

Decision in case 2006/2017/CEC on how the Court of Justice of the European Union adopted its new Code of Conduct and handled requests for access to documents

Decision

Case 2006/2017/LP - Opened on 27/08/2018 - Decision on 05/06/2019 - Institution concerned Court of Justice of the European Union (No maladministration found) |

The complainant is a former judge at the EU's General Court, which is the court of first instance within the Court of Justice of the European Union (CJEU). He complained to the Ombudsman that the CJEU had wrongly extended the scope of its Code of Conduct for Members and former Members. He also claimed that the CJEU had handled incorrectly a number of his requests for public access to documents. The documents related, among other things, to the adoption of the new Code of Conduct, the recruitment of a director, the use of official drivers at the CJEU, the reform of the General Court, and 75 of the former judge's own memoranda and related documents.

The Ombudsman cannot inquire into the activities of the CJEU when it is acting in its judicial role. Moreover, the Ombudsman cannot examine complaints where the issues raised are or have been the subject of legal proceedings.

For these two reasons, the Ombudsman found that she could not look into how the CJEU amended the Code of Conduct. Specifically, the question of whether the adoption of the code amounts to judicial activity is the subject of an ongoing court case.

Similarly, two of the complainant's requests for access to documents are the subject of court proceedings. Regarding one of the other two requests, the Ombudsman noted that the CJEU had granted the complainant partial access, disclosing 190 documents amounting to 1 686 pages. Regarding the other request, the CJEU disclosed 557 documents amounting to 2 960 pages. Having carefully reviewed the reasons given by the CJEU for refusing access to the remaining documents, or parts thereof, as well as the arguments put forward by the complainant, the Ombudsman found that there was no maladministration by the CJEU.

Background to the complaint



1. The complainant is a former judge at the General Court of the European Union. The General Court, alongside the Court of Justice, forms part of the Court of Justice of the European Union (the CJEU).

2. In July and August 2016, the complainant, whilst still a judge of the General Court, submitted thirteen requests for information to the CJEU. His requests concerned: the position of the CJEU and its exchanges with other EU institutions on certain legislative matters; the development and costs of certain IT applications; recruitment matters; details of a dispute between the CJEU and a Member of the Court regarding the application of the CJEU's Code of Conduct for Members and former Members of the CJEU [1] to him; how official drivers at the CJEU are used; and the work trips and external activities of judges.

3. When the CJEU replied, on 13 October 2016, the complainant was no longer a judge. As a result, the CJEU informed him that it could not provide to him the information he had requested. It reminded him of the obligations of former judges to respect the secrecy of the CJEU's deliberations, to behave with integrity and discretion, and to abstain from making any public comments that might harm the CJEU's reputation.

4. Between December 2016 and November 2017, the complainant submitted four requests for access to documents [2] (requests I-IV below), in accordance with the applicable rules on access to documents of the CJEU [3] (the CJEU's access rules).

5. On 14 December 2016, the complainant requested access to a number of documents (request I), including: documents relating to the adoption of the Code of Conduct; documents and information concerning the possible appointment of an individual to a senior post within the CJEU; and work trips involving the use of the CJEU's official drivers. The CJEU ultimately granted partial access to these documents.

6. On 27 January 2017, the complainant requested public access to documents exchanged between the former President of the CJEU and the German authorities between 2011 and 2015, and a list of all the documents sent by the former President to EU governments (request II). The CJEU stated that it found no documents that were exchanged between the former President of the CJEU and the German authorities, and that the requested list did not exist. The complainant challenged the CJEU's decisions on requests I and II before the General Court. [4]

7. On 22 March 2017, the complainant requested access to thirteen sets of documents (request III). These included documents: linked to a proposal to double the number of judges at the General Court; concerning the development of an IT application ('*the Presidents' site*'); regarding the recruitment of a director; regarding the referral of a case to the 'Code of Conduct committee'; concerning the use of official drivers at the CJEU; and regarding the reform of the General Court, and the authorised work trips and external activities of Members.

8. Ultimately, the CJEU granted the complainant partial access, disclosing 190 documents falling under his request (which amounted to 1 686 pages).



9. On 17 August 2017, the complainant made a request for public access to documents (request IV) concerning 12 sets of documents. These included: the list of letters between the former President of the CJEU and the EU institutions during his mandate; the 'exit allowance' of a senior member of staff, his salary and details of the work he carried out; the reasons for the appointment of a director; specific travel request approvals for official drivers; the requests received by the CJEU for public access to documents not related to legislative procedures; and 75 of his own memoranda and 25 related documents.

10. The CJEU ultimately granted partial access to this request, disclosing 557 documents (amounting to 2 960 pages).

11. Dissatisfied, the complainant turned to the Ombudsman on 14 November 2017. He submitted an updated version of his complaint on 20 March 2018.

12. In his complaint, the complainant raised not only his concerns about how the CJEU handled his requests for access to documents, but also how the CJEU had amended the Code of Conduct for Members and former Members. In his view, by extending the scope of the code to cover non-judicial matters, the CJEU had breached various rules.

The inquiry

13. The Ombudsman opened an inquiry into the complainant's concerns that the CJEU: (A) extended its Code of Conduct for Members and former Members to cover not only judicial, but also administrative matters; and (B) handled incorrectly the complainant's requests III and IV for access to documents. [5]

14. In the course of the inquiry, the Ombudsman's inquiry team met with the CJEU and inspected the relevant file [6]. The Ombudsman further considered the reply of the CJEU, subsequent to the report on the inspection meeting [7], and the complainant's comments.

A. Extension of the Code of Conduct to administrative matters

Arguments presented to the Ombudsman

15. **The complainant** contended that by stating that "*Members shall comply with their duty to exercise discretion in dealing with judicial and administrative matters*" [8], the Code of Conduct that was adopted in 2016 went beyond the Statute of the Court [9]. The statute sets out the duty of Members to preserve "*the secrecy of the deliberations of the Court*" [10]. In the complainant's view, this provision refers to *judicial* deliberations only, and not administrative matters. He argued that extending the scope of the Code of Conduct also breached transparency rules, the right to good administration, the right to turn to the Ombudsman, the



freedom of expression and the protection of whistleblowers.

16. In its reply to the Ombudsman, **the CJEU** questioned whether the Ombudsman could inquire into the Code of Conduct. It noted that the Ombudsman does not have the power to inquire into the CJEU when it is acting in its judicial role. [11] For the CJEU, the code defines the obligations of current and former Members of the CJEU. These are inextricably linked to Members' judicial functions. Therefore, it argued, the adoption of the Code of Conduct falls within the meaning of 'judicial activity'. Moreover, it stated that the question of whether the adoption of the Code of Conduct is a 'judicial activity' is currently pending before the General Court (within the context of the complainant's action for annulment against the decisions of the CJEU rejecting his requests I and II).

17. In any event, according to the CJEU, none of the arguments raised by the complainant was well-founded. For the CJEU, the Code of Conduct did not extend the scope of the provisions on Members' duty to behave with discretion to encompass administrative matters. In fact, the previous Code of Conduct, which required Members to refrain from making public statements that could harm the Court's reputation [12] , also covered administrative matters.

18. The CJEU further stated that the duty to behave with discretion reflects the fundamental principle of respect for the rule of law, and the need to safeguard the authority and independence of the CJEU. [13] It stated that if a current or former Member publicly criticises how the CJEU works, they undermine its authority. Because of the high standing enjoyed by Members of the CJEU, the public and the media would be less inclined to question the veracity of criticism made by them. The CJEU, which is bound by the duty to exercise discretion in order to safeguard its independence, cannot respond directly to such criticism. It added that a similar duty to behave with discretion applies also to (former) judges of the European Court of Human Rights (ECtHR) [14] .

19. That said, the CJEU emphasised that the duty to exercise discretion does not prevent (former) Members from reporting any illegalities regarding the CJEU. However, they must do so using the mechanisms provided for by the EU Treaties and EU legislation; that is, depending on the nature of the issues, by turning to the European Ombudsman, the European Parliament, the European Court of Auditors (ECA) or the European Anti-fraud Office (OLAF).

20. In his comments, **the complainant** took issue with the CJEU's position that current or former Members are prohibited from publicly criticising the Court. He contended that the CJEU's reference to the ECtHR's rules, which require that judges exercise discretion in relation to court proceedings, was selective and misleading. He argued that, according to the ECtHR [15] , freedom of expression is an essential component of whistleblower protection. He said the CJEU overlooked this since it does not protect whistleblowers. He also stressed that the media would always seek to establish the truth, and not simply rely on the public statements of individuals, such as former Members. He also argued that the Code of Conduct should state explicitly that the duty to exercise discretion does not prevent (former) Members from reporting any alleged illegalities through the mechanisms available under EU law.



The Ombudsman's assessment

21. The Ombudsman cannot inquire into the activities of the CJEU when it is acting in its judicial role. [16] Moreover, the Ombudsman cannot examine complaints where the issues raised are or have been the subject of legal proceedings. [17]

22. The complainant has not contested that the question of whether the adoption of the Code of Conduct constitutes a 'judicial activity' is central to the action for annulment he brought before the General Court against the decisions of the CJEU rejecting his access to documents requests I and II [18] .

23. The Ombudsman cannot address the complainant's arguments on the Code of Conduct, since to do so would mean that the Ombudsman has to take a position on whether the adoption of the Code of Conduct constitutes a 'judicial activity', a question that is currently the subject of legal proceedings.

24. That said, the Ombudsman welcomes the clarifications given by the CJEU that the duty of discretion does not deprive Members of their right to turn to Parliament, the Ombudsman, the Court of Auditors or OLAF, to report any illegality or maladministration regarding the functioning and inner workings of the CJEU. Regarding the complainant's point that the Code should state explicitly that the duty to exercise discretion does not prevent (former) Members from reporting any alleged illegalities through the mechanisms available under EU law, the Ombudsman would expect current and former Members to be familiar with the use of such mechanisms.

25. In light of the above, the Ombudsman **closes her inquiry into this aspect of the complaint** [19] .

B. Access to documents

Introductory remark

26. In its reply, the CJEU stated that, since its decisions on access to documents requests III and IV were not challenged before the General Court within the applicable time limit, they are final. [20]

27. The role of the Ombudsman is to check whether an EU institution, when dealing with requests, has applied the relevant rules and case-law on access to documents in a correct and reasonable manner. If the Ombudsman considers that a decision refusing access was not well-founded, she can ask the EU institution concerned to consider granting (further) access to documents, through proposals for solutions, recommendations and/or suggestions. It is for the institution concerned to decide what action to take in such cases. If an institution that has refused to grant public access to a document subsequently changes its position, there is no legal reason why it could not take a new decision to grant access to the document. The Ombudsman cannot oblige EU institutions or bodies to withdraw decisions they have already taken. However, she can [21] assess such decisions, even after the time limit for legally



challenging them before the General Court has expired. If she could not, it is hard to see the purpose of the legislature having listed the Ombudsman, alongside the Court, as one of the two means of redress available to dissatisfied applicants in the EU's rules on public access to documents. [22]

28. To this end, the Ombudsman will examine below the complainant's arguments regarding how his two requests for access to documents (requests III and IV) were handled, and, in particular, that: (a) the CJEU's revised access rules limit transparency, compared to the former rules [23] ; (b) the CJEU's reasoning in refusing access varies from one case to another; (c) the CJEU's replies lack transparency and only the decisions on his requests to review the initial decisions are sufficiently reasoned; (d) the CJEU treats certain requests for access to documents as requests for information; (e) the CJEU relies excessively on the exception for protecting personal data to refuse access to documents; and (f) the CJEU wrongly classifies administrative documents as constituting part of its judicial activity.

a) Current CJEU access rules provide for less transparency

Arguments presented to the Ombudsman

29. The complainant contended that the current CJEU access rules provide for less transparency than the former rules [24] , and thus breach the EU Treaties [25] . In his view, the current rules result in many requests for access to documents being refused. The complainant also referred to a recent report by the European Court of Auditors (ECA), which criticised the fact that the CJEU withheld from the ECA a number of internal documents, thus preventing it from analysing the work of the Members of the CJEU. [26]

30. In its reply, **the CJEU** stated that the reason for amending the rules was to centralise and streamline its initial replies to access to documents requests. [27] It noted that the exceptions to the right of access to documents in both the current and former rules were essentially the same, and essentially the same as the rules on public access to documents that apply to the other EU institutions (Regulation 1049/2001) [28] .

The Ombudsman's assessment

31. The Ombudsman agrees with the CJEU that the exceptions to the right of access to documents in the current and former CJEU access rules and Regulation 1049/2001, are essentially the same. Thus, the current rules are not more restrictive than the former rules. The current and former rules are in line with the provisions in the EU Treaties on access to documents and transparency.

32. Furthermore, the complainant has not raised any compelling argument to substantiate his assertion that the CJEU is using the current rules to systematically refuse requests for public access to documents and, thus, limit transparency.

33. The report by the ECA, mentioned by the complainant, is also not relevant in this regard.



The report states that the ECA could not assess the impact of factors, such as the complexity of court cases, on the case-management process of the CJEU, since certain documents exchanged between Judges and Advocates-General on pending cases were not disclosed to the ECA. The CJEU withheld access to these documents in order to respect the secrecy of its deliberations, in accordance with the exceptions provided for under the applicable rules.

b) Inconsistent reasoning for refusing access to documents

Arguments presented to the Ombudsman

34. The complainant contended that the CJEU regularly changes the reasons it gives for refusing to grant access to documents. He referred to the different reasons given by the CJEU when refusing to disclose one of his memoranda to another individual, compared to the reasons given in response to his request for access to the same document. He also referred to the fact that he received documents about travel approvals for drivers under his request I, but initially not in response to his request IV (although the CJEU subsequently disclosed these documents). Furthermore, the CJEU initially questioned whether his request IV was admissible, but subsequently accepted it. Finally, he stated that he had previously received documents in which comments of Members concerning legislative and administrative matters were not redacted, whereas similar comments were redacted in other cases. [29]

35. In reply, the CJEU argued that the Ombudsman's inquiry concerns only the complainant's access requests, and not requests made by other individuals. In any event, it had refused access to both the complainant's and the other individual's request on the same grounds, with additional reasons being given to reflect the specificities of each request. Concerning the requests for access to the travel approvals, the CJEU argued that its decision on request I is the subject of pending judicial proceedings and, thus, outside the scope of the Ombudsman's inquiry. In any event, it is inherent in the two-stage procedure for dealing with requests for public access to documents, that the decision and/or reasoning in both stages (initial reply, review decision) might be different. Furthermore, its reasoning for not disclosing the comments of Members relates to the scope of the CJEU's access rules, which is the subject of the complainant's case before the General Court. In any event, if certain passages of a document were mistakenly not redacted, this does not imply that similar passages of other documents should be disclosed without redactions.

The Ombudsman's assessment

36. Requests for access to documents by other individuals fall outside the scope of this inquiry. The Ombudsman examines each refusal to grant access to a document on its own merits. As such, she is not in a position to consider any of the complainant's arguments in this context. [30]

37. As the CJEU pointed out, it is inherent to the two-stage procedure for access to documents requests that requests are re-examined, and that the decision and/or the underlying reasoning can differ from one stage to another (initial reply, review decision).



38. Finally, the Ombudsman must assess whether a decision on a request for access to documents is in line with the applicable rules. Thus, even if the CJEU previously disclosed documents without redactions, this does not necessarily mean that it is wrong to subsequently redact similar information.

c) Lack of transparency in replies to access requests

Arguments presented to the Ombudsman

39. **The complainant** argued that the CJEU does not provide any meaningful explanations in its initial replies to requests for access to documents, but only in its subsequent decisions reviewing requests (so-called 'confirmatory decisions'). Thus, those requesting access to documents can contest the CJEU's reasoning only by bringing a costly and lengthy case before the General Court against a review decision.

40. He adds that the CJEU's replies are not transparent since they do not include a list of all the documents it holds, indicating which of them can be disclosed and which cannot. In particular, he referred to the CJEU's initial reply to his request for access to his memoranda. He also referred to the fact that the CJEU initially refused to grant him access to a memorandum of the former President concerning the appointment of a director, and did so only after its review, following media coverage of the issue.

41. Finally, the complainant pointed out that the CJEU has yet to disclose to him, the cover letter and the preparatory acts of an unsigned, undated and unregistered document sent by the CJEU to Parliament and Council (part of request III).

42. In its reply, **the CJEU** denied that it provides reasons for its decisions only when it reviews requests. It restated its view that changes in the reasoning and/or its decisions are inherent to the two-stage procedure that applies to access to documents requests.

43. Regarding the complainant's request III, the CJEU noted that it had initially disclosed 189 documents and, subsequently, one additional document, after reviewing its initial decision. While it gave more detailed explanations in its review decision, this does not mean the reasoning was "late". Regarding request IV, the CJEU said that, in both its initial reply and review decision, it provided detailed reasons to justify its refusal to disclose certain documents.

44. The CJEU further stated that the complainant had himself provided a detailed list of the documents to which he wanted access in his request IV. The CJEU refused access to these documents, explaining clearly the reasons for doing so. It is therefore unclear what kind of list or additional explanations the CJEU could have given to the complainant.

45. The CJEU stated that it had initially disclosed several documents concerning the appointment of a director, before subsequently disclosing the memorandum of the former President.



The Ombudsman's assessment

46. As stated above, the fact that the reasoning of the CJEU may vary at the review stage is inherent to the two-stage procedure applicable to access to documents cases. There is nothing to suggest that the CJEU deliberately fails to provide sufficient explanations in its initial replies, and does so only if an applicant requests that it review its initial decision.

47. The complainant's argument about the list of documents (request IV) is unfounded. As the CJEU stated, the complainant himself provided a list of all the documents to which he wanted access. Moreover, the CJEU provided clear explanations why access to these documents was refused; namely that they concerned its judicial activity, and therefore fell outside the scope of the CJEU's access rules.

48. However, it is not clear why the CJEU disclosed the memorandum of the former President on the appointment of a director only after the complainant requested that it review its initial decision.

49. With a view to facilitating access to documents procedures, the Ombudsman considers that, in future, **the CJEU could seek to provide, in its initial replies, a list of all the relevant documents that fall under the scope of a request for access to documents. While it is possible that additional documents will be identified at the review stage, drawing up a list at the initial stage is a good administrative practice.**

50. Finally, regarding the complainant's argument that the CJEU has not yet disclosed documents concerning the cover letter and the preparatory acts of a legislative document, the Ombudsman notes that the CJEU has already informed the complainant that no such documents exist. The complainant has not submitted any convincing arguments to demonstrate that this is not true. [31]

d) The CJEU treats certain requests for access to documents as requests for information

Arguments presented to the Ombudsman

51. **The complainant** considered that the CJEU acted in bad faith and breached its obligation to assist those seeking access to documents [32] by treating part of his request IV for access to documents, as a request for information.

52. In reply, **the CJEU** stated that the complainant had clearly formulated part of his request as a request for information, and that such requests fall outside the scope of the rules on access to documents. [33] That said, the CJEU acknowledged that it had also relied on the applicable access to documents rules to reject these requests for information (on data protection grounds). The CJEU also stated that this issue is covered by the complainant's case before the General Court.

The Ombudsman's assessment



53. A request for information that is contained within documents should be treated as a request for public access to the documents containing that information . [34]

54. The Ombudsman's view is that the CJEU should have dealt with the complainant's requests according to the rules on access to documents, and not as requests for information. However, the CJEU provided reasons why, even if it had treated the requests as such, it could not disclose the documents containing the information. This was because of data protection concerns. In addition, some of the documents had already been disclosed or were otherwise in the public domain.

55. Therefore, there **was no maladministration in how the CJEU dealt with these requests.** That said, the Ombudsman **encourages the CJEU, in the future, to take a more citizen-friendly approach when assessing a request for access to documents that refers to information contained in documents .**

e) The CJEU excessively applies the exception for protecting personal data

Arguments presented to the Ombudsman

56. The complainant argued that, in order to justify refusing access to documents, the CJEU makes excessive and unjustifiable use of the exception for protecting personal data, provided for under the CJEU's access rules. In particular, he disagreed with the CJEU's practice of redacting the names of legal clerks (' *référéndaires* ') from minutes it discloses. He claimed that all other EU institutions mention on their websites the names of persons occupying similar positions [35] , and that all the CJEU's legal clerks are listed on the online public directory of EU civil servants [36] . Concerning the refusal to disclose information on travel expenses on the grounds of data protection, he noted that the Commission recently provided full access to the individual travel expenses of all Commissioners. Consequently, he argued that the CJEU should do the same for the travel expenses of its Members, in order to allow proper scrutiny of public funds. He also referred to the refusal to grant access to documents concerning the work of a senior member of the CJEU's staff.

57. In reply, **the CJEU** stated that personal data means any information relating to an identified or identifiable natural person. [37] In certain circumstances, confirming the existence of a document could, in itself, be personal data. [38] Since the complainant requested access to several documents concerning a person he identified by name, all such documents were classified as the personal data of that person. To have this data transferred to him, the complainant would need to demonstrate why he needed it. In addition, disclosing the data must not prejudice the legitimate interests of the person concerned. [39] The complainant did not demonstrate in any of his requests why he needed this data. The CJEU also stated that what is meant by personal data should not be confused with what is regarded as relating to private life. [40] Furthermore, the CJEU noted that the scope of the exception concerning the protection of personal data is an issue covered by the complainant's case before the General Court.

58. In his comments, the complainant argued that the case-law of the EU Courts regarding the



protection of personal data is very restrictive. He also contended that, in his reply to the Ombudsman's inquiry, the President of the CJEU went beyond his administrative role in referring to a judgment about the protection of personal data for which the deadline to appeal had not expired.

59. The complainant referred to his requests for access to documents and stated that the requested data needed to be in the public domain in order to enable the CJEU's administrative and legislative decisions to be properly scrutinised. However, it is difficult for an individual requesting access to a document to provide precise justifications when the content of the documents is not known. The complainant also emphasised that data protection is not an absolute right, but must be balanced against the rights to transparency, freedom of information and good administration.

60. Furthermore, the complainant considered that the Commission made the use of official cars and chauffeurs by Commissioners very transparent, whereas the CJEU keeps this information " *completely secret*". He also considered that the CJEU was wrong not to disclose any document about the work of a senior member of its staff.

The Ombudsman's assessment

61. The Ombudsman cannot inquire into matters that concern the CJEU's judicial activity and case-law [41] or question the soundness of a court's ruling [42]. Furthermore, the Ombudsman does not agree that the fact that the President of the CJEU, in his reply to the Ombudsman, referred to a judgment for which the deadline to appeal had not elapsed, meant he acted in a judicial, rather than an administrative, capacity. He was merely referring to the most recent judgment concerning the protection of personal data under access to documents rules. Following this reasoning, no judgment by the General Court could be accepted as definitive until the deadline for making an appeal has expired, or, in case of an appeal, a judgement by the CJEU is issued. However, this is not the case. [43]

62. The Ombudsman considers the CJEU's broad approach to the application of the exception for protecting personal data to be in line with EU case law. EU case-law has made clear that those seeking access to documents containing personal data must demonstrate the "necessity" of having the personal data transferred to them. [44] Moreover, there is no automatic priority given to the objective of transparency, over the right to the protection of personal data. [45]

63. By restricting his justification for needing the data to the need for the public to be able to scrutinise, in general, the CJEU's administrative and legislative decisions, the complainant has not provided any concrete reasons to demonstrate the "necessity" of having the personal data transferred to him.

64. While the information that a person works at the CJEU as a legal clerk may, and indeed should, be in the public domain, this does not mean that the CJEU should disclose that person's personal data in the context of a request for access to documents. The person seeking



access to the documents in question must still demonstrate the necessity to have any specific personal data transferred to them, which in this case, the complainant has not done.

65. Since the complainant has taken a case to the General Court contesting the CJEU's decision to redact the personal data in the travel approval disclosed to him under request I, the Ombudsman considers that she cannot take a position on the CJEU's redactions under request IV, because this issue is also now pending before the EU Courts. [46] It is sufficient to point out that the Ombudsman recently welcomed the proactive commitment by the European Commission to publish information about each Commissioner's travel expenses every two months.

66. Finally, concerning the documents about the work done by a senior member of the CJEU's staff [47], the fact that a specific period of time has passed since the person concerned took up their role, does not, as such, demonstrate the "necessity" to have the related data transferred in the context of a request to access documents. The fact that a person may have been in a post for a given period does not mean that their right to have their personal data protected diminishes or ceases to apply.

f) The CJEU considers administrative documents as being judicial in nature

Arguments presented to the Ombudsman

67. The complainant disagreed with the CJEU's view that comments made by Members about administrative and legislative matters relate to its judicial activity. He stated that, under the EU Treaties, transparency is a priority and it is essential for ensuring the EU institutions function correctly.

68. In reply, **the CJEU** stated that the complainant's arguments were directly linked to the question of the scope of the CJEU's access rules, and thus relate to the distinction between the CJEU's judicial and administrative activities. It noted that this matter is covered by the complainant's case before the General Court, and that the Ombudsman could thus not inquire into it.

69. In his comments on the CJEU's reply, **the complainant** argued that his case before the General Court does not cover the CJEU's replies to his requests III and IV, which were sent later. He also emphasised that the CJEU's refusal to disclose the views expressed by Members on administrative or legislative matters does not pose a risk to their judicial independence.

The Ombudsman's assessment

70. In his case before the General Court, the complainant has contested the CJEU's refusal to grant access to documents leading to the adoption of the Code of Conduct on the basis that these documents express the opinions of Members, and thus are linked to its judicial activity.

71. The arguments raised by the complainant in this case also relate to the general question of



whether comments by Members are intrinsically linked to their judicial function, and therefore fall outside the scope of the CJEU's access rules [48] . Given the General Court will rule on this case the Ombudsman will not look into **this aspect of the complaint** [49] .

Conclusions

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

There was no maladministration by the CJEU regarding those aspects of the complaint not covered by the complainant's case before the General Court.

The Ombudsman closes without further action those aspects of the complaint covered by the complainant's case before the General Court.

The complainant and the CJEU will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 05/06/2019

ANNEXES

Access to documents request I

1. On 14 December 2016, the complainant requested public access to a number of documents ('request I'), including: (1) the documents that led to the adoption of the 2016 Code of Conduct [51] ; (2) documents and information concerning the possible appointment of Mr X to a senior post within the CJEU; and (3) the authorisations for work trips [52] that involved the use of the CJEU's official drivers.
2. Considering that the initial decision of the CJEU of 17 February 2017 to his request I was partially negative, the complainant requested the CJEU to review that decision.
3. On 22 May 2017, the CJEU adopted its decision (the so-called 'confirmatory decision') on the complainant's request for review (the so-called 'confirmatory application').
4. It stated that the documents relating to the adoption of the 2016 Code of Conduct (request I.



1) did not relate to its 'administrative tasks' (as referred to in Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) [53] and thus, fell outside the scope of the CJEU's rules on public access to documents [54]. The CJEU stated that the obligations imposed by the Code of Conduct on current and former Members of the Court are intrinsically linked with the exercise of their judicial functions, and are thus not 'administrative'. In addition, disclosing documents that express opinions for internal use, as part of deliberations and preliminary consultations, would seriously undermine the CJEU's decision-making process [55]. If such documents were disclosed, Members of the CJEU would not be able to express their opinions independently, to the detriment of the CJEU's decision-making process.

5. The CJEU disclosed in full a letter (request I. 2) setting out the reasons for appointing Mr X as a senior member of its staff. It stated that the CJEU had obtained the consent of Mr X for this disclosure.

6. The CJEU also granted partial access to two authorisations for work trips (request I. 3). It stated that the redactions were made to protect personal data. It noted that the complainant had not established the necessity of having this personal data transferred to him.

Access to documents request II

7. On 27 January 2017, the complainant requested public access to documents exchanged between the former President of the CJEU and the German authorities between 2011 and 2015 (request II. 1), and a list of all the documents addressed by the former President of the Court to the Member States during his presidency (request II. 2).

8. On 18 May 2017, following the complainant's request for review of its initial reply, the CJEU confirmed that it had not found any documents exchanged between the former President of the CJEU and the German authorities, and that the requested list did not exist.

9. On 12 July 2017, the complainant challenged before the General Court the legality of the CJEU's review decisions on his access to documents requests I and II [56]. He argued, among other things, that the documents concerning the adoption of the 2016 Code of Conduct relate to the CJEU's administrative tasks, not its judicial tasks.

Access to documents request III

10. On 22 March 2017, the complainant requested access to thirteen sets of documents ('request III'). These included: [57]

- all the documents that led to the drafting of an unsigned and undated memorandum of May 2015, presented by the CJEU to the EU institutions, regarding the doubling of the number of judges at the General Court (request III.5);
- the instructions issued by the former President of the CJEU and his Cabinet concerning the development of an IT application ('*the Presidents' site*'), any objections raised by the IT Directorate (request III.6), and the documents related to the total costs for the '*Presidents' site*' (request III.9);
- documents exchanged between the President, the Vice-President and the Registrar of the CJEU, and staff of the Directorate-General for personnel, regarding the recruitment of a Director (request III.7);
- all the documents regarding a referral of a case to the 'Code of Conduct committee' (request



III.8);

- documents regarding the use of official drivers at the CJEU (request III.10); and,
- documents regarding the reform of the General Court, and the authorised work trips and external activities of Members (request III.12).

11. On 24 May 2017, the CJEU granted the complainant access to 189 documents. Regarding request III.5, it stated that it could not identify any document. Regarding request III.8, it refused access because disclosure of the document would undermine the protection of personal data. Regarding request III.10, the CJEU disclosed to the complainant the applicable rules on the use of drivers.

12. On 23 June 2017, the complainant submitted a request for review. Regarding request III.5, he clarified that the document he had referred to in his request was an unsigned memorandum of May 2015, which, in his view had played a decisive role in the decision taken by the EU legislature to double the number of judges at the General Court. Regarding request III.6, he contested the fact that the documents disclosed did not include instructions issued by the former President, or objections raised by the IT Directorate, concerning ‘*the Presidents’ site*’. Regarding request III.7, he noted that a Memorandum of the former President of March 2015 was not among the documents disclosed, although the press had mentioned it. Regarding request III.8, he stated that the application of the Code of Conduct was not judicial in nature. If the exception to protect personal data applied, the CJEU should ask the person whose personal data was concerned for his consent for the disclosure of his personal data. Regarding request III.9, he stated that the documents disclosed did not provide any evaluation of the total costs of ‘*the President’s site*’. Regarding request III.10, he stated that disclosing the documents regarding the use of official drivers was in the public interest in order to monitor the budgetary implications and the working conditions of the drivers. Regarding request III.12, he considered that he had not received all the documents requested.

13. On 25 August 2017, the CJEU replied, confirming that it had not been able to identify any document corresponding to request III.5, nor any documents, apart from those already disclosed, corresponding to request III.6. Regarding request III.7, it disclosed the Memorandum of the former President of the CJEU of 10 March 2015. Regarding request III.8, it stated that the application of the Code of Conduct to a Member was intrinsically linked to the exercise by Members of their judicial tasks, and consequently any related documents fell outside the scope of the CJEU’s access rules [58]. In addition, given that the request concerned an identified person, the CJEU rejected it on data protection grounds, noting that the complainant had not demonstrated the need to transfer these data to him. Further, the CJEU stated that it had already disclosed the documents corresponding to request III.9 and that information requests regarding the total cost of the ‘Presidents’ site’, fell outside the scope of the CJEU’s access rules. Regarding request III.10, the CJEU stated that there was no document in its possession with a cost breakdown analysis on the use of official drivers. The CJEU also gave the complainant information as to where, within the batch of documents already disclosed to him, he could find the documents relating to request III.12. [59]

Access to documents request IV

14. On 17 August 2017, the complainant made a fourth request for public access to documents



(‘request IV’). This request comprised 12 sets of documents, including: the list of letters between the former President of the CJEU and the EU institutions during his mandate (request IV.4) [60] ; the ‘exit allowance’ of a senior member of staff and his remuneration from the CJEU (request IV.5); the work completed by that senior member of staff for the CJEU (request IV.6); the reasons for the appointment of a Director (request IV.7); specific travel authorisations for official drivers (request IV.8); the requests received by the CJEU for public access to documents not related to legislative procedures, including the requests by Ms Z for access to memoranda drafted by the complainant while he was a judge at the General Court together with the CJEU’s replies to them (request IV.10); and 75 of his own memoranda and 25 directly related documents (request IV.12).

15. In its initial replies of 17 and 18 October 2017, the CJEU refused access to all the above-mentioned documents. Regarding request IV.12, it stated that the complainant’s memoranda, and the directly related documents, fell outside the scope of the CJEU’s access rules as they were not related to ‘administrative tasks’, but rather contained opinions of Members of the Court made in the exercise of their judicial functions [61] .

16. On 16 November 2017, the complainant submitted a request for review to the CJEU, contesting its replies regarding requests IV.4, IV.5, IV.6, IV.7, IV.8, IV.10 and IV.12.

17. On 17 January 2018, the CJEU replied to the complainant. Regarding request IV.4, the CJEU stated that it had previously informed the complainant that a “*list*” of letters from and to its former President did not exist. It also considered that requests IV.5, IV.6 and IV.7 were requests for information, and thus fell outside the scope of the CJEU’s access rules [62] . If they were to be treated as a request for access to documents, the complainant would need to make a new request for public access. In any event, the relevant documents under request IV.5 were already in the public domain. It added that the documents concerned under requests IV.5, IV.6 and IV.7 contained personal data [63] and that the complainant had not shown the necessity of having them transferred to him.

18. Regarding request IV.8 the CJEU disclosed the travel authorisations requested having redacted all personal data from them.

19. Regarding request IV.10, the CJEU disclosed the requests for access to documents for which it had obtained the consent of the applicant, while redacting all personal data, and the CJEU’s replies . It refused however to disclose the requests made by Ms Z and the CJEU’s replies thereto, based on data protection grounds. For the CJEU, Ms Z’s consent would not have been sufficient to disregard the data protection rules [64] .

20. Regarding request IV.12, the CJEU stated that since the complainant already had copies of his own memoranda, his request was in fact a request to the CJEU to allow him to publish these memoranda. Such request fell **within the scope of the CJEU Statute** [65] , which requires that Members, during and after their term of office, behave with integrity and discretion [66] . It also referred to the fact that under the 2016 Code of Conduct, former Members continue to be bound by their duty of integrity, dignity, loyalty and discretion, and should refrain from any statement



that may harm the reputation of the Court [67] . It noted that the Statute contains specific rules regarding the conduct of Members of the CJEU and therefore takes precedence over the CJEU's access rules. In addition, the memoranda and related documents in question **related to the Court's judicial activity** , and thus fell outside the scope of application of the CJEU's access rules [68] . For the CJEU, the exclusion from the transparency rules of documents that express the individual opinions of Members in matters that concern the exercise of their functions or the functioning of the Court contributes to their independence and thus, to the protection of court proceedings. Moreover, the disclosure of the documents in question, used as part of deliberations and preliminary consultations within the CJEU, would also undermine **the decision-making process** [69] **of the CJEU** . [70]

[1] Code of Conduct for Members and former Members of the Court of Justice of the European Union 2016/C 483/01:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR> [Link].

[2] More comprehensive details on these requests, and how the CJEU dealt with the requests, can be found in the annex below.

[3] Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2016/C 445/03):

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016D1130%2801%29&from=EN> [Link].

[4] Case T-433/17, Dehousse v Court of Justice of the EU:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=194304&pageIndex=0&doclang=EN&mode=lst&dir> [Link].

[5] See the Ombudsman's letter informing the complainant about the scope of her inquiry:

<https://www.ombudsman.europa.eu/pdf/en/104332> [Link].

[6] See the Ombudsman's inspection meeting report:

<https://www.ombudsman.europa.eu/pdf/en/107584> [Link].

[7] The CJEU's reply is available at: <https://www.ombudsman.europa.eu/pdf/en/106452> [Link].

[8] Article 7(2) of the current Code of Conduct.

[9] Statute of the Court of Justice of the European Union (CJEU Statute):

https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf [Link].

[10] Article 2 of the CJEU Statute.



[11] In line with Article 228(1) TFEU.

[12] See Article 1(3) of the former Code of Conduct.

[13] The requirement that courts are independent pertains moreover to the fundamental right to a fair trial. See Case C-216/18, LM, paragraph 63 and the case law cited therein:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir>
[Link].

[14] See point VI “Freedom of expression” of the ECtHR’s Resolution on Judicial Ethics:

https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf [Link].

[15] He referred to judgments of the ECtHR *Guja v Moldova* (

[https://hudoc.echr.coe.int/eng#{"languageisocode":\["ENG"\],"appno":\["14277/04"\],"documentcollectionid2":\["GRAND"\]](https://hudoc.echr.coe.int/eng#{)
[Link]), application no. 14277/04, and *Heinisch v Germany*, application no. 28274/08
([https://hudoc.echr.coe.int/eng#{"fulltext":\["heinisch v germany"\],"itemid":\["001-105777"\]](https://hudoc.echr.coe.int/eng#{))).

[16] Treaty on the Functioning of the European Union (TFEU), Article 228(1), first subparagraph.

[17] In accordance with Article 228(1), second subparagraph TFEU.

[18] Case T-433/17, *Dehousse v Court of Justice of the EU*:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=194304&pageIndex=0&doclang=EN&mode=lst&dir>
[Link]. The Report of the Oral Hearing in that case clearly shows that this matter has been
raised before the General Court.

[19] In accordance with Article 2(7) of the Statute of the European Ombudsman (

<https://www.ombudsman.europa.eu/en/legal-basis/statute/en> [Link]) and Article 6(4) of the
Implementing Provisions of the European Ombudsman
(<https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en>).

[20] The CJEU referred to case-law on the legal status of decisions on access to documents:

C-188/92, *TWD Textilwerke Deggendorf*, paragraph 25 and C-135/16

(<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98496&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&>
Georgsmarienhütte and Others, paragraphs 14 and 15 (

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=204381&pageIndex=0&doclang=EN&mode=lst&dir>
[Link]).

[21] Article 7(2) of the CJEU’s access rules and Article 8(1) of Regulation 1049/2001.

[22] Article 8(3) of Regulation 1049/2001.

[23] Decision of the Court of Justice of the European Union of 11 December 2012 concerning



public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D0209\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D0209(02)) [Link].

[24] Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D0209\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D0209(02)) [Link].

[25] Notably Article 15 of the Treaty on the Functioning of the European Union, which provides that decisions should be taken as closely as possible to the citizen and in a transparent manner.

[26] European Court of Auditors, Special report no 14/2017: Performance review of case management at the Court of Justice of the European Union,

<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=42128> [Link]

[27] See Article 8 of both decisions.

[28] 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:

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

[29] The complainant referred to a memo of an advocate-general on the CJEU's position on a legislative procedure, which he claimed the CJEU would not disclose. He also noted that the CJEU had disclosed a report of a committee on the legislative reform of the EU courts, whereas it subsequently refused to disclose the position of the General Court on the same reform. He also disagreed with the CJEU's refusal to disclose a report on its governance, which had been adopted by the plenary of the General Court.

[30] This conclusion applies to all the arguments the complainant raised in his complaint, which refer to how the CJEU dealt with the requests for access to documents requests by other individuals. The Ombudsman will therefore not deal with each of these arguments separately.

[31] As required under EU case-law. For example, T-468/16, Verein Deutsche Sprache v Commission, paragraph 35 and the case law cited therein:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=C6E583D2629630367B66E55C8342C568?text=&docid=61308&pageIndex=0&doclang=EN&mode=lst&dir=asc> [Link].

[32] In accordance with Article 4(3) of the CJEU's access rules.

[33] T-264/04, WWF European Policy Programme v Council, T-264/04, paragraph 76 :

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=61308&pageIndex=0&doclang=EN&mode=lst&dir=asc> [Link].

[34] T-264/04, WWF European Policy Programme v Council, paragraph 76: “ (...) *It is true that it*



*is apparent from the judgment in Council v Hautala, cited in paragraph 50 above, that Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), which preceded Regulation No 1049/2001, covered not only documents held by the institutions as such but also information contained within those documents (paragraph 23 of the judgment). However, **access to information** – within the meaning of that judgment – **may be granted only if that information is contained within documents, which presupposes that such documents exist** .”*

[35] In particular, he mentioned the Commission, the European Parliament and the European Court of Auditors.

[36] <http://europa.eu/whoiswho/public/> [Link].

[37] T-639/15 to T-666/15 and T-94/16, Psara and Others v Parliament, paragraph 45:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=206663&pageIndex=0&doclang=EN&mode=lst&dir>
[Link].

[38] The CJEU argued that the Ombudsman had confirmed that approach in case 1976/2017/THH: <https://www.ombudsman.europa.eu/en/decision/en/90579> [Link].

[39] See T-639/15 to T-666/15 and T-94/16, Psara and Others v Parliament, paragraphs 70-71 and the case-law cited.

[40] See Cases T-639/15 to T-666/15 and T-94/16, Psara and Others v Parliament, paragraph 50 and the case-law cited therein.

[41] In accordance with Article 228(1) TFEU.

[42] In accordance with Article 1(3) of the Statute of the European Ombudsman:
<https://www.ombudsman.europa.eu/en/legal-basis/statute/en> [Link].

[43] In accordance with Article 278 of the TFEU, an appeal to the CJEU has no suspensive effects.

[44] See, to that effect, C-28/08 P, Commission v Bavarian Lager, paragraph 78 and T-82/09

(<http://curia.europa.eu/juris/document/document.jsf?text=&docid=84752&pageIndex=0&doclang=EN&mode=lst&dir>
Dennekamp v Parliament, paragraphs 30 and 34:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=115062&pageIndex=0&doclang=EN&mode=lst&dir>

[45] C-615/13 P, ClientEarth and PAN Europe v EFSA, paragraphs 51 and 52:

<http://curia.europa.eu/juris/document/document.jsf;jsessionid=0D099A9A96F3286A0D53CBF4CC422586?text=&dir>
[Link].

[46] Although this case concerns redactions of personal data, the Ombudsman notes that in her Decision in cases 562/2017/THH and 1069/2017/THH on how the Commission handled a large



number of requests for access to documents on Commissioners' travel expenses, she welcomed the proactive commitment by the Commission to publish information about each Commissioner's travel expenses every two months:

<https://www.ombudsman.europa.eu/en/decision/en/106536> [Link].

[47] The CJEU had rejected the request, among other reasons, citing the need to protect personal data. During the inspection meeting, the CJEU also confirmed that the complainant made a new request for, among other things, documents produced by the member of staff, without naming the person concerned.

[48] See above paragraph 5 of this decision.

[49] In accordance with Article 2(7) of the [Statute of the European Ombudsman](#) [Link] and Article 6(4) of the [Implementing Provisions of the European Ombudsman](#) [Link].

[51] Code of Conduct for Members and former Members of the Court of Justice of the European Union 2016/C 483/01:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR> [Link].

[52] Also referred to by EU institutions and EU staff as 'mission orders'.

[53] According to Article 15(3), fourth subparagraph of the Treaty on the Functioning of the European Union (TFEU), the CJEU is subject to the rules on the right of access to documents only " *when exercising [its] administrative tasks* ". See also Article 1(1) of its 2016 access to documents Decision.

[54] Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2016/C 445/03):
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016D1130%2801%29&from=EN> [Link].

[55] In accordance with Article 3(3), second subparagraph of the 2016 access to documents Decision.

[56] Case T-433/17, *Dehousse v Court of Justice of the EU* :
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=194304&pageIndex=0&doclang=EN&mode=lst&dir> [Link].

[57] The numbering used here corresponds to the numbering of the complainant's original request to the CJEU.

[58] In accordance with Article 15(3), subparagraph four of the TFEU and Article 1(1) of its



access to documents rules.

[59] In total, under request III, the CJEU granted access to 190 documents, amounting to 1 686 pages.

[60] The numbering used here corresponds to the one used by the complainant in his initial request IV.

[61] Article 15(3), fourth subparagraph of the TFEU.

[62] Case T-264/04, *WWF European Policy Programme v Council* , paragraph 76:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=02E8DE7D9EF33AC957FC048C845B95E8?text=&docid=177121&pageIndex=0&doclang=FR&mode=lst&dir=asc>
[Link].

[63] Article 2(a) of Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R0045> [Link].

[64] Case T-221/08, *Strack v Commission* , paragraph 192 and the case law cited therein:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=177121&pageIndex=0&doclang=FR&mode=lst&dir=asc>

[65] In accordance with Article 4(3) of the CJEU's Statute.

[66] Case C-432/04, *Commission v Cresson* , paragraphs 69 and 70.

[67] Articles 6(4) and 9(1) of the 2016 Code of Conduct:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=3AEA6BE050FC09F02EFDDC9D07CAD5E8?text=&docid=192887&pageIndex=0&doclang=EN&mode=lst&dir=asc>

[68] In accordance with Article 15(3), subparagraph four of the TFEU, Article 1(1) of the CJEU's access rules, and Case C-213/15 P, *Commission v Breyer* , paragraph 48:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=192887&pageIndex=0&doclang=EN&mode=lst&dir=asc>

[69] Article 3(3), second subparagraph of the CJEU's access rules.

[70] In total, under request IV, the CJEU granted access to 557 documents (2 960 pages in total).