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European Union

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| From:            | Ms Emily O'Reilly, European Ombudsman                                       |
| date of receipt: | 25 September 2023   |
| To:              | Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union |

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| Subject:        | Complaint 1834/2022/NH to the European Ombudsman<br>- Decision |

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Delegations will find in the Annex a copy of the Decision by the European Ombudsman in complaint 1834/2022/NH.

Personal data have been blanked out.



Emily O'Reilly

European Ombudsman

Received on  
25. 09. 2023

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Ms Thérèse Blanchet  
Secretary-General  
Council of the European Union

Email:



Strasbourg, 25/09/2023

Complaint 1834/2022/NH

Decision in the above case on how the Council of the European Union handled a request for public access to the legal opinion on the proposed EU directive on adequate minimum wages (your reference: 12/c/01/21)

Dear Ms Blanchet,

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:

The Council has reacted positively to the Ombudsman's recommendation and granted full public access to the document at issue. However, since the Council maintains its position that disclosure of the document at the time of the adoption of the confirmatory decision, when the legislative procedure was still ongoing, was not possible, the Ombudsman confirms her finding of maladministration. The Ombudsman calls - again - on the Council to grant the widest possible access to legislative documents at a time that will allow the public to participate effectively in legislative procedures.

Yours sincerely,



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Enclosure:

- Decision on complaint 1834/2022/NH



Emily O'Reilly

European Ombudsman

## Decision

on how the Council of the European Union handled a request for public access to the legal opinion on the proposed EU directive on adequate minimum wages (case 1834/2022/NH)

*The case concerned a request for public access to an opinion of the legal service of the Council of the EU on a draft law on adequate minimum wages.*

*The Council granted the complainant access to parts of the opinion in May 2021. It invoked two exceptions under the EU legislation on public access to documents to justify redacting the remaining parts of the document, arguing that full disclosure could undermine the decision-making process (since negotiations on the law were still ongoing at the time) and the protection of legal advice.*

*The Ombudsman found that the Council's refusal to grant full public access to the legal opinion at the time of the confirmatory decision constituted maladministration. She made a recommendation that the Council grant full public access to the opinion.*

*In reply to the Ombudsman's recommendation, the Council disclosed the document. However, it maintained its position that the document should not have been disclosed earlier and that its confirmatory decision was correct at the time it was adopted. The Ombudsman closed the inquiry, confirming her finding of maladministration.*

*She called again on the Council to grant the widest possible access to legislative documents at a time that will allow the public to participate effectively in EU law making.*

## Background to the complaint

1. The complainant, a Swedish journalist, made a request for public access<sup>1</sup> to an opinion by the legal service of the Council of the EU on a legislative proposal for a directive on minimum wages.<sup>2</sup> He made his request in March 2021, when the negotiations on the directive were still ongoing between the EU co-legislators.

<sup>1</sup> Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049>

<sup>2</sup> The European Commission published a proposal for a directive on adequate minimum wages in the EU in October 2020 (document COM/2020/682 final). After two years of negotiations between the European Parliament and the Council, the directive was approved by both co-legislators, with the Council adopting the final text on 4 October 2022: <https://www.consilium.europa.eu/en/press/press-releases/2022/10/04/council-adopts-eu-law-on-adequate-minimum-wages/>

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2. The Council disclosed only a very limited part of the opinion.<sup>3</sup> It argued that full disclosure would undermine the protection of legal advice and the ongoing decision-making process.<sup>4</sup>

3. The complainant turned to the Ombudsman in October 2022, after the directive had been adopted.

## The inquiry

4. The Ombudsman opened an inquiry into the Council's refusal to grant full public access to the opinion at the time the confirmatory decision was adopted. In the course of the inquiry, the Ombudsman inquiry team inspected the document at issue.

## The Ombudsman's recommendation

5. The Ombudsman recalled that, under the EU Treaties, citizens have the right to participate in the democratic life of the Union, which means that EU decisions should be taken as openly and as closely as possible to the citizens. EU case law has confirmed that the possibility for citizens to scrutinise all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights.

6. The Ombudsman took the view that the Council had not demonstrated how disclosure of the document would undermine its decision-making process or its capacity to seek and obtain frank, objective and comprehensive advice.

7. In particular, the legal opinion examines whether the Commission chose the appropriate legal basis for the proposal for the directive on minimum wages. The Ombudsman considered that such an examination is a standard and expected question in almost every legislative process, which means that, contrary to what the Council argued, the content of the opinion was not "*particularly sensitive*".

8. The Ombudsman noted that legislative proposals are designed to be debated, in particular as regards the choice of legal basis. Transparency of the choice of legal basis does not weaken the decision-making process, but strengthens it.

9. The Ombudsman was also not convinced by the Council's argument that the disclosure of the content of the legal advice would prevent the Council from defending its position in any potential litigation before the EU courts. In particular, the Council had argued that, in view of the discussions and concerns expressed by several Member States, some Member States might challenge the act. In this respect, the Ombudsman noted that the Member States already had access to the requested document: opinions by the Council legal service are distributed to the Member States' representatives.

<sup>3</sup> The document partially disclosed on 31 May 2021 is available here: <https://data.consilium.europa.eu/doc/document/ST-8817-2021-INIT/en/pdf>

<sup>4</sup> In accordance with Article 4(2), second indent, and Article 4(5) of Regulation 1049/2001.

10. The Ombudsman further considered that it was difficult to understand how disclosure could have put the Council legal service at risk of undue external pressure.

11. In light of the above, the Ombudsman found that the Council's refusal to grant full public access to the legal opinion at the time of the confirmatory decision constituted **maladministration**. She made the following recommendation:

**The Council should grant full public access to the opinion of its legal service.**

In addition, the Ombudsman again called on the Council to make sure that, in future requests concerning public access to documents related to the legislative process, the widest possible access is granted while negotiations are ongoing. Timely access to legislative documents is crucial for citizens to exercise their Treaty-based right to participate in the democratic life of the Union.

## The Council's reply to the Ombudsman's recommendation

12. In reply<sup>5</sup> to the Ombudsman's recommendation, the Council gave full public access to the legal opinion in question.

13. The Council explained that, at the time of the confirmatory decision, the Council had based its refusal to disclose the document on the need to protect an ongoing decision-making process. At that time, the preparatory bodies of the Council had just started debating the Commission's proposal for a directive. The Council insisted that a premature disclosure of the document to the public would have entrenched delegations' positions and seriously undermined the ability of the institution to reach an agreement on this file. Since then, the political negotiations have resulted in the adoption of Directive 2022/2041, which means that the decision-making process no longer requires protection.

14. In this regard, the Council also took into account a recent judgment of the Court of Justice of the European Union concerning a similar document.<sup>6</sup>

15. The Council said that it had also refused disclosure of the document based on the need to protect the legal advice. At the time of the adoption of the confirmatory decision, the Council had argued that the risk of litigation was significant. The Council noted that a Member State had, since then, brought an action for annulment of the directive on adequate minimum wages before the Court of Justice of the EU.<sup>7</sup> However, after having assessed the document, the Council concluded that full disclosure of the requested opinion would not compromise the equality of arms in the context of these proceedings nor undermine the ability of the Council to defend its position in these proceedings.

<sup>5</sup> In accordance with Article 4(2) of the Statute of the European Ombudsman.

<sup>6</sup> Judgment of the Court of 8 June 2023, *Council of the European Union v Laurent Pech*, case C-408/21 P, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0408>. The case concerns the interpretation of Article 4 of Regulation 1049/2001 regarding public access to Council legal opinions in legislative procedures. It confirms the previous ruling by the General Court in 2021 (*Pech v. Council*, case T-252/19), against which the Council appealed. The previous ruling had found that none of the grounds relied on by the Council in support of its refusal to grant full access to an opinion by its legal service was well founded.

<sup>7</sup> See the action brought on 18 January 2023 – *Kingdom of Denmark v European Parliament and Council of the European Union*, Case C-19/23, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-19/23>.

16. The Council therefore decided, in accordance with the Ombudsman's recommendation, to grant full access to the requested document.

## The complainant's comments on the Council's reply

17. The complainant noted that the Council failed to recognise that it should have disclosed the document when the Legal Service finalised it in 2021. Instead, the Council disclosed the document because of a change of circumstances, namely the conclusion of the decision-making process in question.

18. The complainant contended that the Council's decision to publish the document because the minimum wage directive had already been adopted means that the public had been prevented from participating in the debate on the legal basis of the directive under the same conditions as the politicians involved.

19. The complainant expressed his concerns that the Council would not change its behaviour for the future.

## The Ombudsman's assessment

20. The Ombudsman welcomes the Council's decision to grant full public access to the opinion at issue.

21. The Ombudsman notes, however, that the Council maintains its position that, at the time of the adoption of its confirmatory decision, it was justified in refusing access to the requested document. The Ombudsman agrees with the complainant that the Council's reply to her recommendation failed to acknowledge that it should have disclosed the document sooner, while the legislative process was still ongoing.

22. The Ombudsman reiterates her view that the grounds on which the Council based its decision to refuse access to the relevant legislative documents, at the time of the adoption of its confirmatory decision, were not convincing.

23. The Ombudsman recalls that *timely* access to legislative documents, which include documents produced by the legal services of the institutions relating to a legislative procedure,<sup>8</sup> is crucial for citizens to exercise their Treaty-based right to participate in the democratic life of the Union. In the case of documents forming part of a legislative process, the exceptions in Article 4 of Regulation 1049/2001 must be interpreted and applied all the more strictly; access to such documents can only be refused "*in duly justified cases*".<sup>9</sup>

24. The Ombudsman, once again, calls on the Council to make available legislative documents at a time that will allow the public to participate effectively in the ongoing decision-making process.

<sup>8</sup> See judgment of the Court of Justice of 8 June 2023, *Council v Pech*, C-408/21 P, paragraphs 92 and 93; available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0408>

<sup>9</sup> See judgment of the General Court of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, paragraph 112, available at <https://curia.europa.eu/juris/liste.jsf?num=T-540/15>

25. The Council's position is particularly concerning given the recent judgment of the Court of Justice in the *Council v Pech* case. In this judgment, the Court reiterated its position that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's Legal Service relating to a legislative process. In particular, the Court stated that the mere fact that an opinion of the Council legal service was drawn up at an early stage of the decision-making process at issue is not capable of justifying the application of the exception for the protection of an ongoing decision-making process. Similarly, the mere possibility that interested parties may influence the procedure is not sufficient to prove that disclosure of a requested document would seriously undermine that decision-making process.<sup>10</sup>

26. In light of the above, the Ombudsman confirms her finding of maladministration in this case.

## Conclusion

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

The Council has reacted positively to the Ombudsman's recommendation and granted full public access to the document at issue. However, since the Council maintains its position that disclosure of the document at the time of the adoption of the confirmatory decision, when the legislative procedure was still ongoing, was not possible, the Ombudsman confirms her finding of maladministration. The Ombudsman calls - again - on the Council to grant the widest possible access to legislative documents at a time that will allow the public to participate effectively in legislative procedures.

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



Emily O'Reilly  
European Ombudsman

Strasbourg, 25/09/2023

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<sup>10</sup> See paragraphs 42, 81 and 88 of the *Council v Pech* judgment.