Council of the
European Union

Brussels, 15 November 2017
(OR. en)

14418/17

API 138
INF 208
OMBUDS 12
JUR 539
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COVER NOTE

From:	Mr Fergal O'Reagan, European Ombudsman, Unit 2 - Coordination of Public Interest inquiries
date of receipt:	14 November 2017
To:	Mr Emanuele Rebasti, General Secretariat of the Council - Legal Service
Subject:	Complaint 1955/2017/THH to the European Ombudsman

Delegations will find in the Annex a copy of a letter sent by the services of the European Ombudsman to the Council concerning complaint 1955/2017/THH.

European Ombudsman

Unit 2 - Coordination of Public Interest Inquiries

Mr Emanuele REBASTI
General Secretariat of the Council
Legal Service

Strasbourg, 13/11/2017

Complaint 1955/2017/THH

Subject of case: The Council of the European Union's handling of requests for access to documents prepared by the Article 255 Panel on Judicial Appointments to the Court of Justice of the EU and the General Court of the EU

Dear Mr Rebasti,

The Ombudsman has received a complaint from Access Info Europe and HEC-NYU Law School against the Council of the European Union. She has asked me to deal with the case on her behalf.

The complaint concerns requests for access to the Panel Opinions of the Article 255 Panel on Judicial Appointments. The complainant has submitted a confirmatory application in relation to its request.

The Council has granted Access Info Europe and HEC-NYU Law School partial access to the Panel Opinions in the form of redacted versions of the documents.

We have decided to open an inquiry into the complaint against the Council's decision to grant only partial access under Regulation 1049/2001.

Regulation 1049/2001 states, in its Articles 7 and 8, that applications for access should be handled promptly. It is in line with this principle that the European Ombudsman will also seek to deal with cases such as this as quickly as possible.

As a first step, I consider it necessary to review the documents at issue in the complainant's request. I would be grateful if the Council could provide unredacted versions of the documents for collection by next Monday, 20 November 2017.

The Council's position has been set out in its initial replies to the complainant, and in its response to the confirmatory applications. However,

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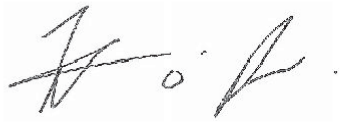
should the Council wish to provide additional views, to be taken into account by the European Ombudsman during this inquiry, I would be grateful if they could be provided to me within fifteen working days from the receipt of this letter, that is, by Monday, 3 December 2017.

Yours sincerely,



Fergal Ó Regan
Coordination of Public Interest Inquiries - Unit 2

Enclosure: complaint in case 1955/2017

EORegistry

From:	helen@access-info.org
Sent:	06 November 2017 16:37
To:	EORegistry
Subject:	[EOWEB#19964] New complaint from: helen@access-info.org -
Attachments:	2017 11 06 Ombudsman Complaint AIE 255 final.pdf; EN.html
Follow Up Flag:	1955/2017
Due By:	07 November 2017 16:30
Flag Status:	Flagged
Categories:	Complaint Fast track 1049

Your complaint has been submitted to the European Ombudsman. We will send you an acknowledgement of receipt within a few days.

NB - Please note that this e-mail was sent from a notification only e-mail address. If you wish to contact technical support, please use the link below:

Contact technical support

Sender

From: helen@access-info.org
Date: Monday, November 6, 2017 4:36:59 PM CET

Complaint about maladministration

Part 1 - Contact information

First name:	Helen
Surname:	Darbishire
On behalf of (if applicable):	Access Info Europe / HEC-NYU Law School
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Address line 2:	4 centro
Town/City:	Madrid
County/State/Province:	Madrid
Postcode:	28005
Country:	Spain
Tel.:	+34667685319
Fax:	
E-mail address:	helen@access-info.org

Part 2 - Against which European Union (EU) institution or body do you wish to complain?

Council of the European Union

Part 3 - What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

This complaint relates to an instance of maladministration by the European Union (the "Council") both through its incorrect denial of our request for information and its delays in processing the request. In its denial (reference

SGS16/06287, dated 13 July 2016), the Council refused to disclose to us documents in its possession prepared by the panel provided for under Article 255 of the Treaty on the Functioning of the European Union (TFEU) (the "Panel") which is charged with reviewing and selecting judicial candidates for the Court of Justice of the EU (CJEU) and the General Court of the EU. In particular, we had sought access to suitability opinions produced by the Panel with respect to successful judicial candidates (the "Panel Opinions").

Our 21 January 2014 request letter

Students at the HEC-NYU EU Public Interest Law Clinic (hereinafter, the EU Clinic), acting on behalf of Access Info Europe, submitted on 21 January 2014 an access to documents request to the Council of the European Union, seeking access to:

1. Panel Opinions regarding all judicial candidates nominated for the CJEU and General Court since the Panel's establishment;

or, in the alternative

2. Panel Opinions for all current members of the CJEU and the General Court; and
3. any document held by the Council, including memos, preparatory notes or e-mails, concerning the confidentiality of such documents.

The Council's 17 February 2014 denial letter

The Council's General Secretariat denied our request in a letter dated 17 February 2014. The Council based its denial on the following arguments:

1. Although the Council maintains physical control over the Panel Opinions, they were prepared in the context and for the purpose of an intergovernmental conference, not for the Council. As a result, the request did "not concern documents on a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility within the meaning of Article 3, point (a), of Regulation 1049/2001."
2. Alternatively, even if Regulation 1049/2001[1] did apply to the Panel Opinions, the Panel Opinions were covered by the following exceptions set forth in Article 4, which provide grounds for non-disclosure of certain documents to the public:
3. where disclosure of information would "undermine the protection of privacy and the integrity of the individual, in particular in accordance with [Regulation 45/2001]"; and
4. where "disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."
5. The Council additionally maintained that none of the requested ancillary documentation ("memos, preparatory notes or e-mails, concerning the confidentiality of [the Panel Opinions]") existed.

Our 25 February 2014 confirmatory application

The EU Public Interest Clinic, represented by law professor Alberto Alemanno, submitted a confirmatory application on behalf of Access Info Europe on 25 February 2014 asking the Council to reconsider its position. The confirmatory application made the following counterarguments against the Council's 17 February 2014 refusal to provide the documents requested.

In response to the Council's first argument, we stated that:

1. It is possession and not authorship of documents of the relevant EU institutions that determines the applicability of Regulation 1049/2001 under Article 2(3);
2. The Council's General Secretariat acts as the Panel's secretariat by maintaining possession of the Panel Opinions, which therefore constitute "documents…relating to the policies, activities and decisions falling within the [Council's] sphere of responsibility" under Article 3(a);

In response to the Council's second argument, we noted that:

1. Even if the Panel Opinions contain personal data within the meaning of Article 2(a) of Regulation 45/2001, "institutions are obliged to process personal data lawfully and fairly," which in some cases involves making them publicly available when necessary to satisfy a legitimate public interest in a democratic society;

2. In any case, providing redacted versions of the Panel Opinions would protect sensitive information and prevent any potential breach of privacy while still respecting the public's right to access Council documents;
3. Non-disclosure of the Panel Opinions is only justified under Article 4(3) of Regulation 1049/2001 if their disclosure would "seriously undermine the institution's decision-making process" in a manner that is reasonably foreseeable and more than purely hypothetical, which is not the case;
4. Even if non-disclosure were to seriously undermine the institution's decision-making process under Article 4(3), in this case there is an "overriding public interest in disclosure" which should prevail over the application of the exception. EU principles of transparency, openness, and democracy are particularly relevant in this case, and EU citizens have a legitimate interest in knowing the names of judicial candidates to the Courts and the reasons the Panel recommended for or against their appointment. Transparency around the selection of judges is a prerequisite for ensuring that the EU's highest court is fully equipped to defend the rights and fundamental freedoms of all EU citizens in an impartial and independent manner;

In response to the Council's third argument, we highlighted that:

If Panel Opinions contain personal data protected from disclosure under Regulation 45/2001, then the Council is required to possess a set of information (presumably including memos, preparatory notes or correspondence with the Data Protection Officer) which set out the standards to be applied with regards to the confidentiality and security of the processing of personal data in connection with the Panel Opinions, as required under Article 25 of Regulation 45/2001.

The Council's 14 April 2014 confirmatory application denial

The Council's General Secretariat denied our confirmatory application on 14 April 2014, reiterating that:

1. The Panel Opinions are not "a matter relating to the policies, activities and decisions falling within the [Council's] sphere of responsibility" under Article 3(a), and are therefore outside of the scope of Regulation 1049/2001.
2. Non-disclosure of the Panel Opinions is in the public interest, as there is a real and concrete risk that disclosure of the Panel Opinions would jeopardise the functioning of the Panel's "quality check" role as envisaged by the TFEU;
3. Although it had notified the processing of personal data relating to candidates to the Data Protection Officer in accordance with Regulation 45/2001, none of the correspondence concerned the confidentiality of the requested Panel Opinions as such.

Our 3 June 2015 complaint to the EU Ombudsman

On this date, the EU Clinic introduced a complaint on behalf of Access Info Europe asking the EU Ombudsman to consider opening an inquiry. The Council had refused access to the opinions arguing Regulation 1049/2001 does not apply to the requested documents and that the procedure for appointing judges and Advocates General is not within the Council's "sphere of responsibility." However, the EU Ombudsman disagreed and after examining the panel's opinion she encouraged the Council to reconsider its disclosure policy.

At this point, the Council announced that it had reassessed its practices and decided to apply Regulation 1049/2001 to documents held by its General Secretariat in relation to tasks supporting various intergovernmental bodies and entities, including the relevant panel.

The Ombudsman welcomed the Council's policy change, and encouraged the complainants to file a new access request to the Council to be dealt with under Regulation 1049/2001.

Our 19 February 2016 request

Following another request for access, which was submitted on 19 February 2016 by Access Info Europe assisted by Alberto Alemanno, the Council released heavily redacted versions of the opinions.

Our 24 May 2016 confirmatory application

A confirmatory application was submitted on 24 May of that same year.

The Council denied the confirmatory application on 13 July 2016, stating that:

1. The notion of personal data covers both factual elements concerning the candidates' professional experience and qualifications and the Panel's assessments of the candidate's competences;
2. The disclosure of the requested documents would undermine the protection of the candidates' commercial interest in the event that they carry out or intend to carry out paid work as lawyer or legal adviser;
3. The disclosure of the requested documents would seriously undermine the decision-making process leading to the appointment of Judges and Advocates General;
4. The Council considers that the disclosure of the Panel's opinions could also undermine the orderly conduct and the serenity of court proceedings;
5. The balancing of democratic rights and the public interests is satisfied by the significant level of transparency assured by the periodical publication of reports on the activity of the Panel.

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[1] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

Part 4 - What do you consider that the EU institution or body has done wrong?

The Council has committed maladministration by improperly applying the exceptions in Regulation 1049/2001 in a way that accords neither with the letter nor the spirit of that law, nor with EU principles of openness, transparency and participatory democracy.[1]

In particular, the Council's rejection failed to justify sufficiently the application of the above-cited exceptions and further failed to give due and adequate consideration to the overriding public interest in disclosure. This is in direct contradiction to the good practices which have been championed by the Ombudsman.[2]

Additionally, our requests were subject to significant delays, which is also a violation of the right of access to documents.

While the Council can effectively refuse public access to an internal document in a set of given circumstances[3], the Council has insufficiently proved the validity of any of these exceptions.

First, the Council failed to show sufficiently how the judicial candidates' privacy interests would be undermined by disclosure of the Panel Opinions, particularly given that judges are public figures subject to different expectations than the ones concerning any other citizen (part A, below).

Second, it is unclear how their other interests invoked by the Council to refuse our request could be affected by increased openness in the process and how their individual interests should take precedence over the general interest to a transparent judicial appointment process (Part B).

Third, the Council has similarly failed to show how the Panel's functioning would be undermined by this disclosure (part C). Rather, the Council simply asserts that "the content of the opinions it gives, whether favourable or not, may not be made public either directly or even, through statistical details, indirectly."[4] In interpreting its operating rules in this way, the Council needlessly impinges on the public's right to access.

Fourth, the Council fails adequately to consider the overriding public interest in this case (part D).

Finally, in addition to these instances of substantive maladministration, the Council exhibited procedural maladministration through excessive delays (part E).

Throughout its case law, the CJEU has required that documents should be systematically examined one-by-one in accordance with the basic principle of the Regulation 1049/2001.[5] The Court has clearly expressed the rationale underlying such a systematic approach, notably by linking the principle of public access with the principle of democracy: "it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, *inter alia*, the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in that this enables citizens to participate more closely in the decision-making

process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system."[6]

EU institutions are bound to give "*the fullest possible effect* to the right of public access to documents"[7], and, more broadly, to work as openly as possible to its citizens. However, the Council's refusal seems to invert this principle through the **over-broad application of exceptions**. In particular, the Council has failed to follow the Ombudsman's advice[8] in appropriately balancing the tensions between the privacy interests and transparency interests inherent to good governance, as required by EU law.[9] Therefore, the Council committed maladministration in its handling of our request and confirmatory application.[10]

A. Judges' privacy interests are not protected by non-disclosure of Panel Opinions.

The Council is correct to take into consideration the right to privacy when assessing a request for access to documents, as required by Regulation 1049/2001. It should however also take into consideration that the right of access to documents now enjoys 'the same legal value as [others of] the Treaties' rights.[11]

The most recent Council rejection of our request concludes that whether the candidates have consented, and whether the information is public, do not impact on whether the information should be considered to be private for the purposes of protecting it. Even holding these assertions to be true, it is unclear how the Council may simultaneously assert that this data is protected by privacy when its annual report provides an extremely detailed analysis of the circumstances that led it to adopt a negative opinion. This allows failed candidates to be identified with ease,[12] without actually enabling the public to understand how the Panel assessed them.[13]

Furthermore, even if the data were not public, *professional* data requires less privacy protection than *other types of private* data. According to the European Data Protection Supervisor (EDPS), tasked with ensuring that European Community institutions respect data protection, professional data is of a different nature than personal data and thus does not deserve the same protection; therefore, public policy should tilt in the direction of disclosure.[14]

Advocate General Cruz Villalón has recently endorsed a similar line of argument, according to which the law should be relaxed where personal data is not the main object of a request, but rather incidental to a request for public documents.[15]Although the opinions may contain personal data, most of the Panel judgements will concern professional data such that the documents are less sensitive than those containing information falling within the ambit of private life.[16]

Additionally, the privacy rights of the judges are not violated because judges are public figures who necessarily have less of a privacy interest to be protected[17]; "privacy" carries significantly different meaning with respect to public figures under EU law.[18] By nature, judges are trusted with the role of ensuring that the rule of law is fully respected. On a daily basis, they are invited to interpret legislation and regulations in order to respect constitutional provisions and common values. Such a core adjudication role has made them into public figures whose prominent role in our modern democracy means that they benefit from a limited protection of personal data compared to that of other citizens.

Indeed, judges' academic and professional backgrounds – and sometimes even their political preferences – are no secret to EU citizens. For example, passing comments by public officials regarding a rejected candidate, when coupled with a simple Internet search, reveal significant information regarding the name and circumstances of the candidate.[19]Scholars routinely identify Member States that have proposed candidates who received negative Opinions.[20]

Hence the Council should not assume, without evidence, that release of this information will hurt the privacy interests of the candidates.[21]After all, "the mere fact that a document concerns an interest protected by an exception does not justify application of that exception" as there needs to be a foreseeable violation rather than a purely hypothetical one.[22]

Other judiciaries share this approach in balancing fundamental rights, including the European Court of Human Rights, which has expressed on multiple occasions the degree to which the right to privacy of public persons must be subjugated to the right to freedom of expression and the right of access to information.[23] Thus, in TASZ vs Hungary, the Court hold that: "it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."[24]

B. Members' non-privacy interests are not protected by non-disclosure of Panel Opinions.

Even assuming the members' non-privacy interests (e.g. reputation, commercial interests) might be negatively affected by full disclosure of the opinions, is not evident how refusing disclosure would protect them. In fact, the Council appears overly scrupulous in protecting potential reputational or commercial interests. Even in cases where a candidate is not recommended by the Panel, disclosing the reasons for which judicial candidates are rejected generally increases independence and legitimacy in the eyes of the public and allows citizens to ascertain whether the rejection of that candidate was fair or not.[25]

In particular, Panel opinions are unlikely to harm a candidate member's future interest, as they do not contain degrading or demeaning elements concerning the candidate under any circumstance. Jean-Marc Sauvé, Panel President since its creation, recently detailed the two potential reasons for a negative opinion from the Panel: a candidate's lack of professional experience in high-level judicial institutions, or her/his insufficient knowledge regarding the EU judicial or legal system.[26] As such, a negative Panel Opinion does not undermine the candidate's ability to hold a national-level position.[27] When it comes to the candidate's ability to provide EU law-related advice, there is little reason to believe that her/his interest in hiding professional weaknesses should prevail over the public interest to know the candidate's suitability for the judicial post.

A positive panel opinion on a *successful* candidate is essentially immune to this criticism: not only will a successful candidacy necessarily produce a favourable review, but the success itself both obviates the need for access to the job market and simultaneously enhances the prestige of any member of EU Courts in a way that overshadows any minor negative implications arising from the Panel's review.

Also, public figures who have gone through a more open vetting process may actually experience enhancement of their reputation. The public is more likely to trust these individuals, which suggests that employers may also be more inclined to hire them once they have ceased their mandate. Indeed, it would certainly be an improvement over the current debate surrounding this secrecy, which itself seems harmful to the reputation of the candidates.[28]

C. Disclosure of the Panel Opinions would not jeopardize the Panel's functioning

The Council argues public access would undermine the Panel's functioning by interfering with the independence of judges, but it does little to explain how disclosure of Panel opinions could cause serious harm to the Panel's decision-making process. The Council claims, without evidence, that disclosure would force the Panel to draft less detailed—and therefore less useful—opinions. However, the CJEU itself has rejected in its case law the assumption that transparency may lead to secrecy.[29]

Transparency in the Panel's process would allow the public to ensure that the Panel itself is not bowing to political pressure or bias, and in doing so the Panel's decision-making will be enhanced. The Panel's process will not be injured by a fear of speaking, as there is nothing in the decision-making process that they should need to hide. The reports state that candidates are evaluated based on two criteria—the legal capacities of the candidate and her/his professional experience (level, length, diversity)—to be assessed in as impartial a manner as possible. Disclosure of such information would not force the Panel to change its decision-making process or render its opinions devoid of substance.

Furthermore, the Council has not cited any evidence to support its assertion that more open systems prevent the identification or vetting of good candidates for judicial positions. In particular, although they assert there may be a "chilling effect" on good candidates, it seems unlikely that a disclosure requirement for potential judges could possibly deter them from applying for one of, if not the most, prestigious positions for a European judge. The Council can only speculate that potential judges might find this openness more intimidating than the gossip that swirls around the secrecy of the selection process as it exists now.[30] This speculation, which seems particularly unlikely with respect to the specific position in question, is an insufficient justification for undermining public trust in the Panel.

The Council also argues that its disclosures concerning Panel activities serve as a sufficient substitute. However, this represents a fundamental flaw in understanding how oversight needs to function. It is not sufficient that the public has access to the decisions the Panel has made; rather, transparency is needed to illuminate *how* the decisions are made. A biased decision-making process can sometimes have the same result as a good one; nevertheless, the former cannot be tolerated in a properly democratic system. Procedural oversight is especially necessary in cases where there is always plausible deniability with respect to decision-making results. This sort of accountability will necessarily enhance the functioning of the Panel, which will make better decisions and will have more public trust of those decisions.

Furthermore, making the suggested changes will not actually greatly alter the procedures of the Panel as they stand. The Panel's official activity reports highlight objectivity, neutrality, and independence as Panel obligations.[31] The

reports state that candidates are evaluated based on two criteria – the legal capacities of the candidate and professional experience (level, length, diversity) – to be assessed in as impartial a manner as possible. Disclosure of such factual information would not force the Panel to change its decision-making process or render its Opinions devoid of substance. Instead, disclosure would likely streamline the Panel's functioning by deterring Member States from offering up candidates unlikely to meet the requirements of the office, improving efficiency of the selection process.

It is undoubtedly true that Panel Opinions will sometimes contain information that should rightly be withheld from public disclosure, at least for the time being. If any portion of a given Opinion is legitimately deemed overly sensitive, it may be redacted from the disclosed version. However, the total lack of transparency regarding the Panel's activities is more likely to undermine its ability to function than the publication of a redacted version of panel opinions. The Panel itself recognises the need for greater transparency in its reports.[32]

D. The public has a legitimate, overriding interest in seeing all Panel Opinions.

In this case, there is an evident overriding public interest in disclosure that should prevail. The CJEU has held that an overriding public interest may be found in EU principles: openness, democracy, and the right to public access.[33]The European public must have a way of establishing a check on the independence, qualifications, and experience of members the CJEU, particularly given how important it is an institution: although non-binding, all Panel Opinions to date regarding CJEU judges have been followed.[34]

Public trust, routing out biases, and transparency in the judicial system are independent public interests that overrides any exception to disclosure. EU citizens have a legitimate interest in knowing how the Panel operates.

Public trust

In an era of increasing distrust of government systems in general, and of the EU in particular, a major priority for these institutions is to strengthen public confidence and trust. Because the members of the court are appointed instead of democratically elected, legitimacy concerns are compounded. Public trust is exceedingly important for governing institutions; without it, there can be no respect or acceptance of law, and individuals become discontented with what they see as arbitrary inconveniences and injustices handed down by a ruling elite.

By showing the public the functioning of the Panel, and exposing its decision-making to public scrutiny, citizens of the EU will feel more confident that the Panel functions as it should. Revealing this information reduces impropriety and partiality while promoting the accountability of the Panel. The public therefore benefits not only from a more smoothly operating system, but also can see that system operating in the societal interest.

Transparency has been shown to increase public trust in and accountability of institutions. With openness, the public will feel confident that the members of the court are legitimately chosen, and are not the results of biased decisions or conflicts of interest (see below). Furthermore, when decision-making is impartial, and when a single, privileged perspective does not dominate judicial thinking, faith in the courts can be expected to grow.[35]

Issues of bias

An extremely important public interest, not considered by the Council in its examination of our requests, comes in the form of bias in the Panel. Transparency is a crucial mechanism for ensuring biases do not result in a situation where the judiciary is improperly chosen.

Public trust in EU institutions is undermined not only by a corrupt judiciary, but also by an inadequate, or non-diverse one. Furthermore, it has negative implications for the capacity of the judges themselves to be fair and impartial. Currently, judicial appointments are very closely tied with member states' governments; although the development of the Panel has increased the independence of the judiciary with regard to this particular issue – by *the facto* Europeanizing the judicial appointment –, the Panel may still, in expressing its own biases, choose judges who are likely to see the world in a particular way.

Certain types of bias are already apparent in the makeup of the court. For example, Mady Delvaux, a Member of the European Parliament (MEP) of the Group of the Progressive Alliance of Socialists & Democrats (S&D Group), recently highlighted the lack of women among the members of the CJEU. Delvaux pointed out that "only five of the 28 judges who sit on the European Court of Justice are women, less than 20%. This is simply not acceptable in the 21st Century."[36] The current gender composition undermines the efforts of Member States to fight against gender inequality in the professional world.[37]

Although it is clear that the EU has a history of devotion to the idea of diversity in its judicial composition, it has failed in extending this concept from national and geographic diversity to demographic diversity. The actual membership of the CJEU is not at all representative of the various types of people who are living as citizens in the EU. If we do not force openness to weed out hidden biases in the judicial selection process, we cannot be surprised at the lack of diversity in gender, race, as well as socio-economic background.[38]

Biases in the Panel's decisions may extend from implicit assumptions[39] to outright prejudice, or from the favouring of certain types of law background or doctrinal positions to outright conflicts of interest. For example, the Panel has established criteria and considerations for judges beyond the text of the TFEU or the Panel's operating rules,[40]and, additionally, its capacity to influence Member States with respect to these standards.[41] A deficiency in qualities the Panel has determined relevant is grounds for an unfavourable review,[42] and the criteria for success in these areas can be vague.[43]

Overall, scrutiny by the public can force the Panel to abandon explicit prejudices or favouritism as a result of public pressure and self-monitoring. When there is a perceived lack of oversight, committee members are less likely to pay heightened attention to their biases, conscious or unconscious. Even more subtle means of bias may be flushed out by allowing the public to spot patterns or discrepancies in hiring criteria or review results.

The selected judges make decisions that affect the lives of 512 million Europeans. These types of biases damage the trust of EU citizens as well as undermining the values of the institution itself. Additionally, representativeness has positive implications both symbolically, for the citizens, and in the functioning of the court: diversity improves the quality of decision-making[44]; a greater range of perspectives allows for a "fuller and richer evolution of the law." The diversity of the court legitimises it and breeds confidence,[45] adding to the court's independence. Other biases, such as conflicts of interest, have negative consequences that can speak for themselves.[46]

Transparency

The absence of any oversight of the Council stemming from the Panel's non-disclosure policy and its relation with the Panel creates a gap in transparency that prevents any scrutiny of the Panel's functioning. This is contrary to what is stipulated in the Treaties of the EU, which highlight the need for openness and transparency. The law calls for a system "in which decisions are taken as openly as possible and as closely as possible to the citizen,"[47] where a citizen has the right of access to the documents "of the institutions, bodies, offices and agencies of the Union,"[48] and where "the Union's institutions, offices, bodies and agencies shall conduct their work as openly as possible."[49] To this end, "[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."[50] The Panel's operating rules lack sufficient transparency or document access, and should include a proactive policy of openness.

In addition to failing to live up to its own values, the secrecy of the Panel undermines the capacity of Member States to protect their own values regarding government transparency. For example, in 2015, we requested access to the Panel opinions at the national level via Member State access to document regimes (in Poland, Austria, Germany and the Netherlands). None of these national requests succeeded as all relevant public authorities refused to treat those demands under their respective Freedom of Information legislations. They instead referred those requests to the Council[51] (acting under Article 5 of Regulation 1049/2001), which opposed them.

Limiting public oversight of Panel Opinions may have a long-term corrosive effect on public access to EU documents. Opaquely appointed members of the CJEU will determine the extent of EU institutions' commitment to transparency as well as that of their appointing Member State. Operating rules written by the Panel itself will continue to serve to insulate its work from scrutiny instead of providing it guidance. We therefore ask that the Ombudsman direct the Council as to how to restore balance and transparency to the situation.

Should we decide to challenge the Council's refusal of our request to access to the suitability's opinions before EU Courts this would inevitably result in the very same individuals whose suitability reports are at stake deciding upon the merit of their disclosure.

In sum, even if disclosure of the Panel Opinions were determined to seriously undermine its functioning, and even if the Panel Opinions were found to trigger privacy concerns, the overriding public interest would still support disclosure. It is in light of the above that we claim that, when weighed against democratic concerns, the CJEU simply "cannot

demand the anonymity of earlier years, hiding behind literal or metaphorical wigs."[52]At the very least, the Ombudsman should review the Panel Opinions and weigh for herself the strength of any justification for non-disclosure against the strength of the public interest.

E. The Council has committed procedural maladministration through excessive delays.

In addition to its numerous substantive failures, the Council has committed procedural maladministration. The Council is required to handle requests promptly, with one 15-day delay permitted with a second 15-day delay allowed only under exceptional circumstances.[53]

The Council responded to our first request, submitted 19 February 2016, after 15 business days, by requesting an extension until 6 April. On 5 April, the Council again only responded to request a second delay until "the end of April." The Council did not issue a response to the request until 04 May, more than 50 working days after the original request. We responded with a confirmatory application, lodged on 24 May 2016. The Council once again waited until the deadline for its response, on 14 June, to request an extension until 5 July. A reply was not issued until 13 July, 21 working days later.

These excessive delays and extensions are in violation of the rules that the Council is obliged to follow regarding timeliness (both as part of Regulation 1049/2001 and as a general principle of good administration), thus qualifying as an instance of procedural maladministration.

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[1] Article 1(2), of the Consolidated Version of the Treaty on European Union art. 1 [2012] ('TEU'), OJ C 326/01; and Article 10(3) of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] ('TFEU'), OJ L 326/49.

[2]According to the Ombudsman's 1997 Annual Report, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." Paul Craig, EU Administrative Law 754-55 (Oxford University 2012) (quoting The European Ombudsman Annual Report for 1997 23, *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces).

[3] Regulation (EC) No. 1049/2001, art. 4(2).

[4] Council document 6509/11, Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union [2011] p.3, *available at* http://register.consilium.europa.eu/pdf/en/11/st06/st06509.en11.pdf.

[5] Päivi Leino, "Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible'," EUI Working Paper (LAW 3/2014), par. 37-38, 40 and 44.

[6] Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v the Council*, par45-This is also reflected in jurisprudence, see e.g. T-452/10 *ClientEarth v Council*; T-303/13 *Miettinen v the Council*; T-395/13 *Miettinen v Council*.

[7] Preamble, Regulation 1049/2001, *supra* note 5 (*emphasis added*).

[8] The Ombudsman has issued extensive guidelines to assist EU institutions to "ensure the correct balance between (i) the needs of transparency…and (iii) the fundamental right to personal data protection." *See by analogy* Good Practice Guidelines [regarding selection boards], *available at* http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54521/html.bookmark

[9] This tension derives from the textual and largely unsolved conflict between Article 6(1) of Regulation 1049/2001 (stating requestors are "not obliged to state reasons for the[ir] application") and Article 8(b) of Regulation 45/2001 (stating requestors must establish "the necessity of having the data transferred").

[10] According to the Ombudsman's 1997 Annual Report, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." Paul Craig, EU Administrative Law 754-55 (Oxford University 2012) (quoting The European Ombudsman Annual Report for 1997 23, *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces).

[11] Curtin, Deirdre, and Päivi Leino. "Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis." (2016) at 4, *available at* http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf.

[12] *See, e.g.*, Judge Rejected for EU Court, Times of Malta, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; Stefan Strömberg anses ej lämplig som EU-domare, Realtid.com, http://www.realtid.se/ArticlePages/201208/03/20120803151050_Realtid881/20120803151050_Realtid881.dbp.asp; *see generally* Tomáš Dumbrovsky, Bilyana Petkova and Marijn Van Der Sluis, Judicial appointments : the Article 255 TFEU advisory panel and selection procedures in the Member States, Common Market L. R., 51: 455, 461 (2014).

[13] Alberto Alemanno, *How Transparent is Transparent Enough?*, in M. Bobek, Selecting Europe's Judges, OUP, 2015.

[14] EDPS pleading before the General Court, Case T-115/13 *Dennekamp* v *European Parliament,* nyr. *Available at* https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Court/2014/14-11-17_EDPS_pleading_Dennekamp_II_EN.pdf

[15] *See* Opinion of Advocate General Cruz Villalón, in Case C-615/13 P, ClientEarth et al. / European Food Safety Authority, ECLI:EU:C:2015:219, para 53. Villalón argues that "the 'necessity' to which Regulation No 45/2001 refers cannot be understood with the same rigour or scope when access is sought to documents quite devoid of public interest as when the application concerns information of obvious public interest and relating to an individual's professional activities..."

[16] *See id.* para 55.

[17] This argument alone favours the release of positive opinions, i.e. the opinions of candidates that have been nominated members of the CJEU.

[18] *See Schecke supra* note 20 at para 85; *European Commission v. The Bavarian Lager Co. Ltd* (n 36), paras 75–79 ("[T]he institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognized by Articles 7 and 8 of the Charter.").

[19] For example, Dr. Niilo Jääskinen, an Advocate General of the CJEU, publicly stated that the Panel had rejected a candidate for the General Court from Sweden in his speech: *Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape* (15 February 2013). As a result, Internet sources such as Realtid have published articles disseminating the information. Stefan Strömberg anses ej lämplig som EU-domare, *supra* note 14.

[20] *See* Tomáš Dumbrovsky et al., *supra* note 14, at459.

[21] *See, e.g.*, Joined Cases C-92/09 and C-93/09 *Schecke* [2010] ECR I-11063; Case C-28/08 *European Commission v. The Bavarian Lager Co. Ltd* [2010] ECR I-6055, paras 75–79; Case T-190/10 *Hackett v. European Parliament* [2012] nyr.

[22] Ibid.

[23] EU Court Limits Privacy Rights for Public Figures, Jurist Twenty, http://www.jurist.org/paperchase/2012/02/eu-court-limits-privacy-rights-for-public-figures.php.

[24] *Judgment by the European Court of Human Rights (Second Section), case of Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05 of 14 April 2009.*

[25] *See* Article 2(a), Regulation 45/2001, *supra* note 1 at 14 (citing Issues of Democracy, Bureau of International Information Programs, U.S. Dept. of State).

[26] *See* Jean-Marc Sauvé, *Selecting Europe's Judges: A critical appraisal of appointment processes to the European courts* (College of Europe, 4 November 2013, Bruges); *see also* Jean-Marc Sauvé, *The role of the Advisory Panel of Article 255 TFEU in the separation of powers within the European Union at the occasion of the 130th anniversary of the French High Judiciary Council* (*Conseil supérieur de la magistrature*, 24 October 2013, Paris).

[27] For example, Joseph Filletti, a Maltese candidate for the General Court who received an unfavourable Opinion later became Malta's permanent representative on the Council of Europe. *See* Judge Rejected for EU Court, Times of Malta, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; http://www.coe.int/t/cm/PRs_en.asp; *see also* Jean-Marc Sauvé, *Selecting European Union's Judges: The Practice of the Article 255 Panel* in M. Bobek, Selecting Europe's Judges, OUP, 2015.

[28] *See* Alemanno, *supra* note 24, at14.

[29] Case C-280/11 P - Council v Access Info Europe, para

[30]*See* Alemanno, *supra* note 24, at14.

[31] *See, e.g.*, Activity Report of the Panel, *supra* note 16.

[32] *See id.* at 3.

[33] Preamble, Regulation 1049/2001, *supra* note 1 (*emphasis added*); *see also* Recital 2 of Regulation 1049/2001; *see generally* Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* [2008] ECR I-04723.

[34] Third Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union at p.10 (emphasis added), *available at* http://curia.europa.eu/jcms/jcms/P_119470/

[35] *See*, *e.g.*, Purdie-Vaughns, V., Steele, C. M., Davies, P. G., Ditlmann, R., & Crosby, J. R. (2008). Social identity contingencies: How diversity cues signal threat or safety for African Americans in mainstream institutions. *Journal of Personality and Social Psychology*, 94(4), 615-630.

[36] European Parliament News. *Step Up The Fight For Equal Pay For Men And Women In The EU, Say Meps*. *Available at* http://www.europarl.europa.eu/news/en/news-room/20170227IPR64162/step-up-the-fight-for-equal-pay-for-men-and-women-in-the-eu-say-meps

[37] See, e.g., Sweden's attempts. European Commission, Directorate-General Justice, Unit D2 "Gender Equality." *The Current Situation of Gender Equality in Sweden – Country Profile (2013). Available at* http://ec.europa.eu/justice/gender-equality/files/epo_campaign/131006_country-profile_sweden.pdf

[38] This is a process known as "homosocial reproduction." See, for example, Ryan A Smith, (2002). Race, Gender, and Authority in the Workplace: Theory and Research. *Annual Review of Sociology*, 28, 509 at 521–22.

[39] *See*, *e.g.*, Amodio, D. M., & Devine, P. G. (2006). Stereotyping and evaluation in implicit race bias: Evidence for independent constructs and unique effects on behavior. *Journal of Personality and Social Psychology*, 91, 652–661.

[40]Third Activity Report of the Panel, *supra* note 33, at 17.

[41] All negative opinions by the Panel have led the relevant Member State to put forward another candidate for the post.

[42]Third Activity Report of the Panel, *supra* note 33.

[43] *See*, for example, *id.* at 19. The Panel considers the "language skill" category to include "the ability to acquire proficiency, within a reasonable time, in the working language of the European courts." The Panel does not describe how it measures a nominee's ability to acquire proficiency in French, nor does it provide any reference to a "reasonable" amount of time.

[44] *See*, *e.g.*, Erhardt, N. L., Werbel, J. D. and Shrader, (2003). C. B. Board of Director Diversity and Firm Financial Performance. *Corporate Governance: An International Review*, 11, 102–111.

[45] Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003) at 3, 19–20.

[46] *See*, *e.g.*, Dreher, Axel, and Thomas Herzfeld, (2005). "The economic costs of corruption: A survey and new evidence."

[47] TEU, *supra* note 2.

[48] TFEU, *supra* note 2.

[49] *Id.* art. 15(1).

[50] *Id.* art. 15(3).

[51] Acting under Regulation (EC) No. 1049/2001, art. 5.

[52] *See* Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom', (2007) 44 OSGOODE HALL L J 557, ('*Citizens have a right to be properly informed about the people who sit in their top courts and determine controversial issues of great moral and political sensitivity*.').

[53] Regulation (EC) No. 1049/2001, *supra* note 1, art. 8.

Part 5 - What, in your view, should the institution or body do to put things right?

The Council should disclose all the requested documents. If the Ombudsman determines that full disclosure would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, and/or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001, the Council should make the most minimally redacted versions possible of all Panel Opinions publicly available.

In addition to considering requests for disclosure of each document separately, the Council should seek – in line with the approach recommended by the EDPS[1] – to prepare redacted versions of any documents whose disclosure it determines would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001.

It should also seek to provide partial access to the documents in line with Article 4.6 of Regulation 1049/2001, instead of simply mechanically denying disclosure. As such, the Council should make all Panel Opinions publicly available, subject to the redactions referred to above. However, it is also important that these opinions not be redacted to such an extent that disclosure is rendered useless.

If the Council is unsure whether full disclosure would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001, the Council should make the Panel Opinions available to the EDPS so that they may independently assess whether there is an overriding public interest in favour of their disclosure.

In tandem, if the Panel Opinions are found to contain personal data protected from disclosure under Regulation 45/2001, the Council must establish internal procedures to maintain a set of information (in the form of memos, preparatory notes or e-mails) about the confidentiality and security of the processing of personal data in connection with the Panel Opinions. This information should be made publicly available going forward.

Going forward, the Council should commit to addressing all future requests for documents originating from the Panel. We believe that best practices for an accountable judiciary include transparency around judicial nominations and selection, thereby contributing to trust in the system.

In guides to best practices in the judiciary, openness is often recommended as a matter of course. For example, some reports have suggested that a proper selection process should be completely open to the public, even going so far as to recommend United State Supreme Court-style nomination and public hearings, asserting that press and public attention is necessary to "discipline" the process, providing a check to ensure independence and impartiality.[2]

Others recommend public participation in addition to transparency, including public meetings and public comment, as well as an open voting process. They also recommend that applications be made public so that individuals can understand who the candidates are and how they are evaluated.[3] Furthermore, accountability should not only be reactive but rather proactive, insofar as transparency is an important mechanism of public accountability.[4]

We therefore recommend that the Panel establish a new publicity policy. This should entail – in line with the best practices followed in other jurisdictions – a proactive publication regime[5] whereby application and evaluation materials are always released to the public, with disaggregated selection criteria.[6] We urge the Panel to include in this proactive publication the automatic release of the panel opinions of all those members who have been successfully nominated to the Court. In addition to being the best way to ensure actual transparency in the system, being proactive will increase public trust.

Giving EU citizens an opportunity to understand 255 Panel's recommendations on CJEU judge's nomination will increase accountability in the judicial appointment process, in addition to respect the right of EU citizens to access.

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[1] EDPS, Public access after Bavarian Lager, Background Paper, 24.03.2011, *available at* https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf.

[2] Kirkland & Ellis for the Due Process of Law Foundation, "Selecting the very best: The selection of high-level judges in the United States, Europe and Asia." (2013), *available at* http://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf.

[3] U.S. Chamber Institute for Legal Reform, "Promoting 'Merit' in Merit Selection: A Best Practices Guide to Commission-Based Judicial Selection." (2009), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/meritselectionbooklet.pdf?phpMyAdmin=4xZE47et5fXTNj495soMxJJPJr6.

[4] *Supra* note 5 at 303.

[5] *Supra* note 5 at 327.

[6] *Supra* note 5 at 311.

Part 6 - Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify and submit copies of the relevant correspondence)

Yes, we have completed the process of submitting a confirmatory application and are basing this appeal to the European Ombudsman on a final response by the Council.

In the full version of this complaint which is attached, we have included links to all the relevant documents.

These are also all on the AsktheEU.org website https://www.asktheeu.org/en/request/article_255_panel_opinions_on_ju#outgoing-5446

Part 7 - 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?

Not applicable

Part 8 - Has the object of your complaint already been settled by a court or is it pending before a court?

No

Part 9 - Please confirm that you have read the information below

You have read the information note on data processing and confidentiality

Part 10 - 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

TO: THE EUROPEAN OMBUDSMAN

COMPLAINT ABOUT MALADMINISTRATION

1. Complainant

First name:	Helen
Surname:	Darbishire (represented by Alberto Alemanno and acting on behalf of **Access Info Europe**)
Additional complainants:	**EU Public Interest Clinic,** established by HEC Paris and NYU School of Law (Alberto Alemanno Anastasia Eriksson Mingzhu Li Paige Morrow Omar Shalaby)
Address:	Cava San Miguel 8 4C
Town/City:	Madrid
Postcode:	28005
Country:	Spain
Tel:	+34 91 365 6558
Email:	alemanno@hec.fr helen@access-info.org

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

The Council of the European Union.

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

This complaint relates to an instance of maladministration by the European Union (the "Council") both through its incorrect denial of our request for information and its delays in processing the request. In its denial (reference SGS16/06287, dated 13 July 2016), the Council refused to disclose to us documents in its possession prepared by the panel provided for under Article 255 of the Treaty on the Functioning of the European Union (TFEU) (the "Panel") which is charged with reviewing and selecting judicial candidates for the Court of Justice of the EU (CJEU) and the General Court of the EU. In particular, we had sought access to suitability opinions produced by the Panel with respect to successful judicial candidates (the "Panel Opinions").

Our 21 January 2014 request letter

Students at the HEC-NYU EU Public Interest Law Clinic (hereinafter, the EU Clinic), acting on behalf of Access Info Europe, submitted on 21 January 2014 an access to documents request to the Council of the European Union, seeking access to:

1. Panel Opinions regarding all judicial candidates nominated for the CJEU and General Court since the Panel's establishment;
   or, in the alternative
2. Panel Opinions for all current members of the CJEU and the General Court; and
3. any document held by the Council, including memos, preparatory notes or e-mails, concerning the confidentiality of such documents.

The Council's 17 February 2014 denial letter

The Council's General Secretariat denied our request in a letter dated 17 February 2014. The Council based its denial on the following arguments:

1. Although the Council maintains physical control over the Panel Opinions, they were prepared in the context and for the purpose of an intergovernmental conference, not for the Council. As a result, the request did "not concern documents on a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility within the meaning of Article 3, point (a), of Regulation 1049/2001."

2. Alternatively, even if Regulation 1049/2001[1] did apply to the Panel Opinions, the Panel Opinions were covered by the following exceptions set forth in Article 4, which provide grounds for non-disclosure of certain documents to the public:

3. where disclosure of information would "undermine the protection of privacy and the integrity of the individual, in particular in accordance with [Regulation 45/2001]"; and

4. where "disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

5. The Council additionally maintained that none of the requested ancillary documentation ("memos, preparatory notes or e-mails, concerning the confidentiality of [the Panel Opinions]") existed.

Our 25 February 2014 confirmatory application

The EU Public Interest Clinic, represented by law professor Alberto Alemanno, submitted a confirmatory application on behalf of Access Info Europe on 25 February 2014 asking the Council to reconsider its position. The confirmatory application made

[1] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

the following counterarguments against the Council's 17 February 2014 refusal to provide the documents requested.

In response to the Council's first argument, we stated that:

1. It is possession and not authorship of documents of the relevant EU institutions that determines the applicability of Regulation 1049/2001 under Article 2(3);
2. The Council's General Secretariat acts as the Panel's secretariat by maintaining possession of the Panel Opinions, which therefore constitute "documents…relating to the policies, activities and decisions falling within the [Council's] sphere of responsibility" under Article 3(a);

In response to the Council's second argument, we noted that:

1. Even if the Panel Opinions contain personal data within the meaning of Article 2(a) of Regulation 45/2001, "institutions are obliged to process personal data lawfully and fairly," which in some cases involves making them publicly available when necessary to satisfy a legitimate public interest in a democratic society;
2. In any case, providing redacted versions of the Panel Opinions would protect sensitive information and prevent any potential breach of privacy while still respecting the public's right to access Council documents;
3. Non-disclosure of the Panel Opinions is only justified under Article 4(3) of Regulation 1049/2001 if their disclosure would "seriously undermine the institution's decision-making process" in a manner that is reasonably foreseeable and more than purely hypothetical, which is not the case;
4. Even if non-disclosure were to seriously undermine the institution's decision-making process under Article 4(3), in this case there is an "overriding public interest in disclosure" which should prevail over the application of the exception. EU principles of transparency, openness, and democracy are particularly relevant in this case, and EU citizens have a legitimate interest in knowing the names of judicial candidates to the Courts and the reasons the Panel recommended for or against their appointment. Transparency around the selection of judges is a prerequisite for ensuring that the EU's highest court is fully equipped to defend the rights and fundamental freedoms of all EU citizens in an impartial and independent manner;

In response to the Council's third argument, we highlighted that:

> If Panel Opinions contain personal data protected from disclosure under Regulation 45/2001, then the Council is required to possess a set of information (presumably including memos, preparatory notes or correspondence with the Data Protection Officer) which set out the standards to be applied with regards to the confidentiality and security of the processing of personal data in connection with the Panel Opinions, as required under Article 25 of Regulation 45/2001.

The Council's 14 April 2014 confirmatory application denial

The Council's General Secretariat denied our confirmatory application on 14 April 2014, reiterating that:

1. The Panel Opinions are not "a matter relating to the policies, activities and decisions falling within the [Council's] sphere of responsibility" under Article 3(a), and are therefore outside of the scope of Regulation 1049/2001.

2. Non-disclosure of the Panel Opinions is in the public interest, as there is a real and concrete risk that disclosure of the Panel Opinions would jeopardise the functioning of the Panel's "quality check" role as envisaged by the TFEU;

3. Although it had notified the processing of personal data relating to candidates to the Data Protection Officer in accordance with Regulation 45/2001, none of the correspondence concerned the confidentiality of the requested Panel Opinions as such.

Our 3 June 2015 complaint to the EU Ombudsman

On this date, the EU Clinic introduced a complaint on behalf of Access Info Europe asking the EU Ombudsman to consider opening an inquiry. The Council had refused access to the opinions arguing Regulation 1049/2001 does not apply to the requested documents and that the procedure for appointing judges and Advocates General is not within the Council's "sphere of responsibility." However, the EU Ombudsman disagreed and after examining the panel's opinion she encouraged the Council to reconsider its disclosure policy.

At this point, the Council announced that it had reassessed its practices and decided to apply Regulation 1049/2001 to documents held by its General Secretariat in relation to tasks supporting various intergovernmental bodies and entities, including the relevant panel.

The Ombudsman welcomed the Council's policy change, and encouraged the complainants to file a new access request to the Council to be dealt with under Regulation 1049/2001.

Our 19 February 2016 request

Following another request for access, which was submitted on 19 February 2016 by Access Info Europe assisted by Alberto Alemanno, the Council released heavily redacted versions of the opinions.

Our 24 May 2016 confirmatory application

A confirmatory application was submitted on 24 May of that same year.

The Council denied the confirmatory application on 13 July 2016, stating that:

1. The notion of personal data covers both factual elements concerning the candidates' professional experience and qualifications and the Panel's assessments of the candidate's competences;
2. The disclosure of the requested documents would undermine the protection of the candidates' commercial interest in the event that they carry out or intend to carry out paid work as lawyer or legal adviser;

3. The disclosure of the requested documents would seriously undermine the decision-making process leading to the appointment of Judges and Advocates General;
4. The Council considers that the disclosure of the Panel's opinions could also undermine the orderly conduct and the serenity of court proceedings;
5. The balancing of democratic rights and the public interests is satisfied by the significant level of transparency assured by the periodical publication of reports on the activity of the Panel.

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

The Council has committed maladministration by improperly applying the exceptions in Regulation 1049/2001 in a way that accords neither with the letter nor the spirit of that law, nor with EU principles of openness, transparency and participatory democracy.[2]

In particular, the Council's rejection failed to justify sufficiently the application of the above-cited exceptions and further failed to give due and adequate consideration to the overriding public interest in disclosure. This is in direct contradiction to the good practices which have been championed by the Ombudsman.[3]

Additionally, our requests were subject to significant delays, which is also a violation of the right of access to documents.

While the Council can effectively refuse public access to an internal document in a set of given circumstances[4], the Council has insufficiently proved the validity of any of these exceptions.

First, the Council failed to show sufficiently how the judicial candidates' privacy interests would be undermined by disclosure of the Panel Opinions, particularly given that judges are public figures subject to different expectations than the ones concerning any other citizen (part A, below).

Second, it is unclear how their other interests invoked by the Council to refuse our request could be affected by increased openness in the process and how their individual interests should take precedence over the general interest to a transparent judicial appointment process (Part B).

Third, the Council has similarly failed to show how the Panel's functioning would be undermined by this disclosure (part C). Rather, the Council simply asserts that "the content of the opinions it gives, whether favourable or not, may not be made public

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[2] Article 1(2), of the Consolidated Version of the Treaty on European Union art. 1 [2012] ('TEU'), OJ C 326/01; and Article 10(3) of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] ('TFEU'), OJ L 326/49.

[3] According to the Ombudsman's 1997 Annual Report, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." PAUL CRAIG, EU ADMINISTRATIVE LAW 754-55 (Oxford University 2012) (quoting THE EUROPEAN OMBUDSMAN ANNUAL REPORT FOR 1997 23, *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces).

[4] Regulation (EC) No. 1049/2001, art. 4(2).

either directly or even, through statistical details, indirectly."[5] In interpreting its operating rules in this way, the Council needlessly impinges on the public's right to access.

Fourth, the Council fails adequately to consider the overriding public interest in this case (part D).

Finally, in addition to these instances of substantive maladministration, the Council exhibited procedural maladministration through excessive delays (part E).

Throughout its case law, the CJEU has required that documents should be systematically examined one-by-one in accordance with the basic principle of the Regulation 1049/2001.[6] The Court has clearly expressed the rationale underlying such a systematic approach, notably by linking the principle of public access with the principle of democracy: "it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, *inter alia*, the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system."[7]

EU institutions are bound to give "*the fullest possible effect* to the right of public access to documents"[8], and, more broadly, to work as openly as possible to its citizens. However, the Council's refusal seems to invert this principle through the **over-broad application of exceptions**. In particular, the Council has failed to follow the Ombudsman's advice[9] in appropriately balancing the tensions between the privacy interests and transparency interests inherent to good governance, as required by EU law.[10] Therefore, the Council committed maladministration in its handling of our request and confirmatory application.[11]

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[5] Council document 6509/11, Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union [2011] p.3, *available at* http://register.consilium.europa.eu/pdf/en/11/st06/st06509.en11.pdf.

[6] Päivi Leino, "Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible'," EUI Working Paper (LAW 3/2014), par. 37-38, 40 and 44.

[7] Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v the Council*, par45-This is also reflected in jurisprudence, see e.g. T-452/10 *ClientEarth v Council*; T-303/13 *Miettinen v the Council*; T-395/13 *Miettinen v Council*.

[8] Preamble, Regulation 1049/2001, *supra* note 5 (*emphasis added*).

[9] The Ombudsman has issued extensive guidelines to assist EU institutions to "ensure the correct balance between (i) the needs of transparency...and (iii) the fundamental right to personal data protection." *See by analogy* Good Practice Guidelines [regarding selection boards], *available at* http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54521/html.bookmark

[10] This tension derives from the textual and largely unsolved conflict between Article 6(1) of Regulation 1049/2001 (stating requestors are "not obliged to state reasons for the[ir] application") and Article 8(b) of Regulation 45/2001 (stating requestors must establish "the necessity of having the data transferred").

[11] According to the Ombudsman's 1997 Annual Report, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it."

A. Judges' privacy interests are not protected by non-disclosure of Panel Opinions.

The Council is correct to take into consideration the right to privacy when assessing a request for access to documents, as required by Regulation 1049/2001. It should however also take into consideration that the right of access to documents now enjoys 'the same legal value as [others of] the Treaties' rights.[12]

The most recent Council rejection of our request concludes that whether the candidates have consented, and whether the information is public, do not impact on whether the information should be considered to be private for the purposes of protecting it. Even holding these assertions to be true, it is unclear how the Council may simultaneously assert that this data is protected by privacy when its annual report provides an extremely detailed analysis of the circumstances that led it to adopt a negative opinion. This allows failed candidates to be identified with ease,[13] without actually enabling the public to understand how the Panel assessed them.[14]

Furthermore, even if the data were not public, *professional* data requires less privacy protection than *other types of private* data. According to the European Data Protection Supervisor (EDPS), tasked with ensuring that European Community institutions respect data protection, professional data is of a different nature than personal data and thus does not deserve the same protection; therefore, public policy should tilt in the direction of disclosure.[15]

Advocate General Cruz Villalón has recently endorsed a similar line of argument, according to which the law should be relaxed where personal data is not the main object of a request, but rather incidental to a request for public documents.[16] Although the

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PAUL CRAIG, EU ADMINISTRATIVE LAW 754-55 (Oxford University 2012) (quoting THE EUROPEAN OMBUDSMAN ANNUAL REPORT FOR 1997 23, *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces).

[12] Curtin, Deirdre, and Päivi Leino. "Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis." (2016) at 4, *available at* http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf.

[13] *See, e.g.*, JUDGE REJECTED FOR EU COURT, TIMES OF MALTA, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; STEFAN STRÖMBERG ANSES EJ LÄMPLIG SOM EU-DOMARE, REALTID.COM, http://www.realtid.se/ArticlePages/201208/03/20120803151050_Realtid881/20120803151050_Realtid881.dbp.asp; *see generally* Tomáš Dumbrovsky, Bilyana Petkova and Marijn Van Der Sluis, Judicial appointments : the Article 255 TFEU advisory panel and selection procedures in the Member States, COMMON MARKET L. R., 51: 455, 461 (2014).

[14] Alberto Alemanno, *How Transparent is Transparent Enough?*, in M. Bobek, Selecting Europe's Judges, OUP, 2015.

[15] EDPS pleading before the General Court, Case T-115/13 *Dennekamp* v *European Parliament,* nyr. *Available at* https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Court/2014/14-11-17_EDPS_pleading_Dennekamp_II_EN.pdf

[16] *See* Opinion of Advocate General Cruz Villalón, in Case C-615/13 P, ClientEarth et al. / European Food Safety Authority, ECLI:EU:C:2015:219, para 53. Villalón argues that "the 'necessity' to which Regulation No 45/2001 refers cannot be understood with the same rigour or scope when access is sought to documents quite devoid of public interest as

opinions may contain personal data, most of the Panel judgements will concern professional data such that the documents are less sensitive than those containing information falling within the ambit of private life.[17]

Additionally, the privacy rights of the judges are not violated because judges are public figures who necessarily have less of a privacy interest to be protected[18]; "privacy" carries significantly different meaning with respect to public figures under EU law.[19] By nature, judges are trusted with the role of ensuring that the rule of law is fully respected. On a daily basis, they are invited to interpret legislation and regulations in order to respect constitutional provisions and common values. Such a core adjudication role has made them into public figures whose prominent role in our modern democracy means that they benefit from a limited protection of personal data compared to that of other citizens.

Indeed, judges' academic and professional backgrounds – and sometimes even their political preferences – are no secret to EU citizens. For example, passing comments by public officials regarding a rejected candidate, when coupled with a simple Internet search, reveal significant information regarding the name and circumstances of the candidate.[20] Scholars routinely identify Member States that have proposed candidates who received negative Opinions.[21]

Hence the Council should not assume, without evidence, that release of this information will hurt the privacy interests of the candidates.[22] After all, "the mere fact that a document concerns an interest protected by an exception does not justify application of that exception" as there needs to be a foreseeable violation rather than a purely hypothetical one.[23]

Other judiciaries share this approach in balancing fundamental rights, including the European Court of Human Rights, which has expressed on multiple occasions the degree to which the right to privacy of public persons must be subjugated to the right

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when the application concerns information of obvious public interest and relating to an individual's professional activities..."

[17] *See id.* para 55.

[18] This argument alone favours the release of positive opinions, i.e. the opinions of candidates that have been nominated members of the CJEU.

[19] *See Schecke supra* note 20 at para 85; *European Commission v. The Bavarian Lager Co. Ltd* (n 36), paras 75–79 ("[T]he institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognized by Articles 7 and 8 of the Charter.").

[20] For example, Dr. Niilo Jääskinen, an Advocate General of the CJEU, publicly stated that the Panel had rejected a candidate for the General Court from Sweden in his speech: *Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape* (15 February 2013). As a result, Internet sources such as Realtid have published articles disseminating the information. STEFAN STRÖMBERG ANSES EJ LÄMPLIG SOM EU-DOMARE, *supra* note 14.

[21] *See* Tomáš Dumbrovsky et al., *supra* note 14, at 459.

[22] *See, e.g.*, Joined Cases C-92/09 and C-93/09 *Schecke* [2010] ECR I-11063; Case C-28/08 *European Commission v. The Bavarian Lager Co. Ltd* [2010] ECR I-6055, paras 75–79; Case T-190/10 *Hackett v. European Parliament* [2012] nyr.

[23] Ibid.

to freedom of expression and the right of access to information.[24] Thus, in TASZ vs Hungary, the Court hold that: "it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."[25]

B. Members' non-privacy interests are not protected by non-disclosure of Panel Opinions.

Even assuming the members' non-privacy interests (e.g. reputation, commercial interests) might be negatively affected by full disclosure of the opinions, is not evident how refusing disclosure would protect them. In fact, the Council appears overly scrupulous in protecting potential reputational or commercial interests. Even in cases where a candidate is not recommended by the Panel, disclosing the reasons for which judicial candidates are rejected generally increases independence and legitimacy in the eyes of the public and allows citizens to ascertain whether the rejection of that candidate was fair or not.[26]

In particular, Panel opinions are unlikely to harm a candidate member's future interest, as they do not contain degrading or demeaning elements concerning the candidate under any circumstance. Jean-Marc Sauvé, Panel President since its creation, recently detailed the two potential reasons for a negative opinion from the Panel: a candidate's lack of professional experience in high-level judicial institutions, or her/his insufficient knowledge regarding the EU judicial or legal system.[27] As such, a negative Panel Opinion does not undermine the candidate's ability to hold a national-level position.[28] When it comes to the candidate's ability to provide EU law-related advice, there is little reason to believe that her/his interest in hiding professional weaknesses should prevail over the public interest to know the candidate's suitability for the judicial post.

A positive panel opinion on a *successful* candidate is essentially immune to this criticism: not only will a successful candidacy necessarily produce a favourable review,

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[24] EU COURT LIMITS PRIVACY RIGHTS FOR PUBLIC FIGURES, JURIST TWENTY, http://www.jurist.org/paperchase/2012/02/eu-court-limits-privacy-rights-for-public-figures.php.

[25] *Judgment by the European Court of Human Rights (Second Section), case of Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05 of 14 April 2009.*

[26] *See* Article 2(a), Regulation 45/2001, *supra* note 1 at 14 (citing ISSUES OF DEMOCRACY, BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, U.S. DEPT. OF STATE).

[27] *See* Jean-Marc Sauvé, *Selecting Europe's Judges: A critical appraisal of appointment processes to the European courts* (College of Europe, 4 November 2013, Bruges); *see also* Jean-Marc Sauvé, *The role of the Advisory Panel of Article 255 TFEU in the separation of powers within the European Union at the occasion of the 130th anniversary of the French High Judiciary Council* (*Conseil supérieur de la magistrature*, 24 October 2013, Paris).

[28] For example, Joseph Filletti, a Maltese candidate for the General Court who received an unfavourable Opinion later became Malta's permanent representative on the Council of Europe. *See* JUDGE REJECTED FOR EU COURT, TIMES OF MALTA, http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266; http://www.coe.int/t/cm/PRs_en.asp; *see also* Jean-Marc Sauvé, *Selecting European Union's Judges: The Practice of the Article 255 Panel* in M. Bobek, Selecting Europe's Judges, OUP, 2015.

but the success itself both obviates the need for access to the job market and simultaneously enhances the prestige of any member of EU Courts in a way that overshadows any minor negative implications arising from the Panel's review.

Also, public figures who have gone through a more open vetting process may actually experience enhancement of their reputation. The public is more likely to trust these individuals, which suggests that employers may also be more inclined to hire them once they have ceased their mandate. Indeed, it would certainly be an improvement over the current debate surrounding this secrecy, which itself seems harmful to the reputation of the candidates.[29]

C. Disclosure of the Panel Opinions would not jeopardize the Panel's functioning

The Council argues public access would undermine the Panel's functioning by interfering with the independence of judges, but it does little to explain how disclosure of Panel opinions could cause serious harm to the Panel's decision-making process. The Council claims, without evidence, that disclosure would force the Panel to draft less detailed—and therefore less useful—opinions. However, the CJEU itself has rejected in its case law the assumption that transparency may lead to secrecy.[30]

Transparency in the Panel's process would allow the public to ensure that the Panel itself is not bowing to political pressure or bias, and in doing so the Panel's decision-making will be enhanced. The Panel's process will not be injured by a fear of speaking, as there is nothing in the decision-making process that they should need to hide. The reports state that candidates are evaluated based on two criteria—the legal capacities of the candidate and her/his professional experience (level, length, diversity)—to be assessed in as impartial a manner as possible. Disclosure of such information would not force the Panel to change its decision-making process or render its opinions devoid of substance.

Furthermore, the Council has not cited any evidence to support its assertion that more open systems prevent the identification or vetting of good candidates for judicial positions. In particular, although they assert there may be a "chilling effect" on good candidates, it seems unlikely that a disclosure requirement for potential judges could possibly deter them from applying for one of, if not the most, prestigious positions for a European judge. The Council can only speculate that potential judges might find this openness more intimidating than the gossip that swirls around the secrecy of the selection process as it exists now.[31] This speculation, which seems particularly unlikely with respect to the specific position in question, is an insufficient justification for undermining public trust in the Panel.

The Council also argues that its disclosures concerning Panel activities serve as a sufficient substitute. However, this represents a fundamental flaw in understanding how oversight needs to function. It is not sufficient that the public has access to the decisions the Panel has made; rather, transparency is needed to illuminate *how* the decisions are made. A biased decision-making process can sometimes have the same result as a good

[29] *See* Alemanno, *supra* note 24, at 14.
[30] Case C-280/11 P - Council v Access Info Europe, para
[31] *See* Alemanno, *supra* note 24, at 14.

one; nevertheless, the former cannot be tolerated in a properly democratic system. Procedural oversight is especially necessary in cases where there is always plausible deniability with respect to decision-making results. This sort of accountability will necessarily enhance the functioning of the Panel, which will make better decisions and will have more public trust of those decisions.

Furthermore, making the suggested changes will not actually greatly alter the procedures of the Panel as they stand. The Panel's official activity reports highlight objectivity, neutrality, and independence as Panel obligations.[32] The reports state that candidates are evaluated based on two criteria – the legal capacities of the candidate and professional experience (level, length, diversity) – to be assessed in as impartial a manner as possible. Disclosure of such factual information would not force the Panel to change its decision-making process or render its Opinions devoid of substance. Instead, disclosure would likely streamline the Panel's functioning by deterring Member States from offering up candidates unlikely to meet the requirements of the office, improving efficiency of the selection process.

It is undoubtedly true that Panel Opinions will sometimes contain information that should rightly be withheld from public disclosure, at least for the time being. If any portion of a given Opinion is legitimately deemed overly sensitive, it may be redacted from the disclosed version. However, the total lack of transparency regarding the Panel's activities is more likely to undermine its ability to function than the publication of a redacted version of panel opinions. The Panel itself recognises the need for greater transparency in its reports.[33]

D. The public has a legitimate, overriding interest in seeing all Panel Opinions.

In this case, there is an evident overriding public interest in disclosure that should prevail. The CJEU has held that an overriding public interest may be found in EU principles: openness, democracy, and the right to public access.[34] The European public must have a way of establishing a check on the independence, qualifications, and experience of members the CJEU, particularly given how important it is an institution: although non-binding, all Panel Opinions to date regarding CJEU judges have been followed.[35]

Public trust, routing out biases, and transparency in the judicial system are independent public interests that overrides any exception to disclosure. EU citizens have a legitimate interest in knowing how the Panel operates.

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[32] *See, e.g.*, Activity Report of the Panel, *supra* note 16.
[33] *See id.* at 3.
[34] Preamble, Regulation 1049/2001, *supra* note 1 (*emphasis added*); *see also* Recital 2 of Regulation 1049/2001; *see generally* Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council of the European Union* [2008] ECR I-04723.
[35] Third Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union at p.10 (emphasis added), *available at* http://curia.europa.eu/jcms/jcms/P_119470/

Public trust

In an era of increasing distrust of government systems in general, and of the EU in particular, a major priority for these institutions is to strengthen public confidence and trust. Because the members of the court are appointed instead of democratically elected, legitimacy concerns are compounded. Public trust is exceedingly important for governing institutions; without it, there can be no respect or acceptance of law, and individuals become discontented with what they see as arbitrary inconveniences and injustices handed down by a ruling elite.

By showing the public the functioning of the Panel, and exposing its decision-making to public scrutiny, citizens of the EU will feel more confident that the Panel functions as it should. Revealing this information reduces impropriety and partiality while promoting the accountability of the Panel. The public therefore benefits not only from a more smoothly operating system, but also can see that system operating in the societal interest.

Transparency has been shown to increase public trust in and accountability of institutions. With openness, the public will feel confident that the members of the court are legitimately chosen, and are not the results of biased decisions or conflicts of interest (see below). Furthermore, when decision-making is impartial, and when a single, privileged perspective does not dominate judicial thinking, faith in the courts can be expected to grow.[36]

Issues of bias

An extremely important public interest, not considered by the Council in its examination of our requests, comes in the form of bias in the Panel. Transparency is a crucial mechanism for ensuring biases do not result in a situation where the judiciary is improperly chosen.

Public trust in EU institutions is undermined not only by a corrupt judiciary, but also by an inadequate, or non-diverse one. Furthermore, it has negative implications for the capacity of the judges themselves to be fair and impartial. Currently, judicial appointments are very closely tied with member states' governments; although the development of the Panel has increased the independence of the judiciary with regard to this particular issue – by *the facto* Europeanizing the judicial appointment –, the Panel may still, in expressing its own biases, choose judges who are likely to see the world in a particular way.

Certain types of bias are already apparent in the makeup of the court. For example, Mady Delvaux, a Member of the European Parliament (MEP) of the Group of the Progressive Alliance of Socialists & Democrats (S&D Group), recently highlighted the lack of women among the members of the CJEU. Delvaux pointed out that "only five of the 28 judges who sit on the European Court of Justice are women, less than 20%.

[36] *See, e.g.*, Purdie-Vaughns, V., Steele, C. M., Davies, P. G., Ditlmann, R., & Crosby, J. R. (2008). Social identity contingencies: How diversity cues signal threat or safety for African Americans in mainstream institutions. *Journal of Personality and Social Psychology*, 94(4), 615-630.

This is simply not acceptable in the 21st Century."[37] The current gender composition undermines the efforts of Member States to fight against gender inequality in the professional world.[38]

Although it is clear that the EU has a history of devotion to the idea of diversity in its judicial composition, it has failed in extending this concept from national and geographic diversity to demographic diversity. The actual membership of the CJEU is not at all representative of the various types of people who are living as citizens in the EU. If we do not force openness to weed out hidden biases in the judicial selection process, we cannot be surprised at the lack of diversity in gender, race, as well as socio-economic background.[39]

Biases in the Panel's decisions may extend from implicit assumptions[40] to outright prejudice, or from the favouring of certain types of law background or doctrinal positions to outright conflicts of interest. For example, the Panel has established criteria and considerations for judges beyond the text of the TFEU or the Panel's operating rules,[41] and, additionally, its capacity to influence Member States with respect to these standards.[42] A deficiency in qualities the Panel has determined relevant is grounds for an unfavourable review,[43] and the criteria for success in these areas can be vague.[44]

Overall, scrutiny by the public can force the Panel to abandon explicit prejudices or favouritism as a result of public pressure and self-monitoring. When there is a perceived lack of oversight, committee members are less likely to pay heightened attention to their biases, conscious or unconscious. Even more subtle means of bias may be flushed out by allowing the public to spot patterns or discrepancies in hiring criteria or review results.

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[37] European Parliament News. *Step Up The Fight For Equal Pay For Men And Women In The EU, Say Meps. Available at* http://www.europarl.europa.eu/news/en/news-room/20170227IPR64162/step-up-the-fight-for-equal-pay-for-men-and-women-in-the-eu-say-meps

[38] See, e.g., Sweden's attempts. European Commission, Directorate-General Justice, Unit D2 "Gender Equality." *The Current Situation of Gender Equality in Sweden – Country Profile (2013). Available at* http://ec.europa.eu/justice/gender-equality/files/epo_campaign/131006_country-profile_sweden.pdf

[39] This is a process known as "homosocial reproduction." See, for example, Ryan A Smith, (2002). Race, Gender, and Authority in the Workplace: Theory and Research. *Annual Review of Sociology*, 28, 509 at 521–22.

[40] *See, e.g.*, Amodio, D. M., & Devine, P. G. (2006). Stereotyping and evaluation in implicit race bias: Evidence for independent constructs and unique effects on behavior. *Journal of Personality and Social Psychology*, 91, 652–661.

[41] Third Activity Report of the Panel, *supra* note 33, at 17.

[42] All negative opinions by the Panel have led the relevant Member State to put forward another candidate for the post.

[43] Third Activity Report of the Panel, *supra* note 33.

[44] *See*, for example, *id.* at 19. The Panel considers the "language skill" category to include "the ability to acquire proficiency, within a reasonable time, in the working language of the European courts." The Panel does not describe how it measures a nominee's ability to acquire proficiency in French, nor does it provide any reference to a "reasonable" amount of time.

The selected judges make decisions that affect the lives of 512 million Europeans. These types of biases damage the trust of EU citizens as well as undermining the values of the institution itself. Additionally, representativeness has positive implications both symbolically, for the citizens, and in the functioning of the court: diversity improves the quality of decision-making[45]; a greater range of perspectives allows for a "fuller and richer evolution of the law." The diversity of the court legitimises it and breeds confidence,[46] adding to the court's independence. Other biases, such as conflicts of interest, have negative consequences that can speak for themselves.[47]

Transparency

The absence of any oversight of the Council stemming from the Panel's non-disclosure policy and its relation with the Panel creates a gap in transparency that prevents any scrutiny of the Panel's functioning. This is contrary to what is stipulated in the Treaties of the EU, which highlight the need for openness and transparency. The law calls for a system "in which decisions are taken as openly as possible and as closely as possible to the citizen,"[48] where a citizen has the right of access to the documents "of the institutions, bodies, offices and agencies of the Union,"[49] and where "the Union's institutions, offices, bodies and agencies shall conduct their work as openly as possible."[50] To this end, "[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."[51] The Panel's operating rules lack sufficient transparency or document access, and should include a proactive policy of openness.

In addition to failing to live up to its own values, the secrecy of the Panel undermines the capacity of Member States to protect their own values regarding government transparency. For example, in 2015, we requested access to the Panel opinions at the national level via Member State access to document regimes (in Poland, Austria, Germany and the Netherlands). None of these national requests succeeded as all relevant public authorities refused to treat those demands under their respective Freedom of Information legislations. They instead referred those requests to the Council[52] (acting under Article 5 of Regulation 1049/2001), which opposed them.

Limiting public oversight of Panel Opinions may have a long-term corrosive effect on public access to EU documents. Opaquely appointed members of the CJEU will determine the extent of EU institutions' commitment to transparency as well as that of their appointing Member State. Operating rules written by the Panel itself will continue

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[45] *See, e.g.,* Erhardt, N. L., Werbel, J. D. and Shrader, (2003). C. B. Board of Director Diversity and Firm Financial Performance. *Corporate Governance: An International Review,* 11, 102–111.

[46] Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003) at 3, 19–20.

[47] *See, e.g.*, Dreher, Axel, and Thomas Herzfeld, (2005). "The economic costs of corruption: A survey and new evidence."

[48] TEU, *supra* note 2.

[49] TFEU, *supra* note 2.

[50] *Id.* art. 15(1).

[51] *Id.* art. 15(3).

[52] Acting under Regulation (EC) No. 1049/2001, art. 5.

to serve to insulate its work from scrutiny instead of providing it guidance. We therefore ask that the Ombudsman direct the Council as to how to restore balance and transparency to the situation.

Should we decide to challenge the Council's refusal of our request to access to the suitability's opinions before EU Courts this would inevitably result in the very same individuals whose suitability reports are at stake deciding upon the merit of their disclosure.

In sum, even if disclosure of the Panel Opinions were determined to seriously undermine its functioning, and even if the Panel Opinions were found to trigger privacy concerns, the overriding public interest would still support disclosure. It is in light of the above that we claim that, when weighed against democratic concerns, the CJEU simply "cannot demand the anonymity of earlier years, hiding behind literal or metaphorical wigs."[53] At the very least, the Ombudsman should review the Panel Opinions and weigh for herself the strength of any justification for non-disclosure against the strength of the public interest.

E. The Council has committed procedural maladministration through excessive delays.

In addition to its numerous substantive failures, the Council has committed procedural maladministration. The Council is required to handle requests promptly, with one 15-day delay permitted with a second 15-day delay allowed only under exceptional circumstances.[54]

The Council responded to our first request, submitted 19 February 2016, after 15 business days, by requesting an extension until 6 April. On 5 April, the Council again only responded to request a second delay until "the end of April." The Council did not issue a response to the request until 04 May, more than 50 working days after the original request. We responded with a confirmatory application, lodged on 24 May 2016. The Council once again waited until the deadline for its response, on 14 June, to request an extension until 5 July. A reply was not issued until 13 July, 21 working days later.

These excessive delays and extensions are in violation of the rules that the Council is obliged to follow regarding timeliness (both as part of Regulation 1049/2001 and as a general principle of good administration), thus qualifying as an instance of procedural maladministration.

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

The Council should disclose all the requested documents. If the Ombudsman determines that full disclosure would undermine the protection of privacy under Article

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[53] *See* Kate Malleson, 'Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom', (2007) 44 OSGOODE HALL L J 557, ('*Citizens have a right to be properly informed about the people who sit in their top courts and determine controversial issues of great moral and political sensitivity.*').

[54] Regulation (EC) No. 1049/2001, *supra* note 1, art. 8.

4(1)(b) of Regulation 1049/2001, and/or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001, the Council should make the most minimally redacted versions possible of all Panel Opinions publicly available.

In addition to considering requests for disclosure of each document separately, the Council should seek – in line with the approach recommended by the EDPS[55] – to prepare redacted versions of any documents whose disclosure it determines would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001.

It should also seek to provide partial access to the documents in line with Article 4.6 of Regulation 1049/2001, instead of simply mechanically denying disclosure. As such, the Council should make all Panel Opinions publicly available, subject to the redactions referred to above. However, it is also important that these opinions not be redacted to such an extent that disclosure is rendered useless.

If the Council is unsure whether full disclosure would undermine the protection of privacy under Article 4(1)(b) of Regulation 1049/2001, or seriously undermine the Panel's decision-making process under Article 4(3) of Regulation 1049/2001, the Council should make the Panel Opinions available to the EDPS so that they may independently assess whether there is an overriding public interest in favour of their disclosure.

In tandem, if the Panel Opinions are found to contain personal data protected from disclosure under Regulation 45/2001, the Council must establish internal procedures to maintain a set of information (in the form of memos, preparatory notes or e-mails) about the confidentiality and security of the processing of personal data in connection with the Panel Opinions. This information should be made publicly available going forward.

Going forward, the Council should commit to addressing all future requests for documents originating from the Panel. We believe that best practices for an accountable judiciary include transparency around judicial nominations and selection, thereby contributing to trust in the system.

In guides to best practices in the judiciary, openness is often recommended as a matter of course. For example, some reports have suggested that a proper selection process should be completely open to the public, even going so far as to recommend United State Supreme Court-style nomination and public hearings, asserting that press and public attention is necessary to "discipline" the process, providing a check to ensure independence and impartiality.[56]

Others recommend public participation in addition to transparency, including public meetings and public comment, as well as an open voting process. They also recommend

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[55] EDPS, Public access after Bavarian Lager, Background Paper, 24.03.2011, *available at* https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf.

[56] Kirkland & Ellis for the Due Process of Law Foundation, "Selecting the very best: The selection of high-level judges in the United States, Europe and Asia." (2013), *available at* http://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf.

that applications be made public so that individuals can understand who the candidates are and how they are evaluated.[57] Furthermore, accountability should not only be reactive but rather proactive, insofar as transparency is an important mechanism of public accountability.[58]

We therefore recommend that the Panel establish a new publicity policy. This should entail – in line with the best practices followed in other jurisdictions – a proactive publication regime[59] whereby application and evaluation materials are always released to the public, with disaggregated selection criteria.[60] We urge the Panel to include in this proactive publication the automatic release of the panel opinions of all those members who have been successfully nominated to the Court. In addition to being the best way to ensure actual transparency in the system, being proactive will increase public trust.

Giving EU citizens an opportunity to understand 255 Panel's recommendations on CJEU judge's nomination will increase accountability in the judicial appointment process, in addition to respect the right of EU citizens to access.

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

Yes, we have completed the process of submitting a confirmatory application and are basing this appeal to the European Ombudsman on a final response by the Council.

7. 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?

Not applicable

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

No

9. Please select one of the following two options after having read the information in the box below

Please treat my complaint publicly

[57] U.S. Chamber Institute for Legal Reform, "Promoting 'Merit' in Merit Selection: A Best Practices Guide to Commission-Based Judicial Selection." (2009), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/meritselectionbooklet.pdf?phpMyAdmin=4xZE47et5fXTNj495soMxJJPJr6.
[58] *Supra* note 5 at 303.
[59] *Supra* note 5 at 327.
[60] *Supra* note 5 at 311.

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

Yes

Date and signature:

Madrid, 6 November 2017

Helen Darbishire

Paris, 6 November 2017

Alberto Alemanno