

☒ PUBLIC

☐ CONFIDENTIAL

Type of action

I confirm that the title of the Ombudsman in the correspondence respects [these rules](#): ☐

- ☐ Request Clarifications
 - ☐ Opinion Request
 - ☐ Opinion + Inspection Request
 - ☐ Inspection Request
 - ☐ Observations Request
 - ☐ Report on inspection of files
 - ☐ Further Inquiry
 - ☐ Friendly solution
 - ☐ Draft recommendation
 - ☐ Deferment of deadline
 - ☒ Decision
 - ☐ Further Correspondence
- In case no FC summary, insert *Entrée* number(s) use "from ... to" if multiple references.**
- ☐ 14.3 Article ECGAB
 - ☐ Reply to request for access to documents
 - ☐ Reply to request for review
 - ☐ Reply to service complaint
 - ☐ EDPS Consultation
 - ☐ Other please specify :

Details of correspondence

- ☒ Letter to the complainant
- ☐ Enclosures : please specify
- ☐ CC : please specify name & address

- ☐ Letter to the Institution
 - ☐ Enclosures : please specify
 - ☐ CC : please specify name & address
 - ☐ Direct transmission to Commissioner's cabinet
- Please specify Cabinet Contact Person :

- ☐ Information letter to third parties
- ☐ Enclosures : please specify
- ☐ CC : please specify name & address

Other comments/information :

NOT CONFIDENTIAL (scroll down to change)

Date of complaint :	23/10/2013	2 years rule :	<input checked="" type="checkbox"/> tick if within 2 years
Date registered :	25/10/2013	Prior approaches :	<input checked="" type="checkbox"/> tick if made
Date of summary :	19/12/2013	Petition :	<input checked="" type="checkbox"/> tick if no petition
		Legal proceedings :	<input checked="" type="checkbox"/> tick if no proceedings
		Grounds :	<input checked="" type="checkbox"/> tick if grounds

Name of complainant : Mr Thomas Holbach
 represented by (as relevant) :
 Language : DE
 Country of address : Germany
 Nationality :

SUMMARY

Complaint against:
 European Commission

Concerning: (As it will be published on the website, this section should be ☒ as short as possible ☒ self-explanatory ☒ drafted in the style of a title and not as an entire sentence ☒ systematically anonymised). It should identify the subject-matter of the complaint in a neutral way.

The handling of the complainant's request for access to documents

Facts and relevant points according to complainant: (This section will not be published on the website)

Background

The present complaint concerns a request for access to documents concerning Mr Strack. The complainant decided to make the said request through the "asktheeu.org"¹ website. As a result, all of the correspondence exchanged was supposed to be published on the relevant website.²

¹ According to the website, this is the way it works: "It's very simple: you file a request with the EU via this website. We send an email to the correct EU body. They have the obligation to answer within 15 working days (about three weeks).

When we get an answer, we send it to you and we publish it on this website. You get to say whether or not you are happy with the answer, to follow up for more information, or to file an appeal.

Everyone else gets to see your answer and that way they don't need to ask the same question again."

² The complainant did not provide any other supporting documents but the following link (under which his correspondence with the Commission figures):

http://www.asktheeu.org/de/request/zugang_zu_allen_dokumenten_im_zu

Chronology (to the extent necessary)

On 17 December 2012, the complainant effectively requested access to all the documents concerning Cases F-121/07, T-197/11P und T-198/11P and the related prior administrative procedures.³

On 18 January 2013, the Commission informed the complainant that the documents related to the court cases would be dealt with by the Commission's Legal Service (SJ), whereas he would receive a separate reply from the Directorate-General for Human Resources (DG HR) concerning the documents related to administrative procedures. Moreover, the Commission prolonged the deadline for dealing with the request for access due to the number of documents concerned.

Still on 18 January 2013, the SJ wrote to the complainant and informed him that on 17, 21 and 22 December 2012, it had received requests for access to document concerning ten court cases concerning Mr Strack. The SJ established that these three requests for access were submitted by the members of the extended board of the Whistleblower-Netzwerk association, presided by Mr Strack and who was a party in all the court cases in question. The SJ pointed out that the complainant's request for access concerned a number of documents and that in view of the nature of the court cases, they would require a concrete examination as they contain personal data. The Commission needed to balance between the right to access and the administrative burden that such a request would entail. Therefore, the SJ asked the complainant to narrow the scope of his requests and provide it with a list of documents that should be dealt with as a matter of priority.

On 23 January 2013, the complainant informed the Commission that he agreed with the extension of the deadline. However, (i) he emphasised that he made the request on his own motion and not in conjunction with third parties, (ii) that thus it was inappropriate to consider the volume of his request together with that of others, (iii) he requested the

³ "Hierzu zähle ich insbesondere aber nicht nur:

* den in den jeweiligen gerichtlichen Verfahren geführten Schriftwechsel, also alle Dokumente beider Parteien und des Gerichts sowie eventuelle Streitbeitrittsanträge,

* die Ausgangsanträge des Herrn Strack und die hierauf ergangenen Antworten der Kommission und ihrer Dienststellen,

* sämtliche Dokumente, die im Rahmen des/r Verwaltungsvorverfahren/s entstanden sind und/oder zwischen den Parteien in dessen Rahmen ausgetauscht wurden,

* sämtliche internen Dokumente, Vermerke und Notizen der Kommission welche im Rahmen der o.g. Rechtsstreite oder des/r Vorverfahren entstanden sind,

* sämtliche Dokumente, die sich auf die Beauftragung des von der Kommission eingeschalteten Rechtsanwalts beziehen, also sämtliche vertragliche und budgetrechtliche Grundlagen, sämtliche dokumentierte Kommunikation mit dem Rechtsanwalt und insbesondere auch dessen Abrechnung und

* sämtliche weitere dokumentierte Kommunikation, die seitens der Kommission mit Herrn Strack oder Dritten mit Bezug auf die o.g. Verfahren geführt wurde. "

Commission to inform him on what legal basis it inquired in which associations he was active in his private life, and (iv) that he refused to narrow the scope of his request.

On 8 February 2013, the SJ replied to its part of the initial request for access. The SJ pointed out that the Commission received three requests for access to all documents concerning ten court cases to which Mr Strack was a party. These requests originated from the complainant and two other members of the governing body of the Whistleblower-Netzwerk, whose president was Mr Strack. This information was publicly available on the Internet.⁴ According to the SJ, the scope of the request was delimited as follows:

"Case F-121/07 Strack v Commission

1. JUR(2007)46066 Note to ex-DG ADMIN DG sending the application
2. LETT(2007)45021 Response by ex-DG ADMIN
3. JUR(2007)46102 Authority
4. JUR(2007)46143 Note to the attention of M. Chene (ex-DG ADMIN) on the amicable settlement procedure
5. JUR(2007)46150 Letter to the CST on the amicable settlement procedure
6. JUR(2008)45041 Letter to the CST on the amicable settlement procedure
7. JUR(2008)45158 Letter to the CST on the amicable settlement procedure
8. JUR(2008)45249 Letter to the CST on the amicable settlement procedure
9. JURM(2008)9107 Objection of inadmissibility
10. CONT(2009)7024 Order of 17 September 2009 (Objection of inadmissibility and lack of jurisdiction)
11. PVR(2009)751 Authority
12. JURM(2009)9201 Defence
13. JUR(2009)45835 Letter sending legal assistance contracts SJ/2009/1411, SJ/2009/1412, SJ/2009/1438, SJ/2009/1439 et SJ/2009/1440
14. JUR(2009)45840 Legal assistance contract (Case F-121/07)
15. LETT(2010)5501 Attorney's fees invoice
16. LETT(2010)5945 Attorney's fees invoice
17. Ares(2010)823661 Authority
18. Ares(2010)900388 Letter sending legal assistance contract SJ/2010/1732

Case T-197/11P Commission v Strack

19. C(2011)1670 Commission decision to appeal against the judgment given by the CST on 20 January 2011 in Case F-121/07
20. Ares(2011)363185 Appeal + Authority
21. Ares(2011)770340 Letter to the General Court: Request for authorisation to file a Reply
22. Ares(2011)905523 Reply
23. Ares(2011)1142760 Letter to the General Court: oral hearing
24. Ares(2013)33766 Information note on the judgment

Case T-198/11P Strack v Commission

25. Ares(2011)767212 Authority
26. Ares(2011)788681 Response and observations on the request for joinder
27. Ares(2011)863895 Letter sending legal assistance contracts SJ/2011/1952

⁴ <http://www.whistleblower-net.de/uber-uns/vorstand/>

- 28. Ares(2011)883346 *Legal assistance contract SJ/2011/1952*
- 29. Ares(2011)1085143 *Attorney's fees invoice*
- 30. Ares(2012)210783 *Letter to the lawyer sending the request to stay proceedings*
- 31. Ares(2012)282460 *Observations on the request to stay proceedings"*

The reply of the SJ concerned the documents listed under 1, 2, 3, 9, 10, 11, 12, 17, 19, 20, 21, 22, 23, 24, 25, 26 and 31. As for the rest, the SJ proposed to send a separate reply by the end of March. These remaining documents related mainly to the fees and contracts with the external lawyer and documents relating to the unsuccessful amicable settlement procedure. The SJ granted full access to the listed documents, save for documents 9, 12 and 26 – the first two contained the name of a doctor, whereas the last contained the name of the Judge-Rapporteur. As regards these documents, the personal data was expunged.

With regard to the documents submitted by Mr Strack himself to the Civil Service Tribunal (CST) and the General Court in Cases F-121/04, T-197/11P and T-198/11P and the documents originating from those courts, the Commission took the view that they fell outside the scope of Regulation 1049/2001.⁵

On 17 February 2013, the complainant submitted a confirmatory application with regard to the documents requested in his initial application, save for the documents to which full access was granted to him by letter of 8 February 2013. He pointed out that the Commission failed to provide him with a reply as regards the administrative documents, even though the deadline had been extended, whereas the reply concerning the court cases of 8 February 2013 did not grant him access to all the documents requested. He put forward the following arguments:

- The Commission still referred to the applications of third persons and failed to deal with his request concerning his privacy from his letter of 23 January 2013;
- With regard to the exception pursuant to Article 4(1)(b) and the personal data of Mr Strack, the complainant referred to an e-mail of the latter of 11 February 2013 (not provided). The complainant accepted that the names of the doctors would be erased, but failed to see why this should be the case for the judge rapporteur, who was mentioned in the ruling in F-121/07;
- The complainant disagreed with the Commission's view as regards the documents submitted to the Court by Mr Strack and documents originating from the Court.

⁵ The Commission argued that Article 15(3) TFUE provides as follows: "*The Court of Justice of the European Union [...] shall be subject to this paragraph only when exercising their administrative tasks*". In the Commission's view, the documents submitted by third parties such as Mr Strack as well as the documents originating from the Court of Justice of the European Union in the framework of court proceedings, would thus not fall under the scope of the regime for public access to documents. The Commission itself received copies of these documents only by virtue of its being a party to the proceedings. In addition, the Commission referred to the judgment in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P according to which "*the Rules of Procedure of EU Courts provide for procedural documents to be served only on the parties to the proceedings [...]. It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings*". In the light of the above, the Commission took the view that, as far as court proceedings were concerned, the scope of Regulation 1049/2001 was limited to its own submissions and that there was no overriding public interest in disclosure.

According to the complainant, his view was confirmed by the judgment in Case T-392/07, where the applicant was granted access to the application and reply in Case T-110/04, which would not have happened if the Commission's argumentation was correct. It was not the intention of the Lisbon Treaty to limit citizens' access to documents. Furthermore, the following points were relevant for Regulation 1049/2001: (i) the relevant documents were documents within the meaning of the regulation, (ii) they were in the possession of the Commission, and (iii) there were no exceptions as to why they should not be disclosed. Consequently, he should be granted access to the documents he had requested.

On 5 March 2013, the Commission extended the deadline for the reply to the confirmatory application by fifteen working days to 4 April 2013, due to the necessary consultations with other Commission services.

On 27 March 2013, the Commission provided the complainant with the second part of its initial reply, which concerned documents 4, 5, 6, 7, 8, 13, 14, 15, 16, 18, 27, 28, 29 and 30. It decided to release documents 13, 14, 15, 16, 18 and 30, having removed the bank account number and the signature of the lawyer concerned for reasons of personal data protection. As regards documents 27, 28 and 30, it decided to refuse access on the basis of the exception provided for in second indent of Regulation 1049/2001 (the protection of court proceedings). This was because even though the proceedings in Case T-198/11P had been closed, the documents would be subject of discussions in the context of the on-going procedure for the recovery of costs. Documents 4, 5, 6, 7 and 8 were drawn up by the Commission in (unsuccessfully) seeking an amicable settlement of the Cases F-118/07, F-119/07, F-120/07, F-121/07 and F-132/07. Document 4 was a note to the attention of the Director-General of the former Directorate-General for Administration (ex-DG ADMIN) summarising the draft agreement contained in the minutes of an informal meeting held by the parties at the CST and asking for observations. All these documents concern the abovementioned cases and were drawn up specifically for the purpose of the court proceedings, of which Case F-118/07 is still pending before the CST. Therefore, documents 4, 5, 6, 7 and 8 were also covered by the exception providing for the protection of court proceedings. Moreover, Article 69(1) first and third paragraphs of the Rules of Procedure of the Court provided that where the parties come to an agreement as to the solution ending the dispute, the President shall set out the terms of the agreement in the order closing the case. It was thus clear that, where the parties did not come to an agreement, the observations, suggestions, proposals and concessions made by the parties and contained in the documents drawn up for the purposes of the amicable settlement, are not subject of such a publication and must remain confidential. The Commission concluded that there was no overriding public interest in disclosure.

On 4 April 2013, the Commission extended the deadline for the reply to the confirmatory application by another fifteen working days because the consultations with other Commission services were on-going. The Commission apologised for the delay.

On 18 November 2013, the Commission replied to the complainant's confirmatory application concerning the administrative documents and regretted the delay in replying.

DG HR rejected access to the documents concerned on 22 January 2013 (copy of the letter not provided) because, pursuant to Articles 4(4) and 4(1)(b) of Regulation 1049/2001, third party access could not be reconciled with the protection of personal data. The fact that Mr Strack, on 11 February 2013, asked to be consulted for every application of Article 4(1)(b) of Regulation 1049/2001 and, simultaneously, with regard to the complainant's request as well as those of two other members of the Whistleblower-Netzwerk, gave his consent for transmission of documents pursuant to Article 5(d) of Regulation 45/2001 was irrelevant in this context. The Commission confirmed the initial decision for the following reasons:

- All the relevant documents, to the extent they were not related to court proceedings, were part of Mr Strack's personal file. The latter was still, even though he had retired, in a service relationship with the Commission. Thus, the provisions of the Staff Regulations still applied to his personal file.
- DG HR correctly applied Article 4(1)(b) of Regulation 1049/2001 because the provisions concerning the handling of personal files of the Staff Regulations were also provisions concerning the protection of personal data.⁶ Article 26 of the Staff Regulations lays down which documents form part of the personal file and how these are to be handled. Only the staff member concerned or, in case of a dispute, the Court (as a third party) may consult the file. Mr Strack's agreement pursuant to Regulation 45/2001 did not affect that view because the Commission's decision was based on Article 26 of the Staff Regulations, which is a more specific provision. Furthermore, releasing the files based on Regulation 1049/2001 would have an *erga omnes* effect.

Allegations: (As it will be published on the website, this section should be systematically anonymised)

(1) The Commission infringed the complainant's right to privacy.

In support of this allegation, the complainant put forward that the Commission spied on his private volunteer activity and published it in the reply sent to him, even though this was not relevant for his request for access, nor for any of the Commission's obligations.

(2) The Commission artificially and unnecessarily split the complainant's request for access and, by so doing, caused him additional work.

(3) The Commission failed to deal with the complainant's initial and confirmatory applications within the respective deadlines.

(4) The Commission wrongly refused the complainant access to the documents requested. In support of this allegation, the complainant argued that the grounds for refusal, to the extent they were based on Regulation 1049/2001, were not convincing as these exceptions were not applicable. In addition, the Commission failed to address his submissions.

⁶ The Commission referred in this context to Case F-121/07 Strack v. Commission, not reported, paragraph 65.

Claims: (As it will be published on the website, this section should be systematically anonymised)

The Commission should: (i) grant the complainant access to the documents sought, (ii) admit its mistakes and apologise for them, and (iii) compensate the damage caused by its delays and infringements of law.

ANALYSIS

☑ Please identify which rights of the Charter of Fundamental Rights, if any, could be at issue - Articles 41 (Right to good administration) and 42 (access to documents)

Admissibility

The claim alleging compensation of damages has not previously been raised with the Commission. It is therefore inadmissible for lack of prior administrative approaches. The remainder of the complaint is admissible.

Grounds

As regards the *first allegation*, the complainant alleges that the Commission infringed his right to privacy by having "spied" on his private volunteer activity and published it in a reply sent to him. In its reply of 8 February 2013, the Commission explained that the information about the complainant's membership of the governing body of the Whistleblower-Netzwerk was freely available on the Internet. This statement is correct. In these circumstances, it is not easy to see how the complainant's right to privacy could have been infringed by mentioning information that was in the public domain. Consequently, there are insufficient grounds for an inquiry into the first allegation. If the complainant nevertheless were to consider that the Commission had unlawfully processed his personal data pursuant to Regulation 45/2001, he could consider turning to the European Data Protection Supervisor.

By his *second allegation*, the complainant alleges that the Commission unnecessarily and artificially split his request, which caused him an additional administrative burden. To the extent that the complainant refers to the separate handling of his request by DG HR and SJ, it should be pointed out that it is for the Commission to organise the way in which it deals with administrative requests, unless this would lead to unnecessarily onerous or burdensome results for the citizens or a failure to respect the procedural requirements of the Regulation 1049/2001. In the present case, the Commission split the request for access into two parts. The Commission's approach does not appear to be unreasonable, in particular in view of the number and type of documents requested. Moreover, the complainant has not substantiated why doing so would have resulted in unnecessary and disproportionate extra work for him. Consequently, there are insufficient grounds for an inquiry into the second allegation. It should be added that the procedural aspects with regard to the deadlines are covered by the third allegation.

As regards the *third allegation*, it is indeed true that the Commission failed to handle the complainant's requests within the deadlines set by Regulation 1049/2001. However, the Ombudsman has recently opened the systemic own-initiative inquiry OI/6/2013/KM concerning the delays in handling requests for access to documents. Against this background, there are insufficient grounds for a separate inquiry into this issue in the framework of the present complaint.

As for the *fourth allegation*, the complainant requested access to 31 documents for which the SJ was responsible. The SJ granted full access to fifteen documents (1, 2, 3, 11, 13, 17, 19, 20, 21, 22, 23, 24, 25, 30 and 31); document 10 was publically available.

As for partial access (documents 9, 12, 14, 15, 16, 18 and 26), the complainant did not explicitly contest the deletion of the names of the doctors in documents 9 and 12. In documents 14, 15, 16 and 18, the information expunged were the bank account and the signature of the attorney, which appears reasonable.

With regard to documents 27, 28 and 29, the Commission stated that they could not be disclosed based on the second indent of Article 4(2) of Regulation 1049/2001 (protection of court proceedings) because they would be the subject of discussion in the context of an on-going procedure for the recovery of costs. According to the Commission, the disclosure would adversely affect the decision in that procedure, weaken its position in any possible dispute on the matter, including its rights of defence. Considering the circumstance of the on-going recovery procedure for costs, the latter would appear to be a legitimate reason not to grant access to the documents in question for the time being.

With regard to documents 4, 5, 6, 7 and 8, the Commission pointed out that Case F-118/07 was still pending before the CST and that the aforementioned documents were drafted so as to seek an amicable solution to Cases F-118/07, F-119/07, F-120/07, F-121/07 and F-132/07. The complainant did not dispute these statements. Against this background, the Commission's position appears reasonable.

As for the documents related to the administrative procedures for which DG HR was responsible, the Commission's position is reasonable. By allowing access to Mr Strack's file under Regulation 1049/2001, the contents of this personal file, which does contain sensitive data, would become available for anyone. The Ombudsman notes that Mr Strack appears to agree with such disclosure. However, in its judgment in Case F-121/07 *Strack v. Commission*, the Civil Service Tribunal held (see notably paragraphs 65-67) that Article 26a of the Staff Regulations was a *lex specialis* vis-a-vis Regulation 1049/2001. Thus, the Commission's position in this respect is in line with the case-law of the Court. If the complainant nevertheless wished to obtain access to Mr Strack's file, he could consider turning to Mr Strack, who himself has access to his personal file.

With regard to access to third-party documents, it appears useful to note that the Ombudsman decided to close Case 422/2011/AN⁷ in view of Case T-188/12 *Breyer v*

⁷ <http://www.ombudsman.europa.eu/cases/decision.faces/en/48986/html.bookmark>

Commission pending before the General Court, which concerns the very question of public access to third-party documents emanating from court procedures. Given that the Commission's position on this point was consonant to the one that it took in the court proceedings and that it declared that it would be willing to re-consider this position only after the General Court's ruling, the Ombudsman took the view that there were no grounds for further inquiries. The Ombudsman took a similar position in Case 1598/2012/(KM)PMC⁸. For the same reason, there are insufficient grounds for an inquiry into this aspect in the present case.

The case pending before the General Court does not seem to concern documents emanating from the courts themselves. However, it seems clear that the ruling in Case T-188/12 *Breyer v Commission* will, to a certain extent, have an impact on the Commission's position concerning the handling of access requests on these kind of documents as well. Thus, there are insufficient grounds for an inquiry as regards that category of documents as well.

As for the name of the Judge Rapporteur in Case T-198/11 P in document 26, this name is, as the complainant correctly pointed out, publically available. However, the Ombudsman considers that it would not be justified to open an inquiry solely in order to make the Commission release a copy of the relevant document that also contains the name of the judge concerned.

PROPOSAL

In light of the above, it is proposed to close the case with a finding of no grounds for an inquiry.

Visa HLU :	Visa Director:
Date :	Date :

Approved by the Secretary General :
Date :

⁸ See paragraphs 23-26 of the decision under:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/52600/html.bookmark>

Statistical information sheet 1

To be completed at the moment of making the decision on admissibility and checked again when closing an inquiry

INQUIRY

1. Please fill in this information sheet by selecting the appropriate answer when several possibilities are given, or by filling in the blanks.
2. Attach the COMPLAINT SUMMARY on a separate sheet. Please also copy the COMPLAINT SUMMARY under S:\Legal\Complaint summaries\ADMISS or INADMIS or NO GROUNDS\year\ (please use "Read only" option)

Case reference: **2027/2013/VL**

Confidential: ☐ Yes ☒ No

Represented by : (fill out when needed)

Kind of complainant: Specify if it is:

☒ **Physical person** (man or woman ?) – Specify if EU staff or MEP **man**

☐ **Legal person** : Company – Lawyers office – Association/Non profit organisation – Other (specify)

For both categories, mention any information you have such as : **nationality** (if possible) **DE**

Profession (e.g.: journalist – farmer – student – doctor – dentist – vet – teacher – other):

Area of activity (e.g.: software company – human rightsNGO – other):

Transmitted : directly – by a MEP – by transfer from the Committee on Petitions of the EP – Other **directly**

Institution or body complained against:

European Commission (+DG or service, when possible.....) – Eur. Parliament (+DG, when possible.....) – EPSO – Court of Auditors – Court of Justice – Committee on Petitions of EP – MEP Other

Commission

Keywords (It is possible to select several key words in each list):

Key work 1 "EUROVOC": **Public services**

If it concerns a competition/selection procedure: select "Administrative competition" and specify the name of the competition

Key work 2 "Field of law": **General, financial and institutional matters**

- If

deemed useful : Legal act :

Key work 3 "Type of maladministration": **Requests for public access to documents**

Key work 4 "Subject matter of the case": **Dealing with requests for information and access to documents**

MALLEA JIMENEZ Juan Manuel

From: EO-Secretariat General
Sent: 04 February 2014 16:44
To: LONCAREVIC Vukasin
Subject: FW: ADMISSIBLE NO GROUNDS (SIMPLE LETTER) - 2027/20138/VL
Attachments: ADMISSIBLE NO GROUNDS (SIMPLE LETTER) - 2027/20138/VL

Dear Vukasin,

The case is fine (pls check my linguistic suggestions in the letter).

Best wishes,

Murielle