The European Ombudsman’s role in access to documents

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Abstract
The right of public access to EU documents was formally established 30 years ago, and given widespread effect through legislation in 2001. The European Ombudsman is a redress mechanism for those seeking access to EU documents. Together with the Court of Justice, the Ombudsman has helped to define how this right can be exercised and set best practice for the EU administration in dealing with access to documents. In doing so, the Ombudsman has helped to develop how this crucial right is used to make EU decision making more transparent. The Ombudsman encourages the EU institutions to take a more proactive approach to transparency.

Keywords European Ombudsman · EU Ombudsman · Access to documents · Public access · Transparency · Freedom of information · Regulation 1049/2001 · Aarhus Convention
1 Introduction

1.1 The European Ombudsman

The Maastricht Treaty created the concept of EU citizenship in 1992. The Treaty established certain rights, freedoms and legal protections that apply to the citizens of all EU Member States. Along with EU citizenship, the Maastricht Treaty also established the European Ombudsman as a body to which EU citizens could turn when they encounter problems with the administrative work of EU institutions.

The European Ombudsman ensures that the EU administration adheres to the highest standards of transparency, ethics and accountability. The Ombudsman is elected by the European Parliament for a five-year term and the current Ombudsman, Emily O’Reilly, was re-elected in 2019. The Ombudsman handles complaints from citizens and EU residents and proactively looks into systemic issues with the EU administration by opening own-initiative inquiries and strategic initiatives.

The Ombudsman’s assessment goes beyond that of a court, not only verifying the legality of institutions’ actions, but also verifying if they comply with the principles of good administration, which is a broader concept. At essence, it implies that EU institutions should act in the most citizen-friendly way, be reasonable and proportionate in their decisions, and clearly explain their actions.

While the Ombudsman’s decisions and recommendations are not binding, there is a high rate of acceptance by the institutions. There are various reasons for this, including the growing awareness of the Ombudsman’s Office and the consequent reputational issues for non-compliance, but also the non-adversarial way in which the Ombudsman tries to resolve complaints. At the same time, by drawing public attention to a particular issue, the Ombudsman’s findings will often achieve gradual improvements over longer periods of time. More generally, the Ombudsman’s findings set the standards for good administration and serve as a reference for the EU administration on how to operate to the highest standards.

1.2 Ombudsman inquiries and court proceedings – what is the difference?

The Ombudsman and the Court of Justice of the EU (CJEU) have overlapping fields of activity, though the Court’s mandate is significantly broader in substance. Often, individuals have the choice between the CJEU and the Ombudsman to remedy the problem they are facing. However, there are fundamental differences between bringing a legal challenge to the court and submitting a complaint to the Ombudsman.

Despite the fact that the Ombudsman’s findings are not binding, there are different advantages that may lead an individual to make a complaint to the Ombudsman rather than initiating legal proceedings:

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1This concept is now codified in Art. 20 of Treaty on the Functioning of the European Union (TFEU).
2The Code of Good Administrative Behaviour, drawn up by the European Ombudsman, sets out the principles of good administration for the EU administration and serves as a benchmark for Ombudsman inquiries: https://www.ombudsman.europa.eu/en/publication/en/3510.
3See European Ombudsman – Annual Report 2021, point 6.5.2. https://www.ombudsman.europa.eu/en/publication/en/156017.
• Unlike with a legal action, complainants turning to the Ombudsman do not have to have standing, that is, they do not have to have been directly affected by the issue. Instead, any EU citizen or any natural or legal person residing or having their registered office in a Member State can complain to the Ombudsman about instances of maladministration.

• There is no financial risk. While a lost court case may require the losing party to bear the cost of the successful party, an Ombudsman’s inquiry does not entail any cost to the complainant (or to the institution).

• The Ombudsman’s inquiries are typically much shorter than court proceedings, allowing complaints to be resolved in a matter of months rather than years.

• While a court assesses compliance with the applicable law exclusively, the Ombudsman’s inquiries take a wider look, not only verifying the legality of institutions’ actions, but also verifying if they comply with the principles of good administration.

1.3 The Ombudsman’s role concerning public access to documents

Committing to high transparency standards and proactively making information public is essential to the credibility of and trust in public administrations in general. Given the perceived distance from the public of policy and law making in the EU, transparency is all the more important. Proactively publishing and granting timely access to documents can help improve public awareness of and support for the EU institutions. It is also essential for enabling citizens to exercise their Treaty-based right to participate in the democratic processes of the EU.

The Maastricht Treaty was also the first treaty to mention transparency and public access to information at EU-level, although it took almost another decade until more widespread formal rules and mechanisms regarding access to EU documents were established. The overarching EU legislation on public access to EU documents, Regulation 1049/2001, was adopted and entered into force in 2001.

Today, the right of public access to EU documents is firmly established. While there is a general right of public access to all documents held by the EU institutions, this is subject to a limited number of exceptions, set out in Regulation 1049/2001. Institutions can invoke these exceptions to justify withholding access to documents or parts thereof. While most EU institutions, bodies, offices and agencies apply Regulation 1049/2001, some, such as the European Central Bank, have their own internal rules, which may include different exceptions.

If an institution has rejected a request fully or partially, or if it has failed to reply within the deadlines foreseen in Regulation 1049/2001, applicants can turn to the European Ombudsman. They can argue that the exceptions invoked do not apply or

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4 Declaration 17 on the Right to access to information.
5 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.
6 According to Art. 8 of the Regulation 1049/2001, “failure by the institution to reply within the prescribed time limit shall be considered as a negative reply”.
7 See Art. 8(3) of Regulation 1049/2001.
that there is an overriding public interest in the document(s) being disclosed. They may also turn to the Ombudsman where the institution does not reply to their request within the applicable deadlines.

The Ombudsman conducts an independent review of the institution’s decision, in most cases after having inspected the documents in question. The particular steps that the Ombudsman may take during an inquiry include reviewing the information provided, as well as asking an institution to meet and/or provide observations on the case, and inspecting the document(s) at issue. On this basis, the Ombudsman assesses whether the institution handled the request in a manner that was reasonable, and that its decision was justified.

Access to documents is a very important field of activity for the Ombudsman’s Office. In recent years, one quarter of the Ombudsman’s inquiries concerned access to documents and transparency.\(^8\) Since 2001, the Ombudsman has opened around 700 inquiries into cases concerning access to documents.

Regulation 1049/2001 sets relatively short deadlines for institutions to reply to requests for access to documents. These short deadlines for institutions are important because, often, access to documents is time-sensitive, in particular for journalists and researchers. The Ombudsman therefore believes that “access delayed is access denied”.\(^9\)

In 2018, the Ombudsman put in place a dedicated Fast-Track procedure\(^10\) for dealing with such complaints. This procedure aims to provide an assessment in ‘access to documents’ inquiries within 40 working days from when the complaint was received. To achieve a speedy resolution, the Ombudsman heavily depends on the institutions’ cooperation in providing her the documents in question and replying to her questions.

Since the introduction of the Fast-Track procedure, the annual amount of complaints concerning access to documents has almost doubled.\(^11\) An internal review of the Fast-Track procedure in 2021 showed that, while there is room for improvement, the procedure has significantly reduced processing times for complaints to the Ombudsman in public access cases.\(^12\)

Beyond the outcome of specific inquiries, the Ombudsman’s work in this area also aims to bring about systemic change, increasing proactive compliance with EU rules on public access to documents and, in general, ensuring a more proactive approach to transparency. While the Ombudsman’s recommendations are not binding, her inquiries can have a wider impact, leading to positive outcomes after an inquiry has been closed.

Some of the Ombudsman’s proposals are far-reaching, involve significant efforts and may imply reforming procedures and practices that have been in place for decades. In other instances, ongoing external momentum after an inquiry has closed may lead, at a later stage, to changes even though the institution may have responded negatively to a proposal while the inquiry was ongoing.

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\(^{8}\) https://www.ombudsman.europa.eu/en/publication/en/156017.

\(^{9}\) https://www.ombudsman.europa.eu/en/speech/en/142211.

\(^{10}\) See https://www.ombudsman.europa.eu/en/access-to-documents/fast-track.

\(^{11}\) https://www.ombudsman.europa.eu/en/document/en/138509.

\(^{12}\) https://www.ombudsman.europa.eu/en/document/en/138509.
EU case-law serves as important guidance for the Ombudsman’s work on access to documents. However, despite the large amount of case-law, the Ombudsman often receives complaints about novel issues and has produced a body of case-work (or ‘ombudspudence’) that defines what the Ombudsman considers to be good administration in the field of access to documents.

2 Select cases

The following sample of inquiries gives an overview of the Ombudsman’s different fields of activity in access to documents.

2.1 Transparent decision making

2.1.1 Transparency of the Council of the EU

Making the legislative process more transparent is an important way to strengthen public trust in the EU and its institutions. It allows citizens to follow and participate in the process of European law making, which is often perceived as remote and bureaucratic.

The lack of transparency in the Council’s work can be seen as one of the drivers of a ‘blame Brussels’ culture, in which governments often take the credit for popular EU decisions, but blame the EU for unpopular decisions which they themselves agreed to as part of the EU.

In recent years, the Ombudsman conducted various inquiries into transparency issues in the Council.

Transparency of Council preparatory bodies

In the context of an important own-initiative inquiry, the Ombudsman systematically reviewed the transparency of Council preparatory bodies, notably working parties. She found that the identities of Member State governments expressing positions were often not recorded and not systematically published (in a timely manner). Instead, many documents from these bodies were marked as ‘LIMITÉ’, meaning they should remain internal to the Council and not be disclosed or published.

The Ombudsman stressed that there should be the widest possible, direct access to EU legislative documents. She said that the Council should

- Systematically record the identity of Member State governments when they express positions in Council preparatory bodies;
- Develop clear and publicly-available criteria for how it designates documents as ‘LIMITÉ’, in line with EU law; and

13 OI/2/2017/TE https://www.ombudsman.europa.eu/en/decision/en/94896.
14 For the principle on the widest possible public access, see Joint Cases C-39/05 P and C-52/05 P Sweden and Turco v Council, EU:C:2008:374, para. 34 and Case C-280/11 P Council v Access Info Europe, EU:C:2013:671, para. 27.
• Systematically review the ‘LIMITE’ status of documents at an early stage, before the final adoption of a legislative act.

The Ombudsman issued a Special Report to the European Parliament in this case. The Parliament endorsed the Ombudsman’s findings.

The Ombudsman’s inquiry also focused wider public attention on the issue. This has helped sustain the momentum for change.

In 2020, under the German Presidency of the EU, the Council published a note on ‘Strengthening legislative transparency’ that announced the publication of more types of documents, including agendas of preparatory bodies and certain positions of the Council.

While this was progress, the Council still does not proactively and systematically publish many legislative documents while the legislative process is ongoing. It also does not systematically record the identity of Member States when they express positions in preparatory bodies. Nor does it publish working papers from Council working parties. It periodically publishes lists of working (WK) documents, but these documents are not directly accessible via the Council public register.

**Transparency of ‘trilogue’ legislative negotiations**

Trilogues are informal negotiations between representatives of the European Parliament, the Commission and the Council on EU legislation. During a trilogue, the Parliament and the Council try to agree a common text before voting on it using the formal legal procedure. Trilogues are used to reach agreement most EU legislative files.

While they are a very effective way of reaching agreements between the co-legislators, trilogues are less transparent than other parts of the EU legislative process.

The Ombudsman conducted an inquiry into the transparency of trilogues. In her decision, she said that citizens must be in a position to scrutinise their elected representatives during this key part of the legislative process. Citizens also require information on the topics under discussion during trilogues to be able to participate effectively in the legislative process.

While she found that trilogues were already more transparent than in the past, she proposed that the institutions should proactively publish more information, such as meeting dates, general agendas, documents showing the initial position of institutions and the compromise text (‘four-column documents’), and lists of the political decision makers involved. The CJEU has also since urged greater transparency concerning the four-column documents.

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15 When an EU institution fails to implement the Ombudsman’s recommendations, she can make a ‘special report’ on the issue to the European Parliament.
16 https://data.consilium.europa.eu/doc/document/ST-9493-2020-INIT/en/pdf.
17 For more information see the European Parliament’s Briefing on informal trilogues, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690614.
18 OI/8/2015/JAS https://www.ombudsman.europa.eu/en/decision/en/69206.
19 After the Ombudsman’s inquiry, the European Court of justice also dealt with trilogue transparency in its De Capitani ruling Case T-540/15 De Capitani v Parliament, EU:T:2018:167. It found that the work of
The Council replied that it would work on a ‘one stop shop’ platform for legislative proposals together with the other institutions where such documents could be published. So far, this platform has not been set up, but there is political agreement between the institutions on its establishment, and the EU Publications Office has now been given the task.

**Fishing quotas**

The Ombudsman also carried out an inquiry\(^{20}\) following a complaint from an environmental organisation concerning access to documents held by the Council relating to the process for adopting the annual regulation on total allowable catches of certain fish stocks in the EU. The Ombudsman found that the Council (a) fails to record the positions of Member State governments as expressed in Council ‘preparatory bodies’ or in meetings of the ministers, (b) failed to provide timely access to legislative documents, proactively and upon request, and (c) has in place an incomplete register of documents.

The Council argued that releasing the documents in question could seriously undermine the decision-making process. It would limit Member States’ possibility to discuss in serenity and agree, which would run counter to the efficiency of the decision-making process. Those involved in the decision-making process would be subject to significant external pressure due to the important economic and environmental interests at stake.

The Ombudsman disagreed: In summary, she found that more openness would actually strengthen the decision-making process rather than weakening it. As both legislative documents and environmental information are subject to broader transparency,\(^{21}\) she recommended that the Council should proactively publish documents related to the matter.

The Council chose not to follow the Ombudsman’s recommendation. The Ombudsman therefore confirmed her finding of maladministration, expressing disappointment that the Council did not follow her recommendation.

**2.1.2 Transparency of the European Commission**

Another high profile access to documents case\(^{22}\) concerned the Commission’s refusal to grant public access to documents containing the positions taken by Member States in the regulatory committee responsible for the risk assessment of pesticides. The complainant sought access to the positions taken by Member States in the process of adopting a guidance document on the risk assessment on how pesticides affect bees. The trilogues constitutes a decisive stage in the legislative process and that trilogue documents should, in principle, be accessible on request.

\(^{20}\)640/2019/TE [https://www.ombudsman.europa.eu/en/case/en/54526](https://www.ombudsman.europa.eu/en/case/en/54526).

\(^{21}\)According to Art. 12 of Regulation 1049/2001 and Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13.

\(^{22}\)2142/2018/EWM [https://www.ombudsman.europa.eu/en/decision/en/122313](https://www.ombudsman.europa.eu/en/decision/en/122313).
In the course of the inquiry, the Ombudsman found that the Commission was wrong to refuse access to the documents in question and recommended that it grant access. She considered that the documents at issue should, in view of the context in which they were drawn-up and their purpose, be considered to be ‘legislative documents’, to which wider access should be granted, in accordance with Regulation 1049/2001. Wider access to such documents is crucial to ensure that EU citizens can scrutinise and be aware of the information forming the basis for legislative action and, thus, is a precondition for the effective exercise of citizens’ democratic rights. The fact that the documents also related to the protection of the environment only strengthened the case for disclosure (as noted in relation to the previous inquiry). While the Commission did not accept the Ombudsman’s recommendation, the inquiry received wide public support.

2.1.3 Transparency of other decision-making bodies and agencies

European Insurance and Occupational Pensions Authority board of supervisors

The Ombudsman looked into the question of public access to documents related to decisions taken by the board of supervisors of the European Insurance and Occupational Pensions Authority (EIOPA).23

One of EIOPA’s tasks is to develop ‘draft regulatory technical standards’ (draft RTSs), which further develop, specify and/or determine rules set out in legislation concerning the insurance and pensions sector. Draft RTSs are subsequently adopted by the European Commission as ‘regulatory technical standards’ in the form of a delegated act.

A journalist had requested access to the voting results of EIOPA’s board of supervisors, which is comprised of representatives of national supervisory authorities, notably related to a decision on a specific draft RTS, along with certain preparatory documents. After EIOPA had refused access, he brought the matter to the Ombudsman.

EIOPA argued that disclosure could lead to undue external influence and there needed to be a safe space for board members to act independently and objectively.

The Ombudsman found that public disclosure of the requested documents would be likely to “enhance the democratic nature of the EU by enabling the public, including the complainant, to scrutinise the reasons put forward by national supervisory authorities for their vote on the draft RTS in question”. She also found that because the term ‘legislative document’ should be understood in a broad way,24 the documents in question were legislative in nature and were therefore subject to broader transparency requirements.

After the Ombudsman sent her analysis to EIOPA, EIOPA provided access to the documents in question.

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23 1564/2020/TE https://www.ombudsman.europa.eu/en/case/en/57775.
24 See also the judgement in case C-57/16 ClientEarth v Commission, EU:C:2018:660, para. 86.
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European Banking Authority board of supervisors

The Ombudsman also looked into the question of public access to documents related to decisions taken by the board of supervisors of the European Banking Authority (EBA).\(^{25}\)

The complainant sought public access to documents showing details of the votes of the EBA’s board of supervisors concerning an investigation in which it found that national authorities had breached EU law (‘BUL recommendations’) with respect to the supervision of two specific banks. The EBA refused access to the documents in question. In doing so, it invoked an exception provided for under the EU’s rules on public access to documents, arguing that releasing these documents would seriously undermine its decision-making process and that there is no overriding public interest in disclosing the documents.

Based on her inquiry, the Ombudsman sent a preliminary assessment to the EBA, setting out her findings. In particular, the Ombudsman considered that the EBA did not provide sufficient reasons for refusing access, and should have disclosed the voting records. She also found that a practice of proactive transparency should apply to BUL recommendations, as applies to EU law making in general.

In reply, the EBA agreed to publish documents related to the two decisions at issue in this case. The Ombudsman welcomed this and encouraged the EBA to do so proactively in future.

The preliminary assessment also assessed the decision-making procedure for BUL recommendations, and provisions for preventing conflicts of interest. The Ombudsman took the view that board members should not vote on whether the EBA should issue a BUL recommendation concerning their own respective supervisory authorities, as had happened in the votes at issue in this case. However, as the EBA had since adopted new internal rules for the board that cover conflicts of interest, which appear to address this issue, the Ombudsman considered that no further inquiries were justified into this aspect of the inquiry.

2.2 Public access to new forms of communication

In the 20 years since the EU transparency regulation was adopted, the working methods of EU institutions have changed drastically, notably through digitalisation and the use of new forms of communication. E-mail has become the norm, but also other new forms of communication, including text messages, instant messages and social media are used in the EU institutions. Regulation 1049/2001 explicitly states that “any content, whatever its medium” is considered to be a ‘document’, as long as it concerns the institutions’ work. The Ombudsman considers that this definition allows for new forms of communication to be also subject to requests for public access to documents, and ensures that the rules on public access are not restricted by the format of a document or technological advances in communications. The Court’s notion of what can be considered a document is also broad.\(^{26}\)

\(^{25}\) 615/2021/TE https://www.ombudsman.europa.eu/en/case/en/59077.

\(^{26}\) See as an example Case T-221/08, Strack v Commission, EU:T:2016:242, para. 250.
However, practical questions arise. Does an institution hold a message that is on a cloud-based server belonging to a private company? How can institutions retain messages sent through private devices? Which messages need to be recorded and how is this done in practice? How can public access be provided?

EU institutions have to develop internal rules and practices, as well as technical solutions, to keep up with the developments.

2.2.1 General approach of the EU administration concerning access to text and instant messages

The Ombudsman is currently carrying out an initiative concerning what measures EU institutions, bodies, offices and agencies have in place for documenting work-related text and instant messages. In a letter to the Commission, Council, Parliament, European Chemicals Agency, European Food Safety Authority, European Medicines Agency, the European Border and Coast Guard Agency (Frontex) and the European Central Bank, the Ombudsman noted that any decision to record information in the administration’s document management system should be dependent on its content and not on its format. She asked them to detail the measures they have in place concerning such messages. Once she has analysed the replies of the institutions, the Ombudsman plans to draw up a list of good practices on the issue.

2.2.2 Text messages sent by the European Council President

The Ombudsman also carried out an inquiry following a complaint about a request for public access to text messages and other mobile phone-based communications sent by – or on behalf of – the President of the European Council in 2018. The Council had refused this request and stated that it did not hold any documents matching the description in the complainant’s request.

The Council did not deny that such text messages may have been exchanged in the past but said that, in order to be considered a document, a text message must not be short-lived but substantive. It further said that it was not the practice of the President to exchange significant information via instant messages about matters falling within his sphere of responsibility.

In her decision, the Ombudsman set out the view that text and instant messages are covered by the rules on public access to documents, but also recognised that access could be provided only if the institution had retained text and instant messages, which had not been the case here. She considered that the complainants had not provided compelling arguments or evidence to overturn the presumption of legality established by EU case-law, of the Council’s statement that it does not hold the relevant documents.

As this was a novel issue with no precedent, the Ombudsman found that there was no maladministration by the Council in denying public access based on the ground

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27 SI/4/2021/MIG https://www.ombudsman.europa.eu/en/case/en/59322.
28 1219/2020/MIG https://www.ombudsman.europa.eu/en/case/en/57432.
29 See, for example, judgment in case T-468/16 Verein Deutsche Sprache v Commission, EU:T:2018:207, para 35.
that it does not hold relevant documents. She noted however that EU institutions should make every effort to reflect the reality of modern communications, and the increased use of text and instant messaging, in their document management rules and practices.

2.2.3 Text messages sent by the Commission President

In 2021, the Ombudsman received a similar complaint from a journalist who sought access to text messages that Commission President Ursula von der Leyen had allegedly exchanged with the CEO of Pfizer, a pharmaceuticals company, along with related documents. This request was triggered by an article by The New York Times, which reported that the Commission President and CEO had exchanged text messages and calls related to the procurement of COVID-19 vaccines.

While the Commission gave access to some related documents, similar to the Council in the above case, it said that it could not provide access to any text messages.

In the context of the Ombudsman’s inquiry, it emerged that the Commission does not consider that text messages generally fall under its internal criteria for document recording, due to the ‘short-lived’ nature of their content. In dealing with the request, the relevant operating entity in the Commission had asked the Commission President’s personal office (cabinet) to identify only documents that fulfil its recording criteria. As such, the Commission President’s cabinet was not required to identify any text messages that had not been registered, and the Commission therefore did not assess whether such messages should be disclosed.

The Ombudsman considered that this constituted maladministration. To address this, she made a recommendation that the Commission ask the Commission President’s personal office to search again for relevant text messages, making it clear that the search should not be limited to registered documents or documents that fulfil its recording criteria. Should the Commission have identified any text messages, she added that the Commission should assess whether the complainant could be granted public access to them.

In its reply to the recommendation, the Commission acknowledged that text and instant messages could be considered as ‘documents’, in the meaning of Regulation 1049/2001, and therefore subject to an access request. However, it reiterated that the Commission President’s cabinet found no relevant text messages falling under the scope of the request and meeting the Commission’s criteria for registering documents. The Commission said that it intends to issue further guidance for its staff on modern communication tools, such as text and instant messages, and hopes that there will also be a more general approach to the issue across the EU administration.

2.3 Access to documents related to the public procurement of masks in the context of the COVID-19 pandemic

The Ombudsman also opened a complaint-based inquiry concerning public access to correspondence exchanged by the Commission with Member State autho-
ities about the distribution of medical masks to protect healthcare workers, as part of the ‘Emergency Support Instrument’ in the context of the COVID-19 pandemic. The Commission granted access to only part of the 134 documents it identified as falling under the request. In refusing access, the Commission invoked an exception provided for under the EU’s rules on public access to documents, arguing that full disclosure could undermine the commercial interests of the manufacturer in question.

The Ombudsman found that the information at issue could not reasonably be considered to be commercially-sensitive within the meaning of the EU’s rules on public access to documents. She also took the view that, even if it were, given the quality issues that emerged with the masks concerned by the documents in question and the fact that they were procured using public funds, there is a strong public interest in finding out how this situation was dealt with. The Ombudsman therefore recommended that the Commission reconsider its position with a view to granting significantly increased, if not full, access to the documents at issue.

In reply to the Ombudsman’s recommendation, the Commission agreed to disclose significant additional information to the complainant. The Ombudsman therefore closed the inquiry.

2.4 Quality of service: biofuels

The Ombudsman inquired into a complaint against the European Commission concerning public access to documents concerning EU imports of used cooking oil. Used cooking oil can be used as a component in biofuels and the Commission receives information on this from Member States under voluntary certification schemes, in accordance with the EU’s Renewable Energy Directive.

The Commission claimed it did not hold any document corresponding to the complainant’s request. However, in the context of the inquiry, the Ombudsman found that the Commission held detailed information on used cooking oil imports, along the lines sought by the complainant.

The Ombudsman therefore proposed as a solution that the Commission should review the documents it holds containing this information with a view to disclosing them. The Commission did not accept this solution proposal.

The Ombudsman found the Commission’s refusal to take into account the complainant’s clarifications and to review the documents in question amounted to maladministration. Given the environmental implications, as well as the complainant’s concerns about fraudulent behaviour, the Ombudsman argued that there is a clear public interest in transparency around this issue. She therefore issued a recommendation that the Commission review the documents it holds containing this information with a view to disclosing them.

The Commission rejected the Ombudsman’s recommendation. The Ombudsman therefore closed the case, confirming her finding of maladministration, and expressing regret that the Commission was unwilling to resolve the case in a citizen-friendly and service-minded way.

32 1527/2020/DL https://www.ombudsman.europa.eu/en/case/en/57742.
2.5 Record keeping and practical implementation of access to documents

To deal efficiently and effectively with requests for public access to documents, the EU institutions need to have in place a solid record management policy, setting out the types of documents that need to be retained and how they should be registered. In addition, they need to have in place citizen-friendly mechanisms to enable the public to request access to documents easily, rather than deterring them from doing so through by putting in place unnecessary administrative barriers.

In order to support EU institutions in giving effect to the right of public access to documents, the Ombudsman issued a short guide setting out the policies and practices institutions should have in place so that they can fully implement their obligations to give effect to the right of public access to documents. The guide was drawn up based on the Ombudsman’s experience in dealing with access to documents complaints. It comprises what the Ombudsman considers good administrative practice.

The guide puts an emphasis on proper record keeping, which is an important requirement for giving effect to the right of public access to documents, and proactive publication of documents. The Ombudsman also reminded institutions that they should also have a public register of documents. Citizens can request access to documents only if they know that they exist. The guide also emphasised the institutions’ obligation to publish an annual report containing statistics on access to documents. Other recommendations included making available information on how to request access to documents in plain and accessible language and making available a submission form for requests for access.

3 Conclusion

The Ombudsman serves as an effective redress mechanism for those who face difficulties gaining access to documents held by the EU institutions. However, through her inquiries and the wider activities associated with her mandate, the Ombudsman also works to achieve systemic change and to stimulate the EU administration to take a more proactive and citizen-friendly approach to making available documents it holds. By shining the spotlight on specific or broader issues, the Ombudsman’s inquiries also help focus public attention on problems, which can help to promote change. Having an independent body to review decisions by EU institutions on access to documents helps strengthen public trust in the administration.

However, the Ombudsman’s role is also dependent on the overarching legislation and related case-law. Regulation 1049/2001 has been in force for over two decades and has never been updated, despite massive technological advances and changes in how the EU institutions communicate. The notion of a ‘document’ is not the same that it was in 2001 and, as mentioned above, digitalisation has brought along new means of communication and different ways of recording, managing and storing information. The recent Ombudsman inquiries concerning access to text and instant

33 https://www.ombudsman.europa.eu/en/doc/correspondence/en/149198.
34 Under Art. 17(1) of Regulation 1049/2001.
messages are a case in point. While the Ombudsman can seek to encourage the EU administration to approach the right of access to documents in the most far-reaching and citizen-friendly manner possible, it is clear that the EU legislators could also reflect on the need to update Regulation 1049/2001.

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