

Preliminary findings on how the European Commission handled a request for public access to documents related to an EU-funded project concerning a study into risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence ('Mobi-Kids' project)

Correspondence - 18/10/2023

Case 2103/2022/OAM - Opened on 01/12/2022 - Decision on 27/06/2024 - Institution concerned European Commission (Maladministration found) |

Ms Ursula von der Leyen President European Commission

Strasbourg, 18/10/2023

Complaint 2103/2022/OAM

Subject of case: How the European Commission dealt with a request for public access to documents related to an EU-funded project aimed at assessing the risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence ('Mobi-Kids' project)

Dear President,

I am writing to you directly about the above case, which concerns the European Commission's refusal to disclose a limited amount of information, dating from 2011 and 2016, from a project concerning the health of children. To date, the Commission has insisted on maintaining the position adopted in its 'confirmatory decision'.

The very purpose of recourse to the Ombudsman is to secure an independent and fresh look at a case, and it is in this spirit that I am writing to you.

The documents at issue relate to an EU-funded project aimed at assessing the risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence (the 'Mobi-Kids' project). [1] The complainant is an oncologist and professor, heavily involved in the same research area as that of the Mobi-Kids project. He first requested access to the documents in November 2020. Beyond the relevance of the broader subject matter of the project for his work, he was concerned that there was a risk of conflicts of interest with some of the researchers



involved in the project.

The Commission gave wide partial access to most of the documents it identified as falling within the scope of the request. However, it refused (full) access to three documents (a 'periodic report' from 2016 and two 'deliverables' setting out the preliminary findings of the project from 2011). This led to my current inquiry.

My inquiry team inspected the documents and found that the arguments put forward by the Commission do not adequately explain how disclosing the outstanding information would undermine the interests put forward for invoking the exceptions under Regulation 1049/2001. [2] Some of the information is already in the public domain. You will find a more detailed analysis in the annex to this letter.

The documents themselves date from 2011 (the two deliverables) and 2016 (the periodic report) and the Mobi-Kids project ended in 2016. EU case-law has recognised that information which is more than five years old is presumed to be no longer commercially sensitive. [3] The information could be protected over longer periods, only if the Commission can clearly show that, despite how old it is, the information can still be commercially-sensitive. We are not convinced the information is deserving of this protection. For some of the information, the Commission already disclosed the same type of information that it now insists needs to be protected.

Against this background, I would like to ask you to reconsider the Commission's confirmatory decision on this public access request, with a view to disclosing the documents in question to the widest extent possible.

I look forward to receiving your reply on this matter no later than 31 December 2023.

Please note that I intend to send your reply and related enclosures to the complainant for comments. [4] I also intend to publish this letter shortly, as well as your reply, once we have received it. Should the Commission have any questions, please contact the inquiries officer responsible.

Yours sincerely,

Emily O'Reilly European Ombudsman

Enclosures: Annex to this letter

Comments received from the complainant on the report on the meeting of 21 April 2023

Annex - complaint reference 2103/2022/OAM



‘Fifth periodic report’

The Commission gave wide partial access to the ‘fifth periodic report’ of the project, which dates from 2016, redacting some limited parts based on the exceptions under Regulation 1049/2001 for the protection of personal data [5] and commercial interests. [6] In particular, the Commission said that the complainant had not put forward sufficient elements to establish the necessity of disclosing the personal data. Furthermore, the Commission said that *“details on the tasks, the planned and reported efforts for the project of the parties involved”* is commercially-sensitive information that, if disclosed, could reveal the internal organisation and strategies of the entities concerned.

The document is one of the reports detailing the work progress over a certain time period. The Ombudsman inquiry team inspected these reports and found that the Commission granted wider public access to previous versions (for example the ‘fourth periodic report’ disclosed at initial stage). In other words, the Commission already disclosed the same type of information that it insists needs to be protected in the ‘fifth periodic report’. By way of example, in previous versions, the time spent by beneficiaries on the project’s working packages was disclosed, as well as the universities to which the contributors to the project were affiliated. This information is, in our view, either not commercially-sensitive (the time spent over a certain period by beneficiaries on a project that was finalised more than seven years ago), or is not personal data (names of the universities). Therefore, it should not have not been redacted from the fifth periodic report.

Concerning the personal data (that is, the names and functions of researchers involved in the project), the Commission’s decision to withhold this information has added to the complainant’s concerns. As noted, the complainant raised concerns about potential conflicts of interest with some of the researchers involved in the project. While EU-case law has set a high threshold for proving a necessity for disclosing personal data, the Commission could nonetheless have informed the complainant that the ‘beneficiaries’ of the Mobi-Kids project (14 organisations) and their respective principal investigators are publicly available. [7] This would have allowed the complainant to have some of the information to which he sought access.

Two ‘deliverables’

The Commission also refused access to two reports dating from 2011 as ‘deliverables’ under the project. These reports contain preliminary findings of the project, which itself ended in 2016. In refusing access, the Commission invoked the exception under Regulation 1049/2001 for the protection of commercial interests.

The Ombudsman inquiry team inspected the documents and found that the arguments put forward by the Commission do not adequately explain how their disclosure would undermine the commercial interests of the organisations that drafted them (the project ‘beneficiaries’). [8] Some of the information is already in the public domain.



The Commission argued that the information contained in the two documents is of a preliminary nature. However, the Commission failed to show how releasing such preliminary data would specifically and actually harm the commercial interests of the organisations, and that the risk was reasonably foreseeable, and not purely hypothetical. [9] The Commission also stated that, if disclosed, the content of the documents could be wrongfully used, thereby harming the commercial interests of the parties involved. However, it again failed to provide convincing evidence how this risk was reasonably foreseeable. [10]

[1] More information about the Mobi-Kids project is available at:

<https://cordis.europa.eu/project/id/226873/reporting> [Link].

[2] Article 4 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049> [Link].

[3] Judgment of the General Court of 23 September 2020, Case T-727/19, *Giorgio Basaglia v European Commission*: <https://curia.europa.eu/juris/liste.jsf?num=T-727/19&language=EN> [Link].

[4] If the Commission wishes to submit documents or information that it considers to be confidential, and which should not be disclosed to the complainant, it should mark them 'Confidential'. Encrypted emails can be sent to our dedicated mailbox. Information and documents of this kind will be deleted from the European Ombudsman's files shortly after the inquiry has ended.

[5] Article 4(1)(b) of Regulation 1049/2001.

[6] Article 4(2) of Regulation 1049/2001.

[7] Available at:

<https://cordis.europa.eu/docs/results/226/226873/final1-list-of-the-participants.pdf> [Link].

[8] See in that regard Judgment of the Court of First Instance of 13 April 2005, *VKI v Commission*, T-2/03, paragraph 69:

<https://curia.europa.eu/juris/liste.jsf?language=en&num=T-2/03> [Link].

[9] Judgment of the General Court of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, paragraphs 85-90:

<https://curia.europa.eu/juris/liste.jsf?num=T-516/11&language=EN> [Link].

[10] Judgment of the Court of Justice of 22 January 2020, *PTC Therapeutics International Ltd v European Medicines Agency (EMA)*, C-175/18 P, paragraphs 95-97:

<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-175/18%20P> [Link].