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From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	12 October 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject:	Complaint 360/2021/TE to the European Ombudsman
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Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Council concerning the closing decision on complaint 360/2021/TE.



European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen
Secretary-General
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Strasbourg, 11/10/2021

Complaint 360/2021/TE

Decision in the above case on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions

Dear Mr Tranholm-Mikkelsen,

Please find enclosed 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 refusing to grant full access to the six documents in question while negotiations on the relevant parts of the legislative proposal are ongoing.

As the Council accepted the Ombudsman's proposal to release, in full, the additional three four-column documents identified during her inquiry, no further inquiries are justified.

Yours sincerely,

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Enclosure:

- Decision on complaint 360/2021/TE



Decision

on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions (case 360/2021/TE)

The case concerned the Council of the EU's refusal to grant full public access to documents relating to trilogue negotiations between the Council, the European Parliament, and the European Commission on draft legislation for vehicle emissions. The Council granted access to only parts of the documents it identified as falling under the request, arguing that disclosing the remaining parts could undermine the ongoing decision-making process.

The inspection of the documents by the Ombudsman's inquiry team showed that the redacted parts contain the Council's strategy for the negotiations with Parliament. These redacted parts had not been shared with Parliament at the time the Council refused access to the complainant.

The Ombudsman acknowledged that releasing this when the negotiations were ongoing could seriously undermine the Council's negotiating position. As such, the redactions were justified in that context. However, she took the view that, once compromises on these issues had been reached in the trilogue negotiations, the relevant parts of the documents should be disclosed.

In the course of the inquiry, the Council identified three additional documents that it had shared with Parliament ahead of trilogue meetings. The Ombudsman took the view that they constitute important legislative documents, and that disclosing them would enable the public to properly follow the trilogue negotiations and to try to influence the legislative process at this crucial stage. The Ombudsman thus proposed to the Council that it should disclose these three documents. The Council accepted the proposal.

The complainant expressed his dissatisfaction with the outcome, notably as regards the Ombudsman's assessment upholding the Council's decision not to disclose certain parts of the documents while the negotiations were ongoing. The Ombudsman thus closed the inquiry, confirming her assessment and setting out in greater detail the conclusions she had reached.



Background to the complaint

1. On 23 November 2020, the complainant requested that the Council of the EU grant him public access to:

“The documents related to the trilogue negotiations on the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information

These should include at least:

ST 12384 2020 INIT (30-10-2020)

ST 12384 2020 REV 1 (03-11-2020).”

2. On 6 January 2021, the Council refused access to the two documents explicitly mentioned in the complainant's request (documents ST 12384/20 and ST 12384/20 REV1). In doing so, it invoked an exception provided for under the EU's rules on public access to documents, arguing that disclosing the documents could undermine an ongoing decision-making process.¹

3. On the same day, the complainant asked the Council to review its decision (by making a 'confirmatory application').² He referred to EU case-law³ and argued, in particular, that trilogue documents are part of the legislative process, which citizens have a right to access. Providing access to such documents would enable the public to better follow the decision-making process, enhancing its legitimacy. The complainant also noted that his request was not restricted to documents ST 12384/20 and ST 12384/20 REV1, but concerned *all* documents related to the trilogue negotiations in question.

4. On 16 February 2021, the Council adopted its decision on the review ('confirmatory decision'). It identified five additional documents as falling within the scope of the complainant's request. In its decision, the Council:

- Granted full access to one of the five additional documents, which contains the positions of the three institutions at the beginning of trilogue negotiations.

¹ Article 4(3), first subparagraph, of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049>.

² In accordance with Article 7(2) of Regulation 1049/2001.

³ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, <https://curia.europa.eu/juris/liste.jsf?num=T-540/15>



- Granted access to parts the remaining six documents, including documents ST 12384/2020 and ST 12384/2020 REV1. In justifying its decision to redact parts of those documents, the Council again invoked the exception provided for under the EU's rules on public access to documents for protecting an ongoing decision-making process⁴. The Council argued that the redacted parts outline its negotiating strategy on provisions in the draft legislative text for which no agreement had yet been found with Parliament in the trilogue negotiations. As these redactions included compromises that the Council was potentially willing to make, the Council argued that this would undermine its negotiating position. It pointed out that the Parliament does not share its negotiating strategy with the Council. As such, for the Council to disclose its strategy would lead to an asymmetric situation.

5. The Council also noted that the case-law referred to by the complainant did not rule out the possibility for institutions to refuse access to legislative documents, in order to protect the decision-making process in the context of ongoing trilogues.⁵ The Council further took the view that there was no overriding public interest in full disclosure of the documents. The complainant had set out general arguments that do not demonstrate that the principle of transparency should prevail over the reasons set out by the Council justifying the refusal to grant full access.

6. The complainant turned to the Ombudsman on 19 February 2021.

The Ombudsman's proposal for a solution

7. The Ombudsman's inquiry team inspected unredacted copies of the six documents at issue. After receiving the Council's written reply⁶ on the complaint, the Ombudsman asked to inspect further documents held by the Council on the trilogue negotiations in question.

8. Based on an analysis of the inspected documents, the written reply of the Council and the complainant's comments on that reply, the Ombudsman proposed a solution to the Council on 18 June 2021.⁷ In her solution proposal, the Ombudsman considered that:

⁴ Based on Article 4(3), first subparagraph, of Regulation 1049/2001.

⁵ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, para. 112.

⁶ Letter from the Council of the European Union to the European Ombudsman on its refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions: <https://www.ombudsman.europa.eu/nl/correspondence/en/140735>

⁷ Proposal of the European Ombudsman for a solution in case 360/2021/TE on the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emission: <https://www.ombudsman.europa.eu/nl/solution/en/144725>



- Trilogues constitute an integral part of the legislative process. As the General Court stressed in its *De Capitani* judgment of 2018, the public should be able to follow the development of a legislative proposal during the negotiations, to exercise their democratic rights. In particular, this implies having access to all columns in the 'four-column documents', which track the positions of the different institutions during trilogue negotiations.⁸
- All six documents at issue in this inquiry were prepared by the Council in view of upcoming trilogue negotiations. Each document contains a table with four columns, setting out the positions of the three institutions at the beginning of trilogue negotiations (first three columns), as well as a fourth column.
- The Council redacted parts of the fourth column in each of these documents. The redacted parts contain the Council's strategy for the negotiations with the Parliament: non-negotiable provisions ('red lines'), issues on which the Council might be flexible and possible compromise positions. This includes instructions to the Council Presidency on how to negotiate the Council's position on a certain article or recital: whether it should compromise on certain provisions (if needed to reach an overall agreement), or to propose alternative wording in relation to certain articles or recitals, should Parliament show flexibility during the meetings. The Council disclosed those parts of the fourth column where provisional compromises had been reached with the Parliament, including the Council's negotiating strategy on these points.
- The content of the fourth column in the six documents at stake in this inquiry is different from that of the fourth column in the *De Capitani* case. In that case, the documents concerned had been shared between the co-legislators (containing in their fourth column the provisional compromise text that had been agreed between the institutions). The redacted parts of the documents in this case had not been shared with the Parliament at the time of the refusal to grant full access.
- If an institution's negotiation strategy were made public during the negotiations, this could seriously undermine their negotiating position and, as a consequence, the ongoing decision-making process.
- In the *De Capitani* case, the General Court considered that the public, in a democratic system, should be able to follow trilogue negotiations, so as to influence the legislative process at this crucial stage. To this end, the public must be given access to the positions, proposals and/or comments that the institutions have put on the negotiating table, and

⁸ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, para. 98.



be able to find out about the preliminary results of trilogue negotiations.

- The General Court did not state that the public should be in a position to know the *negotiating strategy* of the institutions while negotiations are ongoing. However, the Ombudsman considers that, once provisional compromises have been reached in trilogue negotiations, the relevant parts of the documents, including the Council's negotiating strategy on those parts, should be disclosed.
- The three additional documents that the Council shared with the Ombudsman during the inquiry are equivalent to the four-column documents at issue in the *De Capitani* case. They contain the provisional compromises found between the co-legislators, as well as the evolving positions, proposals and comments of the three institutions, as expressed during the ongoing trilogue. Therefore, the additional three documents should have been identified as falling within the scope of the complainant's access to document request and should have been fully disclosed.

9. In view of these considerations, the Ombudsman proposed that the Council disclose to the complainant the three additional four-column documents that it shared with the Ombudsman.

10. The Council agreed to follow the Ombudsman's proposed solution and granted access to the three additional documents.⁹

11. The complainant was dissatisfied with the Ombudsman's proposal for a solution. In particular, the complainant considered that there was no concrete evidence of a specific and actual risk of the decision-making process being seriously undermined if the six documents at issue were to be fully disclosed.

12. The complainant referred to a previous access to document request of 2018, in which he had asked the Council to disclose all documents related to trilogue negotiations on the draft directive on copyright in the Digital Single Market. The Council had identified six documents, which it disclosed fully while negotiations were ongoing. The complainant questioned the difference in approach to the two requests.

13. The complainant also noted that certain Member State delegations had questioned the validity of the Council's argument that fully disclosing the documents risked undermining the ongoing decision-making process.¹⁰

⁹ Reply from the Council of the European Union to the European Ombudsman's solution proposal in case 360/2021/TE: <https://www.ombudsman.europa.eu/nl/correspondence/en/144726>

¹⁰ The complainant referred to a statement published by the Netherlands and Sweden, in relation to the confirmatory decision in this case.



14. The complainant further noted that the three additional documents had already been released by the European Parliament upon request.

The Ombudsman's assessment after the proposal for a solution

15. The Ombudsman welcomes the Council's positive response to her solution proposal. She notes, however, that the complainant is dissatisfied with the outcome.

16. In reply to the complainant's concerns, the Ombudsman wishes to make observations concerning (a) the content of the fourth column at issue in this inquiry and (b) her assessment leading to the conclusion that the Council's decision not to grant full access was justified while the trilogue negotiations on those issues were still ongoing.

a) The content of the fourth column

17. Four-column documents are used to facilitate trilogue negotiations. The first three columns contain the initial positions of the three institutions (the Council, the Parliament and the Commission) in relation to each recital and article in the draft legislative proposal. These three initial positions of the institutions are public.

18. The fourth column is normally used to track the evolving positions of the institutions in ongoing trilogues, to take stock of provisional compromises found or to record comments made during the negotiations. The institutions taking part in a trilogue share such content with each other.

19. The content of the fourth column in the two documents at stake in the *De Capitani* case was of the kind described above. It contained the provisional compromise text and the preliminary positions of the Council's Presidency in relation to the Parliament's proposed amendments. That text had been shared with the Parliament.¹¹ The Ombudsman also understands that the six four-

¹¹ The documents were held by the Parliament. The Court described the documents in paragraph 6 of its judgment: "The tables in the documents at issue contain four columns, the first containing the text of the Commission's legislative proposal, the second the position of the Parliament as well as the amendments that it proposes, the third the position of the Council and the fourth the provisional compromise text (document LIBE-2013-0091-02) or the preliminary positions of the Presidency of Council in relation to the amendments proposed by the Parliament (document LIBE-2013-0091-03)." (emphasis added). The Court gives further detail in paragraphs 93 and 94:

"93 It is clear, in particular, from document LIBE-2013-0091-02 that the text contained in the fourth column is an example of classic legislative work concerning the organisation of an agency, namely Europol, the definition of its relationship with national authorities and of its tasks, the composition of its management board, etc. That column contains rules of a general nature, showing the agreed drafting



column documents that the complainant obtained in 2018, relating to the proposal for a directive on copyright in the Digital Single Market, had been shared between the co-legislators.¹²

20. However, the Council also uses the four-column template to record its internal discussions and negotiating strategies in evolving trilogue negotiations. These are separate documents, serving a separate purpose.

21. The fourth column of the six documents at issue in this inquiry contains the Council's negotiating strategy relating to the ongoing trilogue, as described above.

22. The Ombudsman confirmed that the content of the redacted parts of the fourth column had not been shared with the Parliament at the time of its decision to grant only partial access.

23. Based on the above analysis, the Ombudsman found in her solution proposal that the content of the fourth columns in the documents in this inquiry is of an entirely different nature than those in the *De Capitani* case. The four-column documents in that case had *already been shared* between the co-legislators. In contrast, the fourth columns at issue in this case contain the Council's negotiating strategy, which had *not been shared* with the co-legislators and which related to negotiations that were ongoing.

b) Assessment leading to the conclusion that the Council's refused full access was justified

24. The Council disclosed only those parts of its negotiating strategy relating to recitals or articles on which provisional agreement had already been found in the trilogue negotiations. In its confirmatory decision, the Council argued, in essence, that granting access to the redacted parts would lead to pressure from the other negotiating parties, thus weakening its negotiating position and undermining the ongoing decision-making process.

amendments, indication of the points to be discussed at a later date or the subject of further discussion, shown by the term 'idem' at certain points, and several empty fields.

94 As far as concerns document LIBE-2013-0091-03, the fourth column also does not appear to contain any sensitive information and does no more than provide a limited number of general rules as well as several indications, such as 'the Parliament is invited to reconsider its amendment', 'the amendments by the Parliament may be considered' or 'the amendment by the Parliament could possibly be reflected in a recital', and several empty fields."

¹² The fourth column of the six documents contains compromises provisionally agreed at a trilogue meeting or tentatively agreed at a 'technical meeting'. It also contains wording proposed by the Council, with comments on how this proposal should be dealt with in the negotiations. In brief, it contains a Council position that had been put on the negotiating table and that had thus already been shared between the co-legislators when the documents were disclosed.



25. In her solution proposal, the Ombudsman assessed whether it was reasonable for the Council to refuse full public access, based on the exception in Regulation 1049/2001 for protecting an ongoing decision-making process.¹³

26. According to the case-law of the Court of Justice, the decision-making process is “*seriously undermined*” where disclosing the documents in question is likely to have a substantial impact on the decision-making process.¹⁴

27. The Ombudsman takes the view that it was reasonably foreseeable that disclosing the Council’s negotiating strategy would weaken its negotiating position and, hence, would substantially impact the decision-making process.

28. The complainant asserts that the Ombudsman should base her views on the specific sensitivity of the draft legislation on motor vehicle emissions. He argued that the Council previously disclosed documents to him relating to the negotiations on the draft directive on copyright in the Digital Single Market, which was also a sensitive proposal.

29. As set out in the Ombudsman’s solution proposal, the redacted parts of the documents contain the strategy that the Council intends to follow in the ongoing negotiations. The documents that the complainant previously obtained concerning the negotiations on the draft directive on copyright in the Digital Single Market did not, in contrast, contain such content. Rather, they contained content that had already been shared with the other institutions. The sensitivity of the motor vehicle emissions file is dealt with below.

30. Having concluded that full disclosure of the six documents at issue could undermine the ongoing decision-making process, the Ombudsman then assessed whether there was an overriding public interest in disclosure. To this end, the Ombudsman considered the public interest in the disclosure of trilogue documents while trilogue negotiations are ongoing.

¹³ Article 4(3), first subparagraph, of Regulation 1049/2001.

¹⁴ The relevant case-law is summarised in paras. 63 to 65 of the *De Capitani* judgment:

“63 ... the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 requires it to be established that access to the documents requested was likely to undermine specifically and actually the protection of the institution’s decision-making process, and that the likelihood of that interest being undermined was reasonably foreseeable and not purely hypothetical ...

64 According to the case-law, the decision-making process is ‘seriously’ undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 where, *inter alia*, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, *inter alia*, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question ...

65 That case-law cannot be interpreted as requiring the institutions to submit evidence to establish the existence of such a risk. It is sufficient in that regard if the contested decision contains tangible elements from which it can be inferred that the risk of the decision-making process being undermined was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical, showing, in particular, the existence, on that date, of objective reasons on the basis of which it could reasonably be foreseen that the decision-making process would be undermined if the documents were disclosed ...”



31. In a democratic decision-making process, legislators must be accountable to the public for their actions. Furthermore, according to the EU Treaties, every citizen has the right to participate in the democratic life of the EU and, to this end, decisions should be taken as openly and as closely as possible to the citizen.¹⁵ To be able to exercise their democratic rights, citizens must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. As the Court stated in its judgment on the *De Capitani* case, “the expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens’ democratic rights”.¹⁶

32. The Ombudsman takes the view that, in order for the public to participate in trilogue negotiations and, hence, be able to influence the legislative process at this crucial stage, they must have access to the positions, proposals and/or comments that the institutions have put on the negotiating table, and to know the preliminary results of trilogue negotiations.

33. In the *De Capitani* case, the Court assessed whether the public should be in a position to see the fourth column of four-column documents that had been shared between the co-legislators. The Parliament argued that disclosing the fourth column would lead to public pressure on the negotiating team and make the Presidency of the Council more wary of sharing information and cooperating with the Parliament’s negotiating team. The Parliament also argued that “nothing is agreed until everything is agreed”.¹⁷ The Court rejected these arguments.¹⁸

34. In this inquiry, the Ombudsman assessed whether the Council’s negotiating strategy, which it had not disclosed to the other institutions, should be released. The complainant is right to draw attention to the specific sensitivity of the draft legislation on motor vehicle emissions. There is undoubtedly an elevated public interest in the draft legislation. The Ombudsman has, however, not identified a public interest in disclosure that would override the fact that disclosing the Council’s negotiating strategy, while the negotiations are still ongoing, could undermine the Council’s negotiating position.

¹⁵ Article 10(3) TEU.

¹⁶ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, para. 98.

¹⁷ Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*, para. 7.

¹⁸ The Court found that nothing in the case file suggested that Parliament could reasonably expect there to be a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation (para. 99). The Court also found that, since in the course of trilogues the institutions express their respective positions on a given legislative proposal, and accept that their position could thus evolve, the fact that those elements are then disclosed, on request, is not per se capable of undermining the mutual loyal cooperation which the institutions are required to practice pursuant to Article 13 TEU (para. 104). Finally, the Court found that the public is perfectly able to grasp that, in line with the principle that ‘nothing is agreed until everything is agreed’, the information contained in the fourth column is liable to be amended throughout the course of the trilogue discussions until an agreement on the entire text is reached (para. 102).



35. However, in her solution proposal, the Ombudsman emphasised that, once provisional compromises are found in the trilogue negotiations, the relevant parts of the documents relating to those provisional compromises, including the Council's negotiating strategy regarding those provisional compromises, should, in principle, be disclosed. That way, the public can scrutinise the Council's negotiating strategy *ex post*, so as to hold the institution to account for its actions during the negotiations.

36. In view of the above analysis, the Ombudsman takes the view that there was no maladministration by the Council in refusing to grant full access to the six documents in question while negotiations on the relevant parts of the legislative proposal are ongoing.

37. As the Council accepted the Ombudsman's proposal to release, in full, the additional three four-column documents identified during her inquiry, no further inquiries are justified.

Conclusion

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

There was no maladministration by the Council in refusing to grant full access to the six documents in question while negotiations on the relevant parts of the legislative proposal are ongoing.

As the Council accepted the Ombudsman's proposal to release, in full, the additional three four-column documents identified during her inquiry, no further inquiries are justified.

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

Emily O'Reilly
European Ombudsman

Strasbourg, 11/10/2021

10