimate. It could also be that a requester gets help from colleagues, friends or relatives to submit requests. In the same way a media outlet, academic researchers, citizens groups, civil society organisations, or groups or friends might team up to submit requests on a particular topic, all in legitimate exercise of their right. It could equally be that a topic attracts a lot of attention and suddenly there are a lot of requests about it (TTIP being one example at the present time). This can put a strain on resources but the upholding rights often does imply the dedication of public resources. To reduce this strain, conferring with requesters is a positive approach from any public administration; this can be done by email and followed-up by phone if appropriate and if the requester agrees. At the same time, such occasional peaks in activity should not be used as the basis for policies which in some way could dissuade other legitimate requesters.

2.6 Making it Harder to Submit Requests to the European Union

Access Info Europe runs the AsktheEU.org website whose goal is to make it easier for members of the public to exercise their right of access to EU documents.

The new address policy has caused complications for filing requests across this website because the system is not set up to deliver addresses without making them public. It has therefore interfered with our mission to facilitate submission of requests and hence improving communication between EU citizens and the institutions and for bringing greater transparency to the process of requesting EU documents.

3. Other Issues

3.1 Activity Sector

The Commission defends its policy of asking for the "activity sector" or "Business Domain" of requesters, pointing out that such information is needed for its Annual Report.

Access Info Europe believes that there are various problems with this requirement. It is invasive because it asks the requester for information without making clear how it will be used or how it might affect the processing of the request. It is inappropriate because requests are filed in exercise of a right and should not be conditioned on declaring a field of work or distinguishing between business sectors or citizens.

The requirement is also flawed in practice by assuming that a request is filed because of some "activity" or "business" rather than the right to know of the member of the European public. Furthermore, the "citizen" option excludes EU residents who are not citizens, creating some potential confusion there. Other obvious options such "business

person” and “lobbyist” are not on the list.

There is plenty of other data about requests which could be evaluated in detail in the Commission’s annual report and which might tell us more about its compliance with this treaty right than the professional affiliation of the requesters.

Access Info Europe calls on the European Ombudsman to evaluate the appropriateness of asking requesters for this information.

In any case, it must be made totally clear that this is a voluntary requirement. The Commission is contradictory in its 24 July document about whether or not this is really a voluntary or mandatory requirement. What is certain is that in the particular refusal to register which was the subject of this complaint, registration of the request was conditioned on providing this information – even, remarkably, after it had in fact been provided – and we believe that this is not acceptable and a breach of the right as set out in the treaties.

3.2 Identification of Documents

The Commission raises at the end of its submission (page 7) an issue about the detail in which documents are identified. It notes that it does register and makes an effort to process requests even when they are not fully clear. There are undoubtedly issues here about the ability of requesters to identify the documents they are seeking when such documents do not appear in the register and when it is not possible to know precisely which documents exist.

It is positive that the Commission registers requests even when a document cannot be named because to do otherwise would not be consistent with the spirit or letter of Regulation 1049 and the right as set out in the treaties. Indeed, Regulation 1049 anticipates some challenges and hence there is a provision encouraging clarifications.

These concerns do not, however, appear to be pertinent in this particular case.

Indeed, what is clear, is that much work is needed to make it easier for requesters to be able to find, identify and access the documents which interest them. Making this possible should be a priority for all EU institutions. The focus on knowing who the requester is does not seem the most constructive approach when many of Europe’s’ 500 million citizens and residents still know far too little about what is going on in Brussels.

4. Conclusions

With respect to the complaint which was the subject of this complaint to the European Ombudsman, Access Info Europe asserts that sufficient information was provided – the full name, country of registration, and area of activity of Access Info Europe, as well as the first name, nationality, and country of residence of the intern managing the request – to process the request. We believe that the repeated refusal to register the request was a violation of the right of access to documents under the EU treaties and in breach

of Regulation 1049/2001.

With respect to the new policy adopted by the European Commission on 1 April 2014, Access Info would like to know the European Ombudsman's opinion on the justifications provided by the Commission for refusing to register requests that are not accompanied by what the Commission deems to be a "real" address. Access Info contends that this policy is both inadequate and disproportionate for the aims for which it is intended, and that it has negative consequences that interfere unnecessarily with citizens' ability to exercise their right of access to documents.

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