Council of the
European Union

Brussels, 31 March 2020
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JUR 141
INST 56
INF 49
API 41
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INFORMATION NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Decision of the European Ombudsman on Complaint 1611/2019/KR - Council's refusal to grant public access to documents relating to the 'Nord Stream 2' gas pipeline

1. Delegations will find attached a copy of the letter of the European Ombudsman of 27 March 2020 containing her decision on complaint 1611/2019/KR on the Council's refusal to grant public access to documents relating to the 'Nord Stream 2' gas pipeline. In this decision, the Ombudsman concludes that there was no maladministration of the Council.

2. This inquiry, launched by the European Ombudsman on 4 September 2019[1], concerns in particular the Council's refusal to grant public access to documents 10249/17 RESTREINT UE/EU RESTRICTED and 10249/17 ADD 1 RESTREINT UE/EU RESTRICTED, which contain a Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline and its annex.

[1] Document 11979/1/19 REV 1.

3. It is recalled that by its decision to confirmatory application No 16/c/01/19, the Council has refused to grant public access to the requested documents pursuant to the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) and also, pursuant to Articles 4(3) (protection of the decision-making process) and 4(2) (protection of the interest in court proceedings) of Regulation (EC) No 1049/2001[1].

4. On 27 March 2020, the European Ombudsman closed the inquiry finding that there was no maladministration of the Council in refusing access to the requested documents. In particular, the Ombudsman concluded that it was at least reasonably foreseeable that releasing the documents would undermine international relations, considering that it is of vital importance for the EU, its Member States and its citizens that the institutions are not in any way undermined in the negotiations at issue by the release of sensitive documents at a critical point in time.

5. The Ombudsman has not reviewed, in her decision, the remaining grounds for refusal since the exception regarding the protection of international relations was validly invoked. As regards the fact that the Commission had issued a press release on the Nord Stream 2 negotiations, the Ombudsman noted that this press release was general in nature, whereas the content of the requested documents was far more detailed. She therefore concluded that the fact that such a press release was issued did not entail that public access should, in part or in whole, be granted to the requested documents.

6. As a last remark, it is noted that the requested documents are relevant to the court proceedings currently ongoing before the General court in cases T-526/19 (Nord Stream 2 AG v. Council and Parliament) and T-530/19 (Nord Stream AG v. Parliament and Council)[2] contesting the validity of the Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

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1 Document ST 10629/19.

2 Respectively documents 11875/19 and 11876/19.

E-MAIL

European Ombudsman

Emily O'Reilly
European Ombudsman

IN 003125 2020
27.03.2020

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

jur.ombudsman@consilium.europa.eu

+ copy to:
Ms Thérèse Blanchet
(Director-General of the Legal Service)

Strasbourg, 27/03/2020

Complaint 1611/2019/KR

Decision of the European Ombudsman in the above case on the Council's refusal to grant public access to documents relating to the 'Nord Stream 2' gas pipeline

Dear Mr Tranholm-Mikkelsen,

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

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 in this case.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure:
- Decision on complaint 1611/2019/KR

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European Ombudsman

Emily O'Reilly
European Ombudsman

Decision

in case 1611/2019/KR on the Council's refusal to grant public access to documents relating to the 'Nord Stream 2' gas pipeline

The case concerned requests for public access to documents concerning a recommendation made by the Commission to the Council to give the Commission a mandate to negotiate with Russia on the operation of the Nord Stream 2 gas pipeline.

Nord Stream 2 is a controversial second pipeline, currently under construction, to bring Russian gas under the Baltic Sea to Germany. It is expected to become operational by 2021.

The Council argued that releasing the documents would undermine international relations. The Ombudsman conducted an inquiry and inspected the documents in question. While recognising the strong need for democratic and public scrutiny of this project, the Ombudsman acknowledges that, under EU law, the Council may determine that public access to the documents, at the time of the request, would undermine international relations.

The Ombudsman closed the inquiry by concluding that there was no maladministration by the Council.

Background to the complaint

1. On 10 May 2019, the complainant, requested the Council of the European Union ("the Council") to give him access to the Commission's 2017 'Recommendation' for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline' and the Annex to that Recommendation.

2. On 5 June 2019, the Council refused access to the requested documents.

3. On 23 June 2019, the complainant asked the Council to reconsider its decision (it made a so-called 'confirmatory application'). The Council replied on 26 July 2019, confirming its decision to refuse access to the requested documents.

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4. Dissatisfied by the Council's decision, the complainant turned to the Ombudsman on 27 August 2019.

The inquiry

5. The Ombudsman opened an inquiry into whether the Council had wrongly refused access to the requested documents.

During the inquiry, the Ombudsman's inquiry team inspected the documents and met with representatives of the Council to clarify certain aspects of issues raised by the complaint[1].

Arguments presented to the Ombudsman

By the complainant:

6. The complainant argued that some of the exceptions that the Council invoked should not be considered valid, notably protecting international relations and protecting the decision-making process. This was because information related to the documents in question was already in the public domain, for example through a press release issued by the Commission. According to the complainant, it is unlikely that the requested documents contain information on the EU's negotiation objectives that significantly differs from the information that is already publicly available.

7. The complainant also argued that the Council was wrong to invoke the exception related to the protection of court proceedings, not least because there were no court proceedings ongoing when the request for public access was made.

8. The complainant argued that, even if the exceptions that the Council invoked did apply, there was an overriding public interest in disclosing the documents, namely the public interest in increased transparency in the functioning of the EU institutions.

By the Council:

9. The Council rejected the request for public access as it considered that releasing the document would undermine international relations, its own decision-making process, and ongoing court proceedings[2].

10. As regards the protection of international relations, the Council said that the requested documents reflect 'orientations' and 'directives' for the gas

[1] https://www.ombudsman.europa.eu/cn/report/en/126137

[2] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049.

pipeline negotiations with Russia. The Council considered that making these documents public would reveal the EU's strategic objectives for the negotiations and would likely damage the climate of mutual trust.

11. As regards the public interest in the protection of the decision-making process, the Council stressed that the documents under inspection relate to a mandate that had not yet been adopted. Therefore, making these documents public could be detrimental to the EU's position in negotiations with Russia concerning the area of energy supply. The Council furthermore said the decision-making process is under intense external and media attention. Disclosing the documents containing negotiating positions could therefore lead to undue external pressure.

12. As regards the protection of ongoing court proceedings, in its decision the Council informed the complainant that the Nord Stream 2 consortium had started a dispute settlement procedure in which, under the Energy Charter Treaty, it was challenging the EU gas link rules. In case an amiable settlement in this framework could not be reached, recourse to court proceedings or international arbitration could follow.

13. The Council explained to the Ombudsman that certain of the risks referred to in its decision have now in fact materialised. For example, the Nord Stream 2 consortium brought arbitration proceedings against the EU[3]. Furthermore, the Nord Stream 2 consortium brought litigation against the Council before the General Court seeking the annulment of the Gas Directive[4].

14. As regards the press statement issued by the European Commission on 9 June 2017 referring to the request for a mandate[5], it described this as being of a general nature. The fact that this statement was issued, could not, it stated, justify a (partial) release of the documents.

The Ombudsman's assessment

15. The Ombudsman carefully assessed the arguments of the Council for rejecting the request for public access. Her inquiry team inspected the documents in question and held a meeting with representatives of the Council.

16. The Council has invoked three exceptions to justify refusing access: the protection on international relations; the protection of court proceedings; and the protection of its decision-making processes

[3] Under the Energy Charter Treaty (ECT) against the amended EU Gas Directive (Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (Text with EEA relevance.) and the EU actions in connection with that Directive.

[4] The Council supplied the Ombudsman with further detail on this matter, which is of a confidential nature.

[5] *"Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2"*, see: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1571.

17. Some of the exceptions to the right of public access to a document require an institution to consider whether there is an overriding public interest in access to the document. Specifically, if one of the exceptions mentioned in Article 4.2 or 4.3 of the Regulation is invoked, the institution must consider whether there is an overriding public interest in granting access, even though the exception applies. However, if one of the exceptions in Article 4.1 of the Regulation applies, such as the need to protect international relations, the interests protected by those exceptions cannot be overridden.

18. The Ombudsman's assessment as regards whether disclosing a document would undermine international relations[6] involves determining whether it was 'reasonably foreseeable' that the information, if released at the time of the request, would undermine relations with third countries.

19. In the meeting between the Council's representatives and the Ombudsman's inquiry team, the Council provided further information on the international context in which the documents were drawn up. This information allowed the Ombudsman's inquiry team, which had the opportunity to read carefully the requested documents, to appreciate the sensitivity of the content of the documents. Specifically, in view of these explanations and a careful review of the content of the documents, the Ombudsman has concluded that it was at least reasonably foreseeable that releasing the documents would undermine international relations.

20. In reaching this conclusion, and without any need to reference, in this decision, the content of the document, or the detailed contextual information provided by the Council, the Ombudsman notes that the negotiations relate to a key strategic interest, namely energy supply and security. It is of vital importance for the EU, its Members States, and its citizens, that the institutions are not in any way undermined in such negotiations, by the release of sensitive documents at a critical point in time. The Ombudsman contrasts this situation with negotiations aimed at entering into general trade agreements, where a high degree of transparency is appropriate[7].

21. Since the exception regarding the protection of international relations was validly invoked, the Ombudsman has not reviewed, in this decision, the application of the other two exceptions.

22. As regards the fact that the Commission issued a press release about sending a Recommendation to the Council, the Ombudsman notes that the press release was general in nature. Having examined the requested documents, the Ombudsman notes that their content is far more detailed than the Commission's press release. The Ombudsman also notes that while certain substantive information is contained in the press release, the press release does

[6] Article 4(1) of Regulation 1049/2001.
[7] See for example the Ombudsman Decision closing the own initiative inquiry into the European Commission's efforts to make the Transatlantic Trade and Investment Partnership ('TTIP') negotiations transparent and accessible to the public : https://www.ombudsman.europa.eu/en/decision/en/58668

not contain verbatim extracts from the requested document. Rather, the press release is a general synthesis of some of the information contained in the requested documents. The publication of the press release therefore does not mean that partial access can be given by simply making public certain extracts from the requested documents.

23. The Ombudsman recognises that transparency is achieved not only through public access to documents, but also through proactive publication of information, for example through press releases. Therefore, the publication by the Commission of its press release contributed to ensuring that there was a degree of transparency in relation to the on-going negotiation with Russia regarding the pipeline.

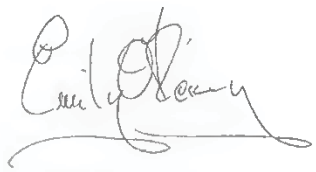
24. However, the Ombudsman recognises that the Nord Stream 2 project has proved to be highly controversial and that proper democratic and public scrutiny of the project is vital.

Conclusion

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

There was no maladministration by the Council in this case.

The complainant and Council will be informed of this decision.



Emily O'Reilly
European Ombudsman

Strasbourg, 27/03/2020