



Council of the
European Union

069277/EU XXVI. GP
Eingelangt am 22/06/19

Brussels, 21 June 2019
(OR. en)

10536/19

API 70
INF 200
OMBUDS 16
JUR 359
INST 178

COVER NOTE

From: Ms E. O'Reilly, European Ombudsman
date of receipt: 27 May 2019
To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. prev. doc.: 14418/17

Subject: Complaint 1955/2017/THH - Decision of the European Ombudsman

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



E-MAIL / ~~FAX~~

European Ombudsman

Emily O'Reilly
European Ombudsman

IM 005971 2019
27.05.2019

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
Council of the European Union

cc. jur.ombudsman@consilium.europa.eu
cc. Hubert Legal
cc. Raphaël Meyer

Strasbourg, 23/05/2019

Complaint 1955/2017/THH

Decision of the European Ombudsman in the above case on the Council of the European Union's refusal to grant public access to opinions evaluating the merits of candidates for appointment to the Court of Justice and the General Court of the European Union

Dear Mr Tranholm-Mikkelsen,

Please find enclosed a copy of my above decision, which has been sent to the complainant, Access Info Europe.

On the basis of my inquiry into this complaint, I have decided to close it with the following conclusion:

There was no maladministration by the Council of the European Union.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure:

- Decision on complaint 1955/2017/THH

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ombudsman.europa.eu

Decision

in case 1955/2017/THH on the Council of the European Union's refusal to grant public access to opinions evaluating the merits of candidates for appointment to the Court of Justice and the General Court of the European Union

The case before the Ombudsman concerned the refusal of the Council of the European Union (the Council) to give an NGO public access to opinions evaluating the suitability of candidates for the positions of Judges and Advocates-General at the Court of Justice and the General Court of the European Union. These opinions, drawn up by a Panel on Judicial Appointments, are used by Member States when they deliberate on the merits of appointing Judges and Advocates-General.

The Council refused to give full public access to the opinions, relying on the need to protect the Panel's decision-making process, the need to protect the Courts' proceedings, the need to protect the candidates' privacy and integrity, and the need to protect the candidates' commercial interests.

The Ombudsman found that the Council was justified in refusing to grant full public access to the opinions, primarily to ensure that the Panel continued to be free to express frank and robust views on the merits of candidates.

She therefore found no maladministration and closed the case.

The Ombudsman nonetheless welcomed the public interest served in submitting the complaint as it provided an opportunity for some independent scrutiny of a matter of significant importance to EU citizens.

Background to the complaint

1. Member States appoint Judges and Advocates-General to the Court of Justice and the General Court of the European Union. Before making any appointment, the Member States must consult a panel established under Article 255 of the

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ombudsman.europa.eu



Treaty on the Functioning of the European Union, namely the Panel on Judicial Appointments to the Court of Justice and the General Court of the European Union (the Panel). This Panel, comprised of seven persons, chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, provides an opinion to the Member States on each candidate's suitability to perform the duties of Judge or Advocate-General. The Panel's opinions "*set out the reasons for which they are favourable or unfavourable based on candidates' legal capabilities, professional experience, ability to perform the duties of a Judge with independence, impartiality, integrity and probity, knowledge of languages and aptitude for working in an international environment*".¹

2. The Panel is not formally part of the Council of the European Union (the Council). However, the Council appoints the members of the Panel and adopts its operating rules. It also provides administrative support to the Panel, which includes retaining copies of the Panel's opinions.

3. In 2014, the complainant, Access Info Europe - a non-governmental organisation represented by a group of pro bono lawyers- asked the Council to give it public access to the Panel's opinions. The Council refused, arguing that the EU rules on public access to documents² do not apply to the Panel's opinions since the appointment of Judges and Advocates-General is not within the Council's "*sphere of responsibility*".

4. Unhappy with this response, the complainant turned to the Ombudsman in 2015. The Ombudsman opened an inquiry into that complaint.³ In the course of that inquiry, the Council agreed with the Ombudsman's suggestion that it should apply Regulation 1049/2001 to the Panel's opinions. As a way forward, the Council suggested that the complainant submit to it a new request for access to documents. The Ombudsman welcomed the Council's change of policy and closed the case.

5. On 19 February 2016, the complainant submitted a new request to the Council for public access to the Panel's opinions.

6. On 4 May 2016, the Council gave very limited partial access to the opinions. It justified the extensive redactions by arguing that it needed to protect the

¹ See Point 8 of the Panel's Operating Rules, annexed to Council Decision of 25 February 2010 relating to the operational rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/124/EU), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0124&from=EN>, along with Section II (5) of the Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, published on 28 February 2018, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/5eme_rapport_dactivite_du_c255_en_final_public.pdf

² Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:en:PDF>

³ Case 1011/2015/TN, available at: <https://www.ombudsman.europa.eu/en/decision/en/66987>



Panel's decision-making process; to protect court proceedings; and to protect the personal data and commercial interests of the candidates.

7. On 24 May 2016, the complainant submitted a request for review, a so-called "confirmatory application", to the Council.

8. On 13 July 2016, the Council confirmed its previous decision.

9. More than one year later, the complainant turned to the Ombudsman, on 7 November 2017. The complainant stated that it was especially interested in receiving full public disclosure of the opinions concerning those candidates who were eventually appointed as Judges or Advocates-General.

The inquiry

10. The Ombudsman opened an inquiry into the Council's handling of the request for access to documents prepared by the Article 255 Panel.

11. In December 2017, the Ombudsman's inquiry team inspected the requested documents and met with the representatives of the Council to obtain a better understanding of the process followed by the Panel in drawing up its opinions recommending or advising against the appointment of Judges and Advocates-General to the Courts, as well as on the intergovernmental process through which Judges and Advocates-General are appointed by the Member States. After a new Panel was appointed, a further meeting occurred in June 2018.

Protection of the Panel's decision-making process

The Council's arguments

12. The Council argued that the protection of the decision-making process leading to the appointment of judicial candidates is crucial for maintaining public trust in the appointments of Judges or Advocate-Generals. It stressed that the Panel's rules required confidentiality: "*the deliberations of the Panel shall take place in camera*"⁴ and "*the hearing [of the candidate] shall take place in private*"⁵. In its Activity Reports, the Panel underlines that its opinions "*are intended exclusively for Member State governments and that positions it takes on the suitability of candidates for judicial office at European Union level may not be disclosed to the public, either directly or indirectly*".⁶

⁴ See Point 5 of the Panel's Operating Rules, annexed to Council Decision 2010/124/EU

⁵ As above, Point 7 of the Panel's Operating Rules

⁶ See, for example, page 24 of the Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union



13. The Council explained that the purpose of this confidentiality is the protection of the Panel's independence from external interference or pressure, and to ensure the objectivity of the proceedings. The Council drew a parallel with the situation concerning the proceedings of staff selection boards,⁷ and, on that basis, invoked a general presumption that disclosure of the relevant documents would, as a matter of principle, seriously undermine the Panel's decision-making process.⁸ Having consulted the Panel, and having obtained its opinion that the documents should not be disclosed, the Council rejected the request for full public access.⁹

14. The Council stated that disclosure of the opinions would impact negatively on the Panel's working methods. It stated that the Panel may be "*restrained and more guarded when drafting its written opinions*" which would lead to difficulties in providing explanations of the rationale for its opinions and would "*reduce the usefulness of the Panel's opinions*". As a result, it was foreseeable that the Panel may instead choose to present its opinions orally to the Intergovernmental Conference, which would have the practical effect of reducing the level of transparency of the Panel's work.

15. The Council rebutted the complainant's argument that the Court's case law¹⁰ has held as insufficient, as a justification for refusal of access to documents, the claim that more transparency would in fact lead to less transparency. The Council said that the case law to which the complainant had referred concerned documents produced in the context of the legislative procedure, in which the arguments in favour of transparency are significantly stronger.

16. The Council highlighted the fact that the context in which Panel opinions are considered is an Intergovernmental Conference composed of representatives of the Member States, during which judicial appointments are made with the agreement of all Member States. In the light of this, the Council concluded that disclosure of the requested documents would "*attract the attention of the public and possibly the media on the assessment of the candidates*". This could result in a "*politicisation of the issue*" which may lead to the Member States having a reduced "*margin of manoeuvre*" in the appointment negotiations. In the Council's view, this would "*impair the chances of reaching agreement at the*

⁷ For example, judgment of the European Union Civil Service Tribunal of 12 February 2014, *Gonzalo de Mendoza Asensi v European Commission*, Case F-127/11, ECLI:EU:F:2014:14, at paragraph 93, which states that "*the secrecy surrounding the proceedings of the selection board was introduced with a view to guaranteeing the independence of competition selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the administration itself or the candidates concerned or third parties. Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates*".

⁸ Judgment of the General Court of 12 November 2015, *Christodoulos Alexandrou v European Commission*, T-515/14 P and T-516/14 P, ECLI:EU:T:2015:844, at paragraph 88 and following

⁹ Relying on Article 4(3) of Regulation 1049/2001

¹⁰ Judgment of the Court of 17 October 2013, *Council of the European Union v Access Info Europe*, C-280/11 P. ECLI:EU:C:2013:671



Intergovernmental Conference” and would affect “*the quality of the selection of Judges and Advocates-General*”.

17. The Council also argued that full public disclosure of the assessments would discourage future candidates - “*individuals of particularly high seniority and visibility at the national level*” - from applying for the positions due to the “*fear of the negative impact of the Panel’s opinions on their reputation*”. The Council dismissed as mere opinion, not supported by any fact, the complainant’s contention that, on the contrary, candidates’ reputations would be further increased through the disclosure of the documents, since doing so would prevent “*speculation, chattering and manipulation*” concerning the appointment.

The complainant’s arguments

18. The complainant considered that the Council had failed to establish how disclosure of the opinions would seriously undermine the Panel’s decision-making process. In response to the Council’s argument that disclosure would lead to the Panel producing less detailed and less useful opinions, the complainant stated that such an outcome should not be the case since “*there is nothing in the decision-making process that they should need to hide*”.

19. The complainant referred to the two evaluation criteria for Panel opinions - “*the legal capacities of the candidate*” and the “*professional experience (level, length, diversity)*”. These two criteria should be assessed in an impartial manner, in line with the “*objectivity, neutrality and independence*” required of the Panel. In the complainant’s view, disclosure of the reports would in fact lead to improved efficiency in the appointment process since, in its view, Member States would be more cautious when suggesting candidates and would ensure that candidates fulfil all of the requirements for appointment.

20. The complainant relied on the case law of the Court¹¹ to dismiss the Council’s contention that more transparency would in fact lead to less transparency (by creating an incentive for the Panel to provide its opinions orally rather than in writing). The complainant noted that a Panel opinion does not indicate the individual positions taken by the members of the Panel and that, as such, the secrecy of the Panel’s decision-making process would not be undermined.

21. The complainant was sceptical as to the likelihood that disclosure would discourage eligible candidates from applying. The complainant was of the view that the reputation of candidates could only be increased, in comparison with the current state of affairs, since the current confidentiality of the process leads to “*speculation, chattering and manipulation*”.

¹¹ See above, *Access Info Europe*
5



The Ombudsman's assessment

22. The Ombudsman's review of the opinions drawn up by the Panel, along with her analysis of the information provided to her concerning the process followed by the Panel in drawing up those opinions and the intergovernmental process through which judicial appointments are made, demonstrated that the Panel applies a robust process when considering the proposals before it. The Ombudsman noted that this robust process resulted in frank and thorough opinions concerning the suitability of the candidates proposed by the Member States. The Ombudsman considers that such a robust process is important to the European Union, as it helps to ensure that those exercising the highest judicial office have the skills and experience necessary to perform such an important role. The existence and proper functioning of this system of control is vital in the maintenance of public trust in the judicial appointments process.

23. The Ombudsman has carefully reviewed a range of opinions drawn up by the Panel. These included opinions on candidates who were eventually appointed to the Courts. All these opinions appeared thorough and frank as regards the relative strengths and weaknesses of all candidates. This approach allows the Member States to come to a clear view as to the merits of each candidate.

24. The Ombudsman notes that the opinions cannot be categorised as wholly positive or negative. The fullness and objectivity of the opinions are such that it would be simplistic to suggest that the disclosure of favourable opinions would not be prejudicial, whereas the disclosure of unfavourable opinions would be damaging. The value of the opinions in serving the serious purpose for which they are used lies precisely in the fact that they are so frank and thorough.

25. The Ombudsman agrees with the Council that, in this specific context, there is a genuine risk that full public access to the Panel's opinions would result in less frank and less thorough Panel opinions. She is of the view that such an outcome would undermine the robustness of the process and thus the protection of the Panel's decision-making process. This would in turn deprive the Member States of the information they need to decide upon these important appointments. Such an outcome would not serve the public interest.

26. Providing Member States with thorough and frank views as regards the suitability of candidates also serves a longer-term purpose: it allows Member States better to understand the standards that need to be met for appointment to the Courts. This may help Member States when they decide whom to propose as candidates in the future.

Protection of court proceedings

27. The Council also applied the exception for the protection of court proceedings. Having made her decision concerning the exception for the

6



decision-making process, it was not necessary for the Ombudsman to make a decision on this ground.

Protection of privacy

The Council's arguments

28. The Council considered that full public disclosure of the opinions would undermine the protection of the candidates' privacy.¹² The Council explained that the opinions consist mainly of personal data of the candidates, namely "*the candidates' professional experience and qualifications and the Panel's assessment of the candidates' competences*". The assessment of a candidate's personal qualities must be considered as personal data. Any differentiation between different "categories" of personal data, such as especially sensitive data related to health, as compared with arguably less sensitive professional data, could not be made.

29. The Council emphasised that the relevant rules¹³ provide that personal data consists of "*any information relating to an identified or identifiable natural person*".¹⁴ Furthermore, the Court has established that "*professional data or information provided as part of a professional activity may well be characterised as personal data*".¹⁵

30. The Council then referred to case-law of the Court which states that the characterisation of information as being 'personal data' does not depend on whether the person concerned (that is, the candidate) has objected to the disclosure of the information.¹⁶

31. It also stated that the fact that certain information may already be public does not mean that this information can no longer constitute 'personal data'.¹⁷

32. The Council drew a distinction with the position concerning the personal data of Members of the European Parliament (MEPs).¹⁸ It stated that the "*lower degree of protection of personal data concerning an MEP in the public sphere can be justified by the need for elected representatives to be accountable to citizens and*

¹² Article 4(1)(b) of Regulation 1049/2001

¹³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0045&from=en>

¹⁴ Article 2 of Regulation 45/2001

¹⁵ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd.*, C-28/08 P, ECLI:EU:C:2010:378, in particular paragraphs 66 to 70

¹⁶ Judgment of the Court of 16 July 2015, *ClientEarth and Pesticide Action Network Europe (PAN Europe) v European Food Safety Authority*, C-615/13 P, ECLI:EU:C:2015:489, at paragraph 33

¹⁷ Judgment of the Court (Grand Chamber) of 16 December 2008, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, C-73/07, ECLI:EU:C:2008:727, paragraph 48

¹⁸ Judgment of the General Court of 15 July 2015, *Gert-Jan Dennekamp v European Parliament*, T-115/13, ECLI:EU:T:2015:497, in particular paragraphs 59 and 77



by their voluntary exposure to the public opinion ... the position of elected politicians is substantially different from the ones of judges" since judges "are not elected and the serene and orderly exercise of the judicial function requires that judges are subtracted from the pressure of public opinion".

33. The Council referred to the fact that the relevant rules¹⁹ stipulate that personal data can be disclosed to a third party "if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced". The Council considered that the arguments put forward by the complainant were insufficient to establish any such necessity for the transfer of the requested personal data. In particular, the argument that transfer of the data was necessary for "transparency and openness" was too general and insufficient in order to prevail over the protection of personal data.

34. The Council emphasised that the criteria against which the Panel evaluates candidates "are broad and go well beyond the knowledge of EU law" and take into consideration "academic record, the professional experience and the performance of the candidates at the interview". As such, the Council was of the view that disclosure of the requested documents would undermine the integrity and reputation of the candidates. This was the case not only for those opinions advising against appointment of a candidate; it was equally true of opinions recommending appointment, given that they "may contain remarks or observations; point out certain less solid elements in the candidate's qualifications or profile or make clear that the positive opinion has been decided by a majority vote (rather than unanimously)". In the Council's view, release of such opinions "may lead to an inevitable comparison of the qualities of those Judges which would be harmful to the persons concerned ... [and] ... also to their activity as members of the Courts". In the light of this, the Council considered it necessary to refuse full disclosure of the requested opinions in order to protect the candidates' integrity and legitimate interests.²⁰

The complainant's arguments

35. Whilst the complainant acknowledged that the rules on protecting personal data applied, it argued that what it sought was information only on the qualification of the candidates for judicial office, their credentials and the reasoning behind the proposal to accept or reject them. The Panel's Activity Reports made clear that the opinions contain the candidates' curriculum vitae and capabilities, including their previous work experience, language abilities and education.

36. The complainant argued that such information is usually publicly available through open source material and, as such, constitutes "public credentials" rather than "personal information". The complainant argued that by virtue of the

¹⁹ Article 8(b) of Regulation 45/2001

²⁰ Under Article 4(1)(b) of Regulation 1049/2001



available open source material²¹ and the assessment criteria set out in the Activity Reports, candidates who were not selected may be easily identifiable,²² without any opportunity for the public to understand the reasons for the decision.

37. The complainant pointed to the argument of the European Data Protection Supervisor²³ that “professional data require less privacy protection than other types of private data” since they are arguably “less sensitive than data containing the information falling within the ambit of private life”, such as health data. The complainant also referred to the fact 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...”²⁴

38. The complainant argued that judges, as public figures, benefitted from a more limited protection of their privacy as compared with other citizens,²⁵ pointing to the argument 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.”²⁶

39. The complainant also argued that the fact that a document contains personal data does not automatically imply that the request for access to documents should be denied. The Council cannot simply assume that the disclosure would undermine the protection of the candidates’ privacy interests; instead, it must establish a foreseeable risk of this taking place.²⁷

The Ombudsman’s assessment

40. The Ombudsman accepts that all the information contained in the opinions constitutes the personal data of the candidates. Some of the information

²¹ For example, Dr. Niilo Jääskinen - an Advocate-General of the Court of Justice - stated that the Panel had rejected a candidate for the General Court from Sweden in his speech of 15 February, 2013: *Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape*, available at <https://www.kcl.ac.uk/law/research/centres/european/Kings-College-Jaaskinen.pdf>

²² For example, *Judge Rejected for EU Court* of May 11, 2012 in the Times of Malta, available at <http://www.timesofmalta.com/Articles/view/20120511/local/judge-rejected-for-eu-court.419266>; and more generally Tomáš Dumbrovský, Bilyana Petkova and Marijn Van Der Sluis, *Judicial appointments: the Article 255 TFEU advisory panel and selection procedures in the Member States*, Common Market Law Review 2014, Volume 51 (no 2) at pages 455 to 482

²³ As argued before the General Court in the *Dennekamp* case (T-115/13)

²⁴ Opinion of Advocate-General Cruz Villalón, in *ClientEarth et al. v European Food Safety Authority*, paragraph 54

²⁵ Judgment of the Court of 9 November 2010, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, joined cases C-92/09 and C-93/09, ECLI:EU:C:2010:662

²⁶ Judgment of the European Court of Human Rights of 14 April 2009 in case *Társaság a Szabadságjogkért v. Hungary*, Application no. 37374/05

²⁷ In addition to case law already quoted above, see judgement of the General Court of 28 March 2012, *Kathleen Egan and Margaret Hackett v European Parliament*, case T-190/10, ECLI:EU:T:2012:165



contained in the opinions goes to the heart of the individual's character and integrity, beyond a list of qualifications and achievements. The Ombudsman therefore agrees with the Council that full public disclosure of the opinions would undermine the protection of the privacy and integrity of the individuals concerned, taking into account EU law on data protection.

41. The Ombudsman has sympathy with the view that the information contained in the opinions relates to the candidates' *professional lives*, rather than their private and personal lives. She also recognises that those who hold or seek high public office should expect that more personal information relating to them might be put into the public domain in the public interest. She understands and supports the general principles behind the complainant's arguments. The Ombudsman accepts that the complainant has made some valid arguments for the necessity of disclosure of the opinions in the public interest. However, she considers these arguments are not sufficient, given the detailed nature of the personal information contained in the opinions. In this context, she notes that the overarching public interest is that the system of review of candidates' suitability for high judicial office at EU level is robust.

42. The Ombudsman is thus of the view that it has not been demonstrated that there is a necessity for the public disclosure of personal data in this case. Therefore, she agrees that the exception for the protection of personal and private information applies.

Protection of the individuals' commercial interests

43. The Council also relied on the exception for the protection of the individuals' commercial interests in refusing full disclosure of the opinions. In the light of the Ombudsman's conclusion that non-disclosure of the opinions is justified on other grounds, it was not necessary for the Ombudsman to take a position on the protection of candidates' commercial interests.

Overriding public interest

The Council's arguments

44. Whilst acknowledging that transparency plays a crucial role in the functioning of the EU democratic system, the Council disagreed with the complainant's view that there was a pressing need for openness and transparency in the EU judicial appointments procedure. Public trust in the EU judiciary would be guaranteed, not through public scrutiny of the Panel's opinions, but rather through trust in the independence and objectivity of the decision-making process, and the candidates' professional competences.



45. The Council highlighted that individuals exercising judicial office are not accountable to the public at large, but are subject to the law. As such, their position could not be compared with that of politicians or citizens' representatives. In this case, the Panel's operating rules clearly envisaged confidentiality of the Panel's activities. The Council argued that the relevant appointment procedure was required to strike a balance between "*the need to select the candidates with the best legal expertise, professional experience and guarantees of objectivity and the principle of transparency.*"

46. The Council was of the view that "*such a balance is satisfied by the significant level of transparency that is already assured by the periodical publication of detailed reports on the activity of the Panel, which provides information about its working methods, the criteria for the assessment of the candidates and its overall yearly activity.*"

47. The Council concluded that, on balance, the public interest in full public disclosure of the Panel's opinions did not override the interests in the protection of the Panel's decision-making process, of the candidates' commercial interests and of legal advice under Regulation 1049/2001.

The complainant's arguments

48. The complainant argued that there was an overriding public interest in releasing the opinions in full, to strengthen public confidence and trust in the legitimate choice of members of the Courts, in view of the fact that they are appointed rather than democratically elected. Full disclosure of the opinions would permit the public to scrutinise the functioning of the Panel and its recommendations on judicial appointments, thus increasing citizens' trust. Such trust is important as it contributes significantly towards a public sense of justice and respect of the law.

49. Transparency as regards the Panel opinions was important in order for the public to be satisfied that there was no bias in the Panel's assessments and no conflict of interest of the candidates, especially given how "*very closely tied with member states' governments*" the appointments process is. This was particularly the case, given the lack of gender²⁸, race and socio-economic diversity of members of the Court.

50. The complainant argued that the criteria used by the Panel are vague - for example, the requirement that candidates possess "*the ability to acquire proficiency, within a reasonable time, in the working language of the European courts*" - and there is insufficient explanation by the Panel as to how the criteria are measured. The Panel's capacity to influence Member States in cases where a negative opinion results in proposing that a Member State put forward another

²⁸ See, for example, *Step Up The Fight for Equal Pay for Men and Women in the EU*, say MEPs in European Parliament News, available at <http://www.europarl.europa.eu/news/en/press-room/20170227IPR64162/step-up-the-fight-for-equal-pay-for-men-and-women-in-the-eu-say-meps>



candidate for the post also argued in favour of transparency, according to the complainant. In such cases, public scrutiny would “force the Panel to abandon explicit prejudice or favouritism” which is of great importance “symbolically for the citizens” on whose lives the judiciary have a significant impact. The significant impact would extend to “the quality of its decision-making process”, “fuller and richer evolution of the law” and the “legitimacy”, “confidence” and “independence” of the Court.²⁹

51. The complainant argued that the lack of transparency resulting from non-disclosure could result in the appointment of inadequate candidates to positions of judicial office; individuals who would then have a mandate to determine issues of great importance for the EU. The complainant argued that the importance of disclosure was reinforced by the fact that the case could not be brought before the Court, since those same members of the Court who are the subjects of the opinions would be required to decide the matter.

52. The complainant disagreed that the Panel’s Activity Report provided sufficient transparency: the reports inform the public as to the Panel’s decisions, but do not explain how the relevant decisions concerning appointment were made. Non-disclosure of such important information cannot be tolerated in a fully democratic system.

53. The complainant was of the view that the Council had applied the relevant exceptions to disclosure too broadly in this case; and that the public interest in disclosure overrode the arguments put forward by the Council. In the event that sections of the opinions were legitimately too sensitive for disclosure, the complainant argued that the opinions could be partially redacted so as to protect this information. The complainant was of the view that the current level of secrecy undermined the Panel’s functioning more than would be the case if the opinions were disclosed.

The Ombudsman’s assessment

54. The Ombudsman recognises the important issues raised in this complaint. Nevertheless, she is of the view that the overriding public interest in this case lies in protecting the Panel’s decision-making process. The Ombudsman considers, on balance, that this constitutes a greater public interest than that of the public knowing further details of the Panel’s opinions.

55. The Ombudsman recognises the legitimate public interest in transparency in the process of appointing judges and Advocates-General to the European Courts. She considers that a degree of transparency has been achieved in this specific context through the publication of more information in the Panel’s

²⁹ Department for Constitutional Affairs, *Constitutional reform: a new way of appointing judges*, CP 10/03 (2003), available at <https://webarchive.nationalarchives.gov.uk/20090117151841/http://www.dca.gov.uk/consult/jacommission/judges.pdf>



Activity Reports and welcomes the willingness of the Panel to explore further ways to increase transparency in this vital area of administration for the European Union.

56. In these circumstances, the Ombudsman finds that the refusal of the Council to provide full public access to the opinions of the Panel on judicial appointments was justified and that there was no overriding public interest in full disclosure.

Undue delay

57. The complainant stated that, by not complying with the time limits set out in Regulation 1049/2001 when responding to the requests for access, the Council had committed procedural maladministration.

The Ombudsman's assessment

58. The Ombudsman notes with concern the Council's extension of the time limits and, in particular, the failure to meet the extended deadlines. However, this has not been the focus of her inquiry. Rather the inquiry has concentrated on the competing strong public interests at stake in the case for and against disclosure. She therefore makes no formal finding on the issue of delay, but expects the Council to do its utmost to meet the legal deadlines when handling future requests for public access to documents.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion³⁰:

There was no maladministration by the Council of the European Union.

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

Emily O'Reilly
European Ombudsman

³⁰ Information on the review procedure can be found on the Ombudsman's [website](http://www.ombudsman.europa.eu/en/resources/otherdocument/faces/en/70669/html.bookmark): <http://www.ombudsman.europa.eu/en/resources/otherdocument/faces/en/70669/html.bookmark>



Strasbourg, 23/05/2019
