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European Union

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COVER NOTE

From: Ms Emily O'REILLY, European Ombudsman
date of receipt: 2 October 2023
To: Ms Thérèse BLANCHET, Secretary-General of the Council of the
European Union

Subject: Own initiative inquiry OI/4/2023/MIK from the European Ombudsman

Delegations will find in the Annex a copy of a letter from the European Ombudsman to the Secretary-General of the Council of the European Union concerning the own initiative inquiry OI/4/2023/MIK.

Personal data have been redacted.

E-MAIL



Emily O'Reilly
European Ombudsman

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03-10-2023

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02. 10. 2023

Thérèse Blanchet
Secretary-General
Council of the European Union

Strasbourg, 02/10/2023

OI/4/2023/MIK

Subject: 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,

Timely public access to legislative documents is essential for interested individuals and organisations to participate effectively in EU law making. The principle of legislative transparency is enshrined in the EU Treaties¹ and is reflected in the EU legislation on public access to documents. Regulation 1049/2001 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.² According to EU case-law, EU institutions can refuse to disclose legislative documents only exceptionally. In such cases, their reasoning must be sufficiently specific and based on tangible elements.³

I continue to receive complaints about insufficient and delayed public access granted to legislative documents held by the European Parliament, the Council of the EU and the European Commission. The cases I deal with suggest that the institutions are not yet giving full effect to the above EU law and related case-law.

I am aware of the large number of access requests the European Parliament, the Council of the EU, and the European Commission receive every year and that this number has been increasing. The complaints that my Office receives constitute a limited sample of

¹ Article 15 TFEU.

² 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>

³ Judgment of 25 January 2023, Case T-163/21, *De Capitani v Council*,
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=269684&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3531724>

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cases only and, by definition, indicate problems that applicants have faced. They do not necessarily therefore reflect how the institutions implement Regulation 1049/2001 overall.

That said, the complaints⁴ that reach my Office continue to raise concerns about refused access to legislative documents, the extent of redactions in the requested documents, inadequate reasoning in the institutions' decisions and/or the time taken to deal with the requests, which, by their very nature, are time-sensitive.

I have therefore decided to open an inquiry on my own initiative - addressing the European Parliament, the Council of the EU, the European Commission in parallel - in an effort to secure systemic improvements in this hugely important area. In particular, this inquiry will focus on how the three EU institutions handle requests for public access to legislative documents.⁵

As a first step in this inquiry, I consider that it would be useful if the Council could provide my Office with the information set out in Annex 2 to this letter. I would be grateful to receive this information by 30 November. I am making the same request to the European Parliament and the European Commission.

Based on this information, my Office will select a sample of administrative files relating to requests for public access to legislative documents the three institutions received.

Should your staff have any queries, or any difficulties in retrieving the requested information, they may contact the responsible inquiries officer, [REDACTED], [REDACTED], [REDACTED].

Yours sincerely,



Emily O'Reilly
European Ombudsman

⁴ Annex 1 to this letter lists these complaints.

⁵ See previous own initiative inquiries on this matter: OI/2/2017/TE on the transparency of the Council legislative process (special report), <https://www.ombudsman.europa.eu/en/special-report/en/94921> and OI/8/2015/JAS on the transparency of trilogues, <https://www.ombudsman.europa.eu/en/decision/en/69206>



Annex 1 - List of examples of recent complaints to the Ombudsman concerning public access to EU legislative documents

- The European Parliament
 - Case 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, <https://www.ombudsman.europa.eu/en/case/en/63316>.
- The Council of the EU
 - Case 360/2021/TE regarding the Council of the EU's refusal to provide full public access to documents related to trilogue negotiations on motor vehicle emissions, <https://www.ombudsman.europa.eu/en/case/en/58819>.
 - Case 717/2021/SF on the refusal by the Council of the EU to give full public access to a legal opinion related to the EU trade agreement with the United Kingdom, <https://www.ombudsman.europa.eu/en/case/en/59170>.
 - 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>.
 - 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 1703/2021/AMF on the Council of the EU's refusal to give public access to documents concerning the ongoing negotiations on the taxation of digital services, <https://www.ombudsman.europa.eu/en/case/en/60163>.
 - 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/62606>.
- The Commission
 - Case 1053/2023/MIK regarding the failure by the European Commission to take a final decision within the applicable time limit on two requests for public access to the impact assessments and opinions of the Regulatory Scrutiny Board regarding the envisaged revision of REACH and the Mercury Regulation, <https://www.ombudsman.europa.eu/en/opening-summary/en/171657>.



Annex 2 - Request for information

First, please provide statistical information concerning all *initial* applications for public access to any documents drawn up or received in the course of the procedures within your institution (including to correspondence, minutes of meetings, impact assessment documents, working documents, amendments, reports, four-column documents, legal opinions and any other documents) leading to the adoption of the following acts:

- The Digital Markets Act,⁶
- The Revision of the Emissions Trading Scheme Directive,⁷
- The Minimum Wage Directive.⁸

The information should include:

- the number of initial applications for public access to legislative documents concerning the above files;
- the number of initial decisions and in how many cases the Commission (a) refused access, (b) granted partial access, (c) granted full access; as well as
- the average and median time taken to process the applications.

Please exclude from the above statistics those applications for public access that concerned exclusively documents that were publically available already.

Second, please provide lists of all *confirmatory* applications for public access to any documents drawn up or received in the course of the procedures within your institution leading to the adoption of the three abovementioned legislative acts.

Please include in the lists information about the type of the requested documents (such as 'correspondence between...', 'minutes', 'impact assessment report', 'legal opinion'), the dates of the confirmatory applications and confirmatory decisions, and information about the outcome of the decision (non-disclosure confirmed, partial disclosure confirmed, wider access granted, full access granted).

⁶ 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>

⁷ 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>

⁸ 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>