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#### COVER NOTE

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From:	Ms Emily O'REILLY, European Ombudsman
date of receipt:	3 December 2024
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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No. prev. doc.:	15494/23; 13836/23; 8344/24; 8491/24
Subject:	Own initiative inquiry OI/4/2023/MIK from the European Ombudsman - Decision

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Delegations will find in the Annex a copy of a letter received from the European Ombudsman on the Own initiative inquiry OI/4/2023/MIK, communicating her decision.

Personal data have been blanked out.



Emily O'Reilly

European Ombudsman

Thérèse Blanchet  
Secretary-General  
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CC: [REDACTED]

Strasbourg, 03/12/2024

OI/4/2023/MIK

Decision in the above case on how the European Parliament, the Council of the European Union and the European Commission handle requests for public access to legislative documents

Dear Secretary-General,

Please find enclosed my decision in this own-initiative inquiry.

On the basis of my inquiry, I have decided to close it with the following findings:

The files inspected in this inquiry show that the Council is failing to give full effect to the principle of legislative transparency, as set out in the EU Treaties, Regulation 1049/2001, and related case-law.

To assist the Council in improving its practices in that regard, I consider it useful to make the following suggestions.

The Council should:

- explicitly state in its replies to public access requests whether the requested documents are 'legislative documents', to which the highest standards of transparency apply;
- promptly disclose the requested legislative documents, notwithstanding the political sensitivity of proposed legislation and even if doing so would - for example - give rise to external pressure, as these are generic elements of any democratic law-making process;
- ensure that it refuses public access to legislative documents in truly exceptional circumstances only, that is, where it identifies a concrete (non-generic) risk to

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the interests explicitly protected, which can be demonstrated by tangible evidence; otherwise, the requested documents must be disclosed;

- demonstrate in its replies that it has carried out a genuine analysis regarding the existence of an overriding public interest in disclosure and, in any case, engage with any arguments made by the applicants in this regard.

I would be grateful if the Council could inform my Office by 3 June 2025 of any action it has taken in relation to my suggestions for improvement.

Yours sincerely,



Emily O'Reilly  
European Ombudsman

Enclosure:

- Decision on inquiry OI/4/2023/MIK



Emily O'Reilly

European Ombudsman

## Decision

on how the European Parliament, the Council of the European Union and the European Commission handle requests for public access to legislative documents (OI/4/2023/MIK)

*This own-initiative inquiry was about how the European Parliament, the Council of the EU and the European Commission handle requests for public access to legislative documents. According to the Court of Justice, "wider access" must be granted to EU legislative documents and any exceptions to it must be interpreted "all the more strictly" as "the possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights". While the Ombudsman has consistently called for more transparency in the EU's legislative process, she continues to receive complaints about refused public access to legislative documents and the time it takes the institutions to disclose such documents.*

*This inquiry thus examined, from a more systemic point of view, whether the institutions give full effect to the principle of legislative transparency as set out in the EU Treaties, the EU legislation on public access to documents (Regulation 1049/2001), the clear body of EU case-law and the Ombudsman's recommendations on this matter. In this context, the Ombudsman reviewed the institutions' replies to public access requests related to three recently adopted legislative acts.*

*The Ombudsman found that the Parliament received too few public access requests within the scope of this inquiry for her to draw conclusions about its practice.*

*As regards the Council and the Commission, the inquiry showed that when requests are made, the two institutions disclosed a large amount of legislative documents. However, in many cases, they continued to apply the exceptions under Regulation 1049/2001 too broadly, that is, in a manner that is not consistent with EU case-law. The Ombudsman finds this deeply concerning in a Union based on the rule of law. In particular, they fail to provide concrete evidence of actual risks that the disclosure of the requested legislative documents would entail.*

*The Ombudsman also found that there continue to be significant delays by the Commission in processing public access requests, including those concerning legislative documents. The Ombudsman has already issued a Special Report to the European Parliament in relation to delays incurred by the Commission in handling public access requests and emphasises the serious consequences of these delays when it comes to legislative documents.*

*The Ombudsman closed the inquiry setting out her findings and reiterating her position that the institutions must give full effect to the EU case-law on public access to legislative documents. To assist the institutions in improving their practices in that regard, the Ombudsman made a series of suggestions.*

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## Background: Legislative transparency in the EU

1. Timely public access to legislative documents is essential for citizens to exercise their Treaty-based right to participate in the democratic life of the EU<sup>1</sup> by scrutinising all the information underpinning a legislative act.<sup>2</sup> Legislative transparency also enables the public to hold the EU legislators to account for their actions.

2. The principle of legislative transparency is enshrined in the EU Treaties<sup>3</sup> and is reflected in the EU legislation on public access to documents (Regulation 1049/2001)<sup>4</sup>, which states that “*legislative documents*” must be directly accessible to the public, unless their disclosure would undermine one or several public or private interests explicitly protected.<sup>5</sup>

3. According to Regulation 1049/2001 and established case-law, “*legislative documents*” are documents drawn up by EU institutions or received from third parties in the course of procedures for the adoption of legislative acts and, even more broadly, acts which are legally binding on or in the EU Member States.<sup>6</sup> EU case-law has established that “*legislative documents*” constitute not only documents drawn up or received by the EU institutions after the adoption of a legislative proposal, but also documents drawn up or received by the European Commission, as a “*key player in the legislative process*”<sup>7</sup>, in the context of preparing a legislative proposal.<sup>8</sup>

4. Regulation 1049/2001 sets out that requests for public access should be handled “*promptly*”. There is a time limit of 15 working days for an institution’s decision, both on the initial access request and on subsequent requests for review (“confirmatory applications”), where the institution has initially refused (full) access. Each time limit can be extended in “*exceptional cases*” by another 15 working days, which means that EU institutions are expected to take a decision, at initial and at confirmatory stage, within a maximum of 30 working days.

5. While Regulation 1049/2001 sets out an exhaustive list of exceptions to the right of public access to documents, these exceptions must be interpreted and applied strictly.<sup>9</sup> Public access can be refused only in cases where the documents’ disclosure would entail

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<sup>1</sup> Article 10(3) TEU.

<sup>2</sup> Judgment of the Court of 1 July 2008, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=67058&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2310692>, paragraph 46.

<sup>3</sup> Article 15 TFEU.

<sup>4</sup> 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>

<sup>5</sup> Article 12(2) of Regulation 1049/2001.

<sup>6</sup> Judgment of 4 September 2018, Case C-57/16 P, *ClientEarth v Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3893014>, paragraph 85.

<sup>7</sup> *Ibid.*, paragraph 88.

<sup>8</sup> *Ibid.*, paragraphs 88 and 90 to 93.

<sup>9</sup> Judgment of 17 October 2013, C-280/11 P, *Council v Access Info Europe*, paragraphs 30 and 33, <https://curia.europa.eu/juris/document/document.jsf?sessionid=33DFC48EF1DCDBAED7499CE14BAAF0F4?text=&docid=143182&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3841290>; Case C-57/16 P, *ClientEarth v Commission*, paragraphs 78 and 84-85.



a reasonably foreseeable, actual and specific risk to the interests explicitly protected by Regulation 1049/2001.<sup>10</sup>

6. For legislative documents, these exceptions must be interpreted "*all the more strictly*"<sup>11</sup> to ensure the highest standard of transparency of such documents. Unless tangible, concrete, and specific evidence<sup>12</sup> of exceptional circumstances can be demonstrated, the EU institutions are legally bound to disclose the requested legislative documents promptly.

7. Moreover, with regard to some of the exceptions to public access - such as the need to protect an ongoing decision-making process, legal advice, or commercial interests - where there is a strong public interest in disclosure, this can override the exceptions.<sup>13</sup>

## The own-initiative inquiry

8. The Ombudsman has consistently called for more transparency of the EU legislative process. She continues to receive complaints concerning refusals to grant public access to legislative documents, and the time it takes to disclose them. In many such cases, the Ombudsman found maladministration or criticised the institutions for the time taken to process the requests and how they applied the exceptions to public access.<sup>14</sup>

9. Against this background, the Ombudsman launched this own-initiative inquiry to examine, from a systemic point of view, the practices of the three institutions in handling requests for public access to legislative documents. In particular, the Ombudsman sought to examine whether the institutions give full effect to the extensive EU case-law on Regulation 1049/2001, according to which legislative documents benefit from the highest standard of transparency.

10. As a first step, the Ombudsman asked the Parliament, the Council, and the Commission to provide information regarding their replies to public access requests concerning the adoption of the following three legislative acts:

- The Digital Markets Act<sup>15</sup>;

<sup>10</sup> Case C-280/11 P, *Council v Access Info Europe*, paragraph 31; judgment of 8 June 2023, Case C-408/21 P, *Council v Pech*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=274436&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2311573>, paragraph 34.

<sup>11</sup> Case C-408/21 P, *Council v Pech*, paragraph 82.

<sup>12</sup> Ibid, paragraph 86; judgment of 25 January 2023, Case T-163/21, *De Capitani v Council*, paragraphs 83, 85, and 93. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=269684&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3531724>.

<sup>13</sup> Articles 4(2), *in fine*, and 4(3), subparagraph one, *in fine*, of Regulation 1049/2001. Exceptions that cannot be overridden by public interest are: public security, defence and military matters, international relations, the financial monetary or economic policy.

<sup>14</sup> See Annex 1, <https://www.ombudsman.europa.eu/en/opening-summary/en/175931>.

<sup>15</sup> Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector, OJ L 265/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1925>





- The Revision of the Emissions Trading Scheme Directive<sup>16</sup>; and
- The Minimum Wage Directive.<sup>17</sup>

11. The Ombudsman chose these three legislative acts as they concerned important issues giving rise to significant public interest among different categories of stakeholders in relation to new technologies, climate action, as well as social and economic inequality.

12. The Parliament informed the Ombudsman<sup>18</sup> that it received only five requests for public access falling within the scope of the inquiry.<sup>19</sup> The Ombudsman considered that this low number of requests is not representative and therefore she did not pursue her inquiry into Parliament's practices.

13. Based on the information provided by the Council<sup>20</sup> and the Commission<sup>21</sup>, the Ombudsman sought to inspect a sample of their replies to public access requests. In a few files concerning the Commission, the Ombudsman inquiry team also inspected the documents the Commission identified as falling within the scope of the requests.

## Replies to requests examined by the Ombudsman

### General information

14. The Council identified 101 initial requests for public access to legislative documents and three confirmatory applications relevant to this inquiry. It also provided information on the number of documents which it disclosed (fully or partially) or refused to disclose. This information shows that the Council fully disclosed legislative documents in reply to the majority of public access requests.<sup>22</sup>

15. The Ombudsman inquiry team inspected a sample of initial replies provided by the Council (47 replies), as explained in the chart below. All three 'confirmatory decisions' issued by the Council had already been examined by the Ombudsman in the context of

<sup>16</sup> Directive 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130/134, <https://eur-lex.europa.eu/eli/dir/2023/959/oj>.

<sup>17</sup> Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L 275/33, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2041>.

<sup>18</sup> <https://www.ombudsman.europa.eu/doc/correspondence/196628>.

<sup>19</sup> The Ombudsman had already dealt with one of these requests in the context of a complaint-based inquiry. 253/2023/MIK regarding how the European Parliament dealt with a request for public access to a 'four-column document' relating to trilogue negotiations on the EU Digital Markets Act.

<sup>20</sup> <https://www.ombudsman.europa.eu/en/case/en/83318>.

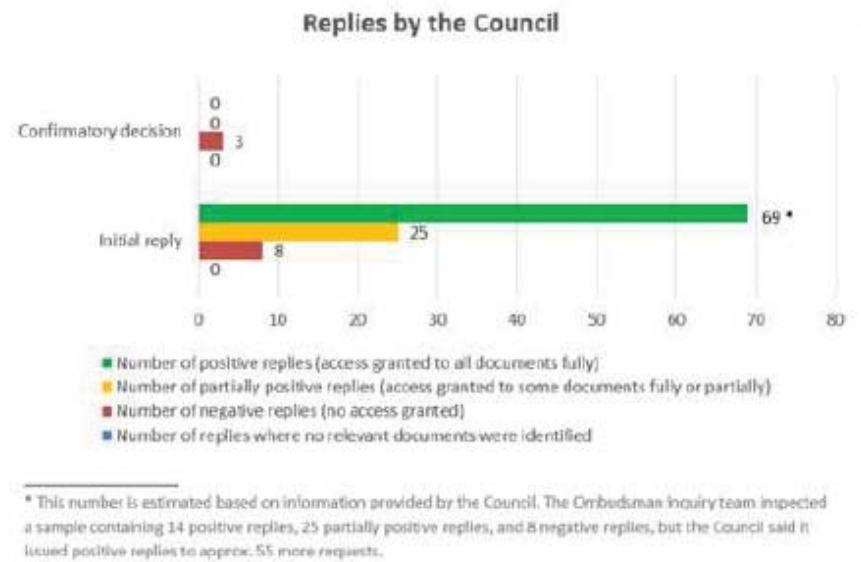
<sup>21</sup> <https://www.ombudsman.europa.eu/doc/correspondence/196629>.

<sup>22</sup> <https://www.ombudsman.europa.eu/doc/correspondence/196630>.

<sup>23</sup> The Council said it fully disclosed 325 documents, it partially disclosed 47 documents, and it refused to disclose 48 documents falling within the scope of this inquiry.



earlier complaint-based inquiries, so they were not examined again in the context of this inquiry.<sup>23</sup>



**16.** The Commission identified 58 initial replies and five confirmatory decisions relevant to this inquiry.

**17.** In most cases, as shown in the chart below, the Commission granted partial access to the requested legislative documents, that is, access to some of the requested documents only, or access to parts of (some of) the documents.

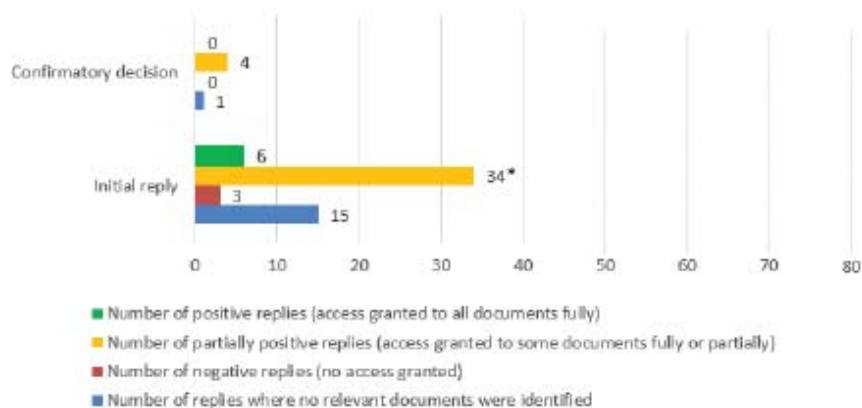
**18.** The Ombudsman inquiry team inspected all 58 initial replies and five confirmatory decisions provided by the Commission. The inquiry team also inspected documents falling within the scope of several requests.

<sup>23</sup> Case 1834/2022/NH on the Council of the EU's refusal to give full public access to a legal opinion on the proposed EU directive on adequate minimum wages, <https://www.ombudsman.europa.eu/en/case/en/62608>; Case 1499/2021/SF regarding the Council of the EU's refusal to give full public access to documents related to negotiations on the draft 'Digital Markets Act', <https://www.ombudsman.europa.eu/en/case/en/59957>; Case 788/2022/SF regarding the Council of the EU's refusal to give public access to documents related to negotiations on the draft 'Digital Markets Act' and the 'Digital Services Act', <https://www.ombudsman.europa.eu/en/case/en/61556>.





### Replies by the Commission



\* In 14 out of these 34 cases, the Commission redacted only personal data, in principle, the personal data of the Commission's staff, so this partial access was, in fact, wide access.

### Time taken to reply to requests

19. According to the data it provided, the Council was, on average, able to respect the statutory time limit of 15 working days to process requests for public access to the legislative documents falling within the scope of this inquiry.

20. According to the data derived from the replies provided by the Commission, the Commission was delayed in handling more than half of the requests at issue. At the initial stage, in nine cases, there was a delay - after the expiry of the extended time limit - of less than 15 working days. In seven cases, there was a delay of 15-30 working days. In eight cases, there was a delay of 30-45 working days. In three cases, there was a much more significant delay of approximately 60, 90 and 120 working days. At the confirmatory stage, the Commission incurred equally significant delays.

### Exceptions to public access invoked by the Council and the Commission

21. When refusing (full) public access, the Council invoked the need to protect (i) ongoing decision-making processes<sup>24</sup>; and (ii) legal advice and court proceedings<sup>25</sup>.

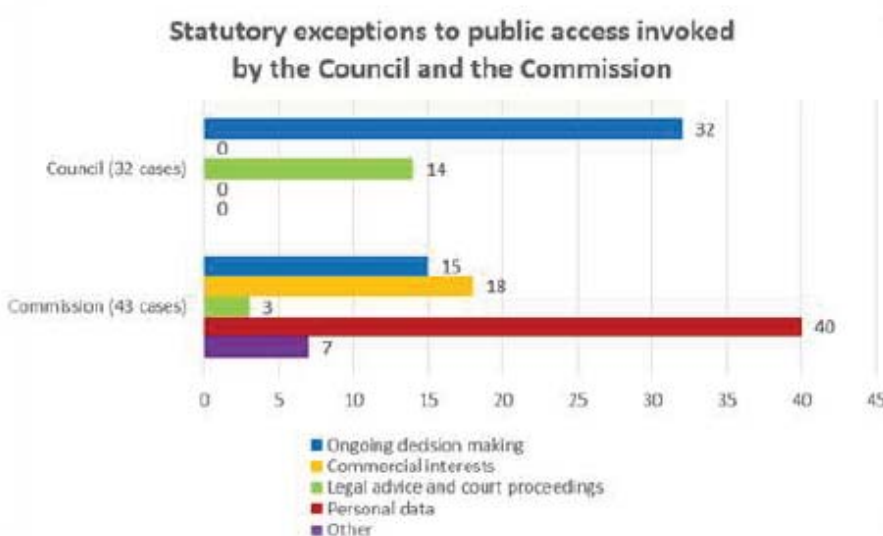
<sup>24</sup> Article 4(3), first subparagraph, of Regulation 1049/2001.

<sup>25</sup> Article 4(2), second indent, of Regulation 1049/2001.



22. The Commission invoked the need to protect (i) ongoing decision-making processes; (ii) commercial interests<sup>26</sup>; and (iii) personal data.<sup>27</sup> In a few cases, the Commission also invoked other exceptions.

23. The chart below shows the exceptions to public access invoked by the Council and the Commission in the initial replies and confirmatory decisions examined in the context of this inquiry.<sup>28</sup>



24. The Council and the Commission did not identify an overriding public interest in disclosure in any of the cases.

## Arguments by the Council

25. The Council invoked the exception concerning the protection of an ongoing decision-making process in 32 cases. The documents requested in those cases concerned Member States' questions and comments on legislative proposals, opinions of its Legal Service, and the work of its preparatory bodies or negotiations between the Council and the Parliament.

26. The Council argued, in essence, that:

- the requested documents contain positions that were preliminary and internal;

<sup>26</sup> Article 4(2), first indent, of Regulation 1049/2001.

<sup>27</sup> Article 4(b) of Regulation 1049/2001.

<sup>28</sup> This includes 58 initial replies and 5 confirmatory decisions of the Commission and 47 initial replies of the Council. This does not include 3 confirmatory decisions of the Council. The Ombudsman examined those in the context of previous complaint-based inquiries, so they were not examined again in the context of this inquiry. See footnote 23.



- the matters tackled in these documents were complex and controversial;
- disclosure of these documents could expose its staff and members to external pressure;
- disclosure of these documents could diminish the chances of reaching agreements within the Council and with the Parliament on the legislative proposals in question.

27. In 14 cases, the Council invoked the statutory exception concerning the protection of legal advice to refuse public access to opinions of its Legal Service.

28. It argued that this advice was addressed to the members of the Council and that its disclosure would subject the members of its Legal Service to external pressure, thereby undermining the Council's ability to obtain frank, objective and comprehensive legal advice in the future. The Council further argued that disclosure of legal opinions would undermine the ability of its Legal Service to defend the Council's acts before the EU Courts.

## Arguments by the Commission

29. The Commission relied on the exception concerning the protection of an ongoing decision-making process in 15 cases to refuse public access to records of exchanges with interest representatives and Member States, as well as other documents drafted by the Commission's departments in the preparation of a legislative proposal or during the legislative procedure.

30. In refusing access, the Commission argued, in essence, that:

- the requested documents contain preliminary views, drawn up for internal use, and that their content could still change;
- the Commission needs a space to think to explore all possible options, and disclosing the documents could deter its staff from expressing their views frankly in the future;
- the public would misinterpret the preliminary views contained in the documents made at an early stage of the decision-making process, and early disclosure could lead to speculation;
- disclosure of the requested documents would expose the Commission to external pressure;
- the legislative proposals to which the documents related were highly sensitive.

31. In some cases, the Commission applied this exception without providing any justification other than that the relevant decision-making procedure was ongoing.





32. The Commission also relied on the exception concerning the protection of commercial interests to refuse public access to exchanges with and submissions from third parties (often big technological companies) lobbying for changes to the draft Digital Markets Act.

33. In these cases, the Commission argued that the requested documents “contained information relating to business strategies, the competitive situation on the market and other commercial interests of companies, including intellectual property” or “strategic information... on the operation and development of their businesses”. Moreover, the Commission argued that the information is not in the public domain and is known to a limited number of persons only. In some cases, the Commission further stated that the requested documents contain the “views” and “positions” of third parties.

34. The Commission also invoked the exception concerning the protection of legal advice in three cases to refuse access to documents containing the advice of its Legal Service. It argued that disclosing the relevant documents would reveal “legal assessments of a preliminary nature intended for internal discussions [...]”, thereby undermining the Commission’s interest in “seeking legal advice and receiving frank, objective and comprehensive advice”. The Commission also referred to the risk of litigation regarding the legal basis of the Digital Markets Act.

35. In a few cases, the Commission invoked other exceptions, such as the protection of the public interest as regards international relations.

## The Ombudsman's assessment

36. The Ombudsman examined (A) the time taken by the Council and the Commission to reply to requests for public access to legislative documents, (B) whether the institutions took into account, in their assessments, the legislative nature of the documents, (C) how the Council and the Commission applied the exceptions to public access and (D) whether they assessed the existence of an overriding public interest, where relevant.

### A. Time taken to reply to requests for access to legislative documents

37. The Ombudsman welcomes the fact that the Council, in general, complied with the statutory time limits when replying to requests for public access to legislative documents.

38. The Ombudsman is concerned by the delays that the Commission incurred in handling public access requests. The inspection of the documents showed that the Commission met the statutory time limits to deal with public access requests in only around half of the cases examined in the context of this inquiry. In the other half, the Commission’s reply was delayed, with a significant delay of more than 30 working days occurring in 40% of the delayed cases.



39. It is crucial to provide access to legislative documents in a timely manner, as this enables the public to understand the choices made by the EU institutions *during* the legislative process and seek to influence these choices.<sup>29</sup>

40. Thus, when handling requests for public access to legislative documents, the EU institutions must observe the statutory time limits, their duty to handle the requests “promptly”, and their duty to provide public access “in good time” to enable applicants to participate in the legislative process.

41. The Ombudsman has already found in a previous inquiry that the systemic and significant delays in processing public access requests amount to maladministration and has urged the Commission to improve how it handles public access requests as a matter of priority.<sup>30</sup>

## B. Taking into account the legislative nature of the requested documents

42. In the inspected replies to requests for access to documents, neither the Council nor the Commission explicitly stated that the requested documents are legislative in nature. As such, it is not clear to what extent the institutions took into account in their assessments the fact the documents are ‘legislative documents’, to which the highest standard of transparency applies.

43. In their replies refusing access, both institutions typically refer to the exceptions to public access in Regulation 1049/2001 without considering the case law according to which these exceptions must be interpreted and applied strictly and, with regard to legislative documents, “all the more strictly”.

44. According to Regulation 1049/2001 and related case-law, EU institutions must, when assessing requests for public access to documents, take into account whether the requested documents are legislative in nature and, if they are, apply the highest standard of transparency. Based on the inspected replies of the Council and Commission it is not clear that the two institutions do so. In the Ombudsman’s view, the institutions’ replies should state explicitly whether the requested documents are “legislative documents”. This would reassure applicants that the institutions have taken the requested documents’ nature into account. It could also make the institutions more aware and sensitive to their duty to implement the highest standard of transparency and interpret the exceptions to public access particularly strictly when it comes to legislative documents. The Ombudsman will make a corresponding suggestion for improvement below.

<sup>29</sup> Ibid, paragraph 84. See also, Decision on how the European Commission dealt with two requests for public access to impact assessments and opinions of the Regulatory Scrutiny Board regarding the envisaged revision of the EU regulations on chemicals (REACH) and mercury (case 1053/2023/MIK), <https://www.ombudsman.europa.eu/en/decision/en/183548>, paragraphs 29-32; Decision on how the European Parliament dealt with a request for public access to a four-column document relating to trilogue negotiations in the adoption of the Digital Markets Act (case 253/2023/MIK), <https://www.ombudsman.europa.eu/en/decision/en/172851>, paragraphs 35-37.

<sup>30</sup> Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents (OI/2/2022/OAM), <https://www.ombudsman.europa.eu/fr/special-report/en/175425>.





## C. Application of the exceptions to public access to legislative documents

45. Overall, the Council and the Commission disclosed large numbers of legislative documents. Moreover, when invoking certain exceptions to public access, the Commission redacted only limited information, thereby granting wide public access to the requested documents. In particular, when invoking the protection of personal data, the Commission redacted in principle only the personal data of its staff, whereas the applicants did not express any interest in that data.

46. However, this inquiry also identified serious issues in how the Council and the Commission apply certain exceptions to refuse public access to legislative documents, which are summarised below. A more detailed assessment of how the Council and the Commission apply these exceptions is provided in the Annex.

### 1. Lack of concrete evidence of risk

47. In most of the inspected replies refusing public access in order to protect ongoing decision-making processes and legal advice, both the Council and the Commission invoke generic risks that they say would arise from disclosure of the documents in question. For example, both institutions refer to:

- challenges in reaching political agreement on legislative proposals within EU institutions and among the Member States;
- 'external pressure' exerted on the institutions;
- the need to retain an internal space for reflection;
- potential public misunderstandings that the disclosed documents might cause; and/or
- the sensitivity of the legislative proposals at stake,
- challenges in receiving objective legal advice, in the future, on legislative proposals raising legal questions.

48. The invoked generic risks constitute standard elements of any democratic law-making and the EU Courts have regularly dismissed such arguments in similar circumstances.<sup>31</sup> As such, they cannot in themselves justify non-disclosure, even more so where the documents in question are legislative in nature. If an EU institution cannot provide any concrete evidence of a specific, actual and reasonably foreseeable risk to the interests protected by the invoked exception(s), the requested documents must be disclosed.

49. The failure by the Council and Commission to provide specific examples and concrete evidence of the risk of disclosure, rather than mere generic arguments, when it

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<sup>31</sup> See, Annex.





comes to some categories of legislative documents related to ongoing decision-making processes is at odds with the applicable case-law, according to which EU institutions must carry out a specific and individual assessment of the documents requested.<sup>32</sup> The Ombudsman will make a corresponding suggestion for improvement below.

## 2. Too broad application of the commercial interest exception

50. The Commission received a substantial number of submissions from interested third parties, such as big technological companies, in the preparation of its proposal for the Digital Markets Act. The Ombudsman's inquiry demonstrated that the Commission often refused access to such submissions, invoking the exception regarding the protection of commercial interests.

51. The Ombudsman takes the view that 'lobbying', that is, the involvement of interest representatives, is an integral part of the legislative process. However, for all interest representatives to be in a position to exchange informed views during the ongoing legislative process, it is crucial that there is, to the greatest extent possible, a level-playing field in terms of access to information. The Ombudsman therefore takes the view that disclosure of submissions from third parties would allow the public - including interest representatives, but also the general public and journalists - to participate more effectively and on an equal footing in the legislative process, thereby enhancing the quality and legitimacy of that process.

52. As such, only in truly exceptional circumstances should the institutions refuse public access to submissions of third parties in the context of ongoing legislative procedures by invoking the exception for the protection of commercial interests. They cannot apply this exception to every document submitted by commercial entities. Rather, the exception should be applied only when a document's disclosure could reveal genuinely sensitive intellectual property, business secrets or financial information.

53. The Commission's practice in this regard does not seem consistent. In certain cases examined in the context of this inquiry, the redactions were limited and appeared justified to protect the companies' business secrets. However, in other cases, the Commission refused public access to entire documents in which companies expressed their views on the draft Digital Markets Act and even proposed specific amendments to it. It was not apparent that those documents contained any business strategies, know-how or other commercial secrets that would be deserving of protection under the exception invoked by the Commission.

54. In the Ombudsman's view, the institutions should ensure that, in future, third parties, who make submissions to the institutions as part of their lobbying activities concerning specific legislative files, are aware that these submissions must in principle be disclosed to the public upon request. The institutions could ask proactively any interested third parties to clearly indicate in their submissions commercially sensitive information and explain their reasons. This approach would allow the institutions to reduce the need to undertake third-party consultations in case of subsequent public access requests, thereby speeding things up, and to know, when handling public access

<sup>32</sup> Case C-57/16 P, *ClientEarth v Commission*, paragraph 120.



requests, whether the requested documents contain any commercially sensitive information. The Ombudsman will make a corresponding suggestion for improvement below.

## D. Assessment of the existence of an overriding public interest

55. In case of some of the exceptions to public access,<sup>33</sup> even if they apply, the institutions must still assess whether there exists an overriding public interest in the documents' disclosure. The institutions must carry out such an assessment on their own initiative<sup>34</sup> and, in any case, must engage with the arguments of the applicants made in this regard.

56. In the inspected replies, the Council and Commission did not tend to detail their assessment of whether or not an overriding public interest exists. The institutions merely concluded that "*no overriding public interest has been identified*". As such, it is not clear whether the institutions conducted an analysis of what the public interest in disclosure could be and, where it exists, why it did not override the interest the institutions are seeking to protect. Individuals requesting access cannot therefore scrutinise or challenge the reasons underlying the institutions' assessment. The Ombudsman will make a corresponding suggestion for improvement.

## Conclusions

The files inspected in this inquiry show that the Commission is incurring significant delays in handling requests for public access to legislative documents. The Ombudsman has dealt with this matter in her previous inquiry OI/2/2022/OAM, in which she urged the Commission to address the issue of delays as a matter of priority. These delays have particularly serious consequences when it comes to legislative documents.

The files inspected in this inquiry show that the Council and the Commission are failing to give full effect to the principle of legislative transparency, as set out in the EU Treaties, Regulation 1049/2001, and related case-law. To assist the institutions in improving their practices in that regard, the Ombudsman makes a series of suggestions below.

## Suggestions for improvement

The Council and the Commission should:

- explicitly state in their replies to public access requests whether the requested documents are 'legislative documents', to which the highest standards of transparency apply;

<sup>33</sup> This applies to the protection of commercial interests; court proceedings; the purpose of inspections, investigations and audits; the ongoing decision-making process; and the completed decision-making process. See Article 4(2) and (3) of Regulation 1049/2001.

<sup>34</sup> Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, paragraphs 49 and 67.





- promptly disclose the requested legislative documents, notwithstanding the political sensitivity of proposed legislation and even if doing so would - for example - give rise to external pressure, as these are generic elements of any democratic law-making process;
- ensure that they refuse public access to legislative documents in truly exceptional circumstances only, that is, where they identify a concrete (non-generic) risk to the interests explicitly protected, which can be demonstrated by tangible evidence; otherwise, the requested documents must be disclosed;
- demonstrate in their replies that they have carried out a genuine analysis regarding the existence of an overriding public interest in disclosure and, in any case, engage with any arguments made by the applicants in this regard,
- ensure that third parties that make submissions in the context of legislative procedures are aware that their submissions can in principle be disclosed to the public and that any commercially-sensitive information be clearly indicated in these submissions in advance, along with a clear explanation regarding why it is to be considered confidential.

The Council of the EU and the Commission shall inform the Ombudsman how they have implemented these suggestions for improvement by 3 June 2025.



Emily O'Reilly  
European Ombudsman

Strasbourg, 03/12/2024