



Council of the European Union
General Secretariat
The Secretary-General

SGS 21 / 004851

Brussels, 15. 11. 2021

Ms Emily O'Reilly
European Ombudsman
Email: Registry@ombudsman.europa.eu

Subject: Strategic initiative SI/4/2021/TE

Dear Ms O'Reilly,

On 30 June 2021, you launched a strategic initiative as regards the way EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity, while indicating that, at this stage, this may potentially be an overlooked issue.

Please find my response in the annex I to this letter.

Yours sincerely,


Jeppe TRANHOLM-MIKKELSEN

ANNEX I: ANSWERS TO THE QUESTIONS

1) On the applicable rules:

- *Does the Council's record management decision cover text and instant messages, sent or received through professional and/or personal devices?*

Yes (see substantive reply below)

- *Does the Council's record management decision set out criteria/principles for the recording of text and instant messages?*

Yes (see substantive reply below)

- *Does the Council's record management decision set out how text and instant messages should be recorded by staff members? Please provide us with the relevant provisions of your record management decision?*

No (see substantive reply below)

As regards these three questions, the Ombudsman's letter rightly points out that "[t]he decision to record a certain piece of information in the administration's document management system should, according to EU law, not be dependent on the medium - be it a letter, an email, a text or instant message – but on its content".

As shown below, this is the approach implemented in the GSC.

First of all, the “Transparency Guide”¹ - available to the staff in 22 languages - reflects this approach by stressing that “[t]he rules on access to documents apply to all documents held by the Council, including those received from third parties, defined as concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility, whatever the medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) or indeed the type or classification.”

Second, Decision No 51/2020 of the Secretary-General of the Council establishing a policy on document and file management in the General Secretariat of the Council² sets out a definition that per se encompasses SMS and instant messages. Article 2 (e) and (f) of that Decision provides that “‘document’ means any content, in whatever medium, which is drawn up or received by the GSC and is in its possession, and concerns a matter relating to the activities, policies and decisions falling within the sphere of responsibility of the institutions and other entities the GSC assists or relating to its official tasks”, and that “‘drawn up by the GSC’ means that a document contains substantive information, is not of a personal nature, is not short-lived and is approved as ready for transmission by its author (i.e. it is validated by the person who is vested with the authority to adopt it or to take responsibility for it)”. In that regard, work is ongoing within the Document and File Management Implementation (DFMI) programme in view of adopting in the medium and long-term complementary internal guidelines and rules as well as new IT tools.

Third, the Information Management Contact Group (IMCG) of the GSC has adopted in May 2021 a document entitled “5-Step approach to decide on what to register”³. The latter is available to the staff and explains in a pedagogic and concrete manner when any support containing substantive information shall be considered as a document and registered according to the applicable rules.

Those rules and guidelines do not specifically address SMS and instant messages; however, they establish the criterion for defining what is a document and helping the staff in this regard, a definition that may also encompass the said electronic items. If such items fulfil the conditions for being qualified as “documents”, they should be treated accordingly under the general approach.

However, as explained in the reply letter, no substantive content is supposed to be exchanged by those electronic means; hence the absence of specific reference to SMS and instant messages in those rules and guidelines.

¹ Annex II.

² Annex III.

³ Annex IV.

2) *On the implementation of the applicable rules:*

- *How is the record management decision, as regards text and instant messaging, implemented? For example, has the Council issued relevant guidelines to staff or does it provide training on this matter to staff?*

The above-mentioned rules and guidelines are available to the staff and properly advertised by line managers within the different administrative divisions of the GSC. They address file management in general. As regard instant messages, it is worth mentioning the Note of the Director-General in charge of Digital Services (SMART) entitled "*Use of commercial messaging apps*"⁴. This note stresses that Instant Messages apps such as WhatsApp "*are not corporate information sharing tools in the GSC's IT portfolio*" and clearly recalls that messaging apps may be used "*only for short-lived, ephemeral chat about public or non-sensitive content; they are not to be used for sharing substantive content on sensitive matters*".

- *In practice, has the Council recorded text and instant messages? If so, could the Council please provide examples?*

For now, no SMS nor instant messages have been recorded as "documents" within the meaning of Regulation No 1049/2001. This can be explained by the fact that staff are asked to use the IT tools provided by the GSC to produce and exchange documents (with substantive content) through the appropriate internal applications, and that SMS, WhatsApp and any other commercial instant messaging services, when used, may only serve a role as ephemeral logistical or organisational support. They may be used, for instance, in the margins of video or teleconferences to organise who will take the floor or to solve technical issues faced by certain participants.

- *Has the Council already received requests for public access to text and/or instant messages, under Regulation 1049/2001, or has the Council identified text and/or instant messages as falling within the scope of an access to documents request? If so, could the Council please give examples?*

So far, the Council has received two requests under Regulation No 1049/2001 for public access to text and/or instant messages, which gave rise to confirmatory applications. In the context of these requests, the GSC checked with the officials involved but was not able to identify any text and/or instant messages falling within the definition of a document within the meaning of Regulation No 1049/2001.

⁴ Annex V.

- *When receiving public access requests which cover, explicitly or implicitly, text and/or instant messages, how does the Council search for relevant 'documents'? Has the Council put mechanisms in place (for instance, guidelines or instructions) to assist staff in searching for such 'documents'?*

When receiving public access requests which cover, explicitly or implicitly, text and/or instant messages, the GSC checks whether content exchanged by text and/or instant messaging that concerns a matter relating to the policies, activities and decisions falling within the Council's sphere of responsibility has been drawn up or received by a Council staff member and remains in his/her possession. The Council considers that only exchanges with a minimum degree of stability and formality, as opposed to ephemeral or short-lived ones, qualify as a document under Regulation No 1049/2001. The Council has not so far put in place specific mechanisms for systematically registering content exchanged by text and/or instant messaging. As already explained above, the staff of the GSC is advised to avoid using commercial messaging applications for exchange of professional documents and/or of sensitive information.