

COMPLAINT TO THE EUROPEAN OMBUDSMAN

1. INTRODUCTION

1. The Complainants submitted a request for access to documents to the European Council, requesting access to all SMS and other text-based communications between the President of the European Council, Mr. Donald Tusk, and foreign Heads of State or Heads of Government in 2018. The request aimed at increasing transparency with respect to the EU's external action, as conducted by the European Council and its President, within the limits of their role pursuant to the EU Treaties.
2. Access to the requested documents was refused by the European Council on the grounds that it did not identify any documents that corresponded to the request of the Complainants. It also noted that phone-based text messages may qualify as a "document" as long as they concern a matter relating to the policies, activities and decisions falling within the EU Institution's sphere of responsibility; be "held by the Institution"; not be ephemeral or short-lived; and, if it contains substantial information, such information needs to be exchanged, registered, saved and eventually archived in accordance with applicable rules.
3. The Complainants submit that the European Council's reply is unlawful and respectfully requests that the European Ombudsman take the necessary steps to ensure that the European Council (i) reconsider its refusal to disclose the requested documents, and (ii) fully comply with the Regulation in the present and future cases.
4. This complaint sets out the relevant procedural steps and legal provisions (see section 2 below) and the Complainants' submission about why the European Council erred in refusing to disclose the requested documents (see section 3 below).

2. RELEVANT PROCEDURAL STEPS AND LEGAL PROVISIONS

5. This section sets out the relevant (1) procedural steps and (2) legal provisions in the framework of the Complainants' request for access to documents.

2.1. Relevant procedural steps

6. On 5 November 2019, Mr. Arne Semsrott and Ms. Luiza Izuzquiza sent a request for access to documents pursuant to Regulation 1049/2001 ("**Regulation**")¹ on behalf of the Complainants to the Transparency and Access to Documents Unit of the General Secretariat of the Council of the European Union ("**Transparency Unit**"). The request concerned: *"all text messages (i.e., SMS messages) and other mobile-phone-based text communications (e.g., WhatsApp, Telegram, iMessage, Facebook Chat, SnapChat, Slack, Facebook and Twitter "direct messages," Signal Messenger, Wire, etc.) sent by – or on behalf of – Council President Donald Tusk in exchange with EU and foreign heads of state or heads of government in 2018."*
7. On 25 November 2019, the European Council refused to grant access to the requested documents. The grounds of the refusal were that the European Council did not have in its possession any such SMS messages or other mobile-phone-based text communications sent

¹ See 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, OJ L 145, 31.5.2001, p. 43.

out in the professional context containing substantial and not short-lived information that would be considered as documents drawn up by the European Council within the meaning of Article 3(a) of the Regulation.

8. On 25 November 2019, the Complainants filed a confirmatory application, requesting that the European Council rectify its assessment and disclose the requested documents. The confirmatory application was based on the following grounds:

(1) text messages and other mobile-phone based text communications fall within the definition of "document" under Article 3(a) of the Regulation;

(2) a refusal to grant access to such documents because information included therein is "substantial" and "short-lived" is not in line with the Regulation; and

(3) other types of documents that constitute exchange of messages of a non-substantial and short-lived nature, such as emails, are frequently disclosed pursuant to the Regulation.

9. On 16 January 2020, the European Council rejected the Complainants' confirmatory application on the grounds that it did not identify any documents held by the European Council that corresponded to the request of the Complainants. The European Council relied on the following reasoning: the combined reading of Articles 2(3) and 3(a) of the Regulation indicates that the medium of the content exchanged content is irrelevant and phone-based text messages may under exceptional circumstances qualify as a "document" as long as the following criteria are met: (i) the content must concern a matter relating to the policies, activities and decisions falling within the EU Institution's sphere of responsibility; and (ii) the content must be "held by the Institution", i.e., be "drawn up or received" by it and remain as two additional conditions are "in its possession". According to the European Council, the content must have a minimum degree of stability and formality, not be ephemeral or short-lived and, if it contains substantial information, such information needs to be exchanged, registered, saved and eventually archived in accordance with applicable rules, including with regard to the security of such information. Finally, the European Council noted that it is not in its practice that information containing substantial content and concerning matters falling within the EU Institution's sphere of responsibility is exchanged by instant messaging communications of its President.

2.2. Relevant legal provisions

2.2.1. The Regulation

10. The main purpose of the Regulation is to ensure the principle of openness enshrined in Article 1(2) TEU by giving the fullest possible effect to the right of public access to documents. In doing so, the Regulation lays down the general principles and limits on such access to documents.²
11. Articles 2(3) and 3(a) of the Regulation define its material scope. Article 2(3) of the Regulation sets out that any document held by an EU Institution (either because it was drawn up or received by it from a third party) that relates to an area of activity of the EU falls within the scope of the Regulation. The Court of Justice of the EU ("CJEU") has clarified that a document is considered to be held by an EU Institution whenever an EU

² See 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, OJ L 145, 31.5.2001, recitals (1) and (4).

Institution is "*physically in possession*" of such document,³ i.e. whenever the EU Institution has access to such document.⁴ Article 3(a) of the Regulation provides that a document within the meaning of Article 2(3) of the Regulation is **any content** (whatever its medium) relating to the policies, activities and decisions falling within the EU Institutions' sphere of competence.

12. Articles 4(1) to (3) and 9 of the Regulation set out the objective limits of public and private interests that are capable of justifying a refusal to disclose documents held by the EU Institutions.⁵ Article 4(1) to (3) provide for various substantive exceptions where disclosure would undermine the protection of predefined interests (e.g. public security, privacy and integrity of the individual, the commercial interests of a natural or legal person, or the EU Institutions' decision-making process). The CJEU has confirmed that these exceptions must be interpreted restrictively and the EU Institutions must systematically explain how access to the requested documents can specifically and effectively undermine the interest(s) invoked.⁶
13. Article 9 lays down special rules for so-called sensitive documents. Sensitive documents are documents from: (i) the Institutions or the agencies established by them, or (ii) EU Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL', which protect essential interests of the EU or of one or more of its Member States in the areas covered by Article 4(1)(a) of the Regulation, notably public security, defence and military matters.⁷ The CJEU has confirmed that there is no other ground available to the EU Institutions to refuse disclosure of a document that falls within the material scope of the Regulation.⁸
14. It follows that the material scope of the Regulation extends to all documents to which the EU Institutions may have access (regardless of their author or medium) and that relate to their activities. Moreover, the grounds on which the EU Institutions may refuse to disclose such documents are strictly limited to those listed in the Regulation.

2.2.2. *The EU Treaties*

15. The EU Treaties set out the role and function of the European Council and delineate its sphere of responsibility. Pursuant to Article 15 of the Treaty on the European Union ("TEU"), the European Council defines the general political direction and priorities of the

³ See Judgment of 27 November 2007, *Pitsiorlas v Council and ECB*, Joined Cases T-3/00 and T-337/04, EU:T:2007:357, para. 122.

⁴ See Judgment of 26 October 2011, *Dufour v ECB*, Case T-436/09, EU:T:2011:634, para. 131; Judgment of 2 July 2015, *Typke v Commission*, Case T-214/13, EU:T:2015:448, para. 56; Judgment of 27 February 2015, *Breyer v Commission*, Case T-188/12, EU:T:2015:124, paras. 51-52.

⁵ See Judgment of 18 December 2007, *Sweden v Commission*, Case C-64/05 P, EU:C:2007:802, paras. 52-53 and 57; Opinion of Advocate General Poiares Maduro of 18 July 2007, *Sweden v Commission*, Case C-64/05 P, para. 55.

⁶ See Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, para. 49.

⁷ See 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, OJ L 145, 31.5.2001, Article 9(1).

⁸ See Judgment of 11 March 2009, *Borax Europe v Commission*, Case T-121/05, EU:T:2009:64, para. 34.

EU and its development. The European Council does not exercise legislative functions.⁹ It also has a central role in the EU's Common Foreign and Security Policy ("CFSP").

16. In that regard, the European Council identifies the European Union's strategic interests, determines the objectives of and defines general guidelines for the CFSP, including for matters with defence implications.¹⁰
17. As regards the role of the President of the European Council, the TEU sets out that the President is to ensure the external representation of the EU on issues concerning its CFSP, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy, as well as at international summits alongside the President of the European Commission.¹¹
18. Further, the President chairs the meetings at European Council, ensures the preparation of the European Council and the continuity of work, and helps facilitate cohesion and consensus within the European Council.
19. The EU Treaties also set out the principle of good governance and participation of civil society. To this end, EU Institutions must conduct their work as openly as possible.¹² The TFEU provides for the right of access to documents of the EU Institutions, whatever their medium, subject to general principles and grounds of public or private interest, on the basis of the Regulation.¹³ In that regard, each EU Institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.¹⁴

2.2.3. *The European Council's Rules of Procedure*

20. The Rules of Procedure of the European Council make the provisions concerning public access to documents of the Council of the EU applicable *mutatis mutandis* to the European Council documents.¹⁵
21. Pursuant to Annex II to the Council's Rules of Procedure, any natural or legal person shall have access to documents, subject to the principles, conditions and limits laid down in the Regulation.¹⁶
22. Without prejudice to the rules on public access to documents, the deliberations of the European Council are covered by the obligation of professional secrecy, unless the European Council decides otherwise.¹⁷

3. THE EUROPEAN COUNCIL ERRED IN REFUSING TO DISCLOSE THE DOCUMENTS REQUESTED BY THE COMPLAINANTS

3.1. The European Council failed to comply with its obligations under the Regulation

⁹ See Consolidated Version of the TEU, OJ C 326, 26.10.2012, Article 15(1).

¹⁰ See TEU, Article 22(1) and 26(1).

¹¹ See TEU, Article 15(6).

¹² See TEU, Article 15(1).

¹³ See TEU, Article 15(3).

¹⁴ *Ibid.*

¹⁵ Rules of Procedure of the European Council, Article 10(2).

¹⁶ Rules of Procedure of the European Council, Annex II, Article 1.

¹⁷ Rules of Procedure of the European Council, Article 11.

23. It is the Complainants' understanding of the European Council's reasoning that SMS and text-based messages would in principle fall within the notion of "document" for the purposes of the Regulation. This is because, as discussed above in Paragraph 10, in accordance with Articles 2(3) and 3(a) of the Regulation the medium of the document is irrelevant. This is subject to certain additional requirements set out by the European Council in its response. In this complaint, the Complainants focus on proving that:

(i) the additional criteria set out by the European Council that the documents fall within its sphere of responsibility and are in its possession were also met in the present case; and

(ii) the additional criteria concerning the documents not being short-lived and duly registered in the EU's systems go beyond the purpose of the Regulation.

Therefore the European Council erred in law in refusing access to the requested documents.

24. This subsection demonstrates that the European Council:

(i) failed to properly examine whether the documents requested by the Complainants were in its possession;

(ii) failed to properly examine whether the documents requested by the Complainants fell within its sphere of responsibility;

(iii) interpreted the relevant provisions of the Regulation in a manner that is contrary to the wording and purpose of the Regulation;

(iv) failed to address the Complainants' arguments and evidence as presented in its confirmatory application; and

(v) failed to abide by the principle of transparency.

3.1.1. *The European Council failed to properly examine whether the documents requested by the Complainants were in its possession*

25. An EU Institution is deemed to hold a document within the meaning of the Regulation when it is "*physically in possession*" of that document, which is to say when it has access to the said document.¹⁸ Pursuant to case law of the CJEU, an EU Institution is also deemed to be "*physically in possession*" of a document where the document concerned is stored by an external service provider, on behalf of the EU Institution; the EU Institution has the tools to search for the requisite information (e.g., in the case of a database); or the document is received by the EU Institution and is retained.¹⁹ The right to access documents extends not only to documents drawn up by the EU Institution, but also to documents received from third parties.²⁰ Further, Article 2(3) of the Regulation does not make the application of the Regulation to documents "received" by the EU Institution contingent on the document having been addressed to it and sent directly by its authors.

26. The Complainants maintain that the European Council was "*physically in possession*" of the requested documents, as the SMS and other text-based messages were (i) received from third parties, (ii) received by its President and (iii) the Complainants assume that were

¹⁸ See para. 13 above.

¹⁹ Judgment of 26 October 2011, *Dufour v ECB*, Case T-436/09, EU:T:2011:634, para. 131; Judgment of 2 July 2015, *Typke v Commission*, Case T-214/13, EU:T:2015:448, para. 56; Judgment of 27 February 2015, *Breyer v Commission*, Case T-188/12, EU:T:2015:124, paras. 51-52.

²⁰ Judgment of 18 July 2017, *Commission v Breyer*, Case C-213/15 P, EU:C:2017:563, para. 36.

retained in the President's mobile phone device. In this regard, the Complainants consider irrelevant that such messages were not directly addressed to the European Council itself, but were addressed to its President. Complainants submit that, so long as such messages contained substantial information about the President's actions in representing the EU externally and drawing its strategic interests, within the remit of his role under the EU Treaties, the President was in possession of documents falling within his sphere of responsibility. Given the President's institutional role, namely to represent the EU externally and ensure continuity of work and coherence within the European Council, his actions are intrinsically linked to the very operation of the European Council itself. It follows that any documents falling within the President's remit of work necessarily fall within the European Council's sphere of responsibility (see section 3.1.2 below).

27. Whether an EU Institution holds a document – and whether, as a result, the Regulation applies to that document – is therefore a factual question determined by whether the EU Institution actually has access to that document. On that basis, the CJEU has imposed two distinct obligations on the EU Institutions. First, "*in order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, retain all documentation relating to their activities.*"²¹ Second, upon receipt of a request for access to a document, they must conduct a "*thorough search*" into whether they actually have access to the requested document. According to the CJEU, "*a less than thorough search [...] may have led the Council to conclude, sincerely but wrongly, that the documents did not exist though they were held in its archives. Such a situation could amount to an infringement of [the rules on public access to EU documents].*"²²
28. As explained above, the documents requested by the Complainants are in the physical possession of its President. In light of the President's institutional role in the EU and the potentially substantive content of the requested documents received by him, which fell within the European Council's sphere of responsibility, the European Council necessarily has, or should have access to these documents. As a result, in refusing to disclose the documents requested by the Complainants on the basis that it did not hold them, the European Council necessarily violated (at least) one of the abovementioned obligations:
- Either the European Council (i.e. the President) failed to properly retain the requested documents in violation of the CJEU's case law;
 - Or – if the requested documents were properly retained in line with applicable case law/rules – the European Council failed to conduct a "*thorough search*" with a view to locate and disclose the said documents.
29. Although a presumption of legality applies to any statement of an EU Institution that it is not in possession of a document, this is merely a simple presumption that can be rebutted by relevant and consistent evidence.²³
30. In the Complainants' submission, SMS and other messages do not present any difference to other similar forms of formal communication used by the European Council (e.g., emails).

²¹ See Judgment of 25 April 2007, *WWF European Policy Programme v Council*, Case T-264/04, EU:T:2007:114, para. 61.

²² See Judgment of 27 November 2007, *Pitsiorlas v Council and ECB*, Joined Cases T-3/00 and T-337/04, EU:T:2007:357, para. 134.

²³ See Judgment of 11 June 2015, *McCullough v Cedefop*, Case T-496/13, EU:T:2015:374, para. 50.

The Complainants invite the Ombudsman to recognise, at a minimum, that the European Council should have been in a position to retain and access the requested documents, similarly to the document retention policy followed for other media of communication used in discharging its role.

31. It follows that the European Council failed to comply with its obligations under the Regulation by failing to properly retain the requested documents and/or to conduct a "thorough search" into whether it had access to the documents requested by the Complainants, and must therefore reconsider its refusal to disclose the documents requested by the Complainants.
- 3.1.2. *The European Council failed to properly examine whether the documents requested by the Complainants fell within its sphere of responsibility*
32. As set out above, the European Council identifies the EU's strategic interests, determines the objectives of, and defines general guidelines for the CFSP. This includes in relation to matters with defence implications.²⁴ In addition, it is within the role of the President of the European Council to ensure the external representation of the EU on issues concerning its CFSP, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.²⁵ It follows that any documents falling within the sphere of the above-mentioned responsibilities should be disclosed to the public pursuant to the Regulation.
33. In light of the fact that the scope of the Regulation is defined by reference to the EU Institutions listed in the Regulation and not by reference to particular categories of documents this includes any non-legislative documents,²⁶ in the Complainants' submission, such documents would necessarily include documents that pertain to the European Council's overall action, including the CFSP and the EU's external policy, which might go beyond any specific legislative procedure.
34. SMS and text-based messages exchanged by the President of the European Council with foreign Heads of State would fall within the European Council's sphere of responsibility to the extent they concern matters of the EU's CFSP and external policy, in accordance with the role of the President pursuant to the EU Treaties. The Complainants submit that the President of the European Council did exchange messages with foreign Heads of State through SMS and other text-based messages in his day-to-day communications. Whereas such messages may, in part, have concerned logistical issues relating to practicalities about potential meetings with foreign Heads of State, the Complainants cannot exclude (and neither can the European Council) that these messages may have contained more substantial content relating to ongoing discussions among them (thus relating to the President's role under the EU Treaties.²⁷

²⁴ See TEU, Article 22(1) and 26(1).

²⁵ See TEU, Article 15(6).

²⁶ See Judgment of 18 July 2017, *Commission v Breyer*, Case C-213/15 P, para. 37.

²⁷ See AP News Article on the exchange of SMS messages between Dutch Premier, Mark Rutte, and Donald Tusk in relation to the Greek bailout deal, dated 16 July 2015, <https://apnews.com/420b699b2dae44808f148699781d642a>: "A single text message rescued the talks — and possibly the euro. Dutch Premier Mark Rutte, a hard-liner on Greek reform waiting outside with other leaders, sent European Union President Donald Tusk an SMS proposing a compromise on the last sticking point keeping the two sides apart."

35. In its response, the European Council indicates that it is not within the European Council's practice to exchange information containing substantial content and concerning matters falling within its sphere of responsibility by instant messaging communications of its President. However, the Complainants underline that this does not mean that such exchanges did not occur. The Complainants submit that by bluntly refusing access to the requested documents based on the assumption that they do not exist because it is not its practice to exchange substantial information via SMS, the European Council erred in its conclusion.

36. Therefore, on a plain reading of Article 3(a) of the Regulation, any document:

"concerning a matter relating to the policies, activities and decisions falling within the Institution's sphere of responsibility"

should, *prima facie*, be eligible for the disclosure, subject to the limits of the Regulation. As such, any SMS and text-based messages exchanged by the President of the European Council with foreign Heads of State should fall within the President's and the European Council's sphere of responsibility. The European Council should have examined whether any such messages indeed might have related the President's activities, as the nature of such communication would seem to relate, in principle, to matters pertaining to the role of the President in representing the EU externally.

3.1.3. *The European Council interpreted the relevant provisions of the Regulation in a manner that is contrary to the wording and purpose of the Regulation*

37. As outlined above, not only has the European Council failed to assess whether it holds relevant documents, but it has also interpreted the Regulation inappropriately narrowly. Its approach lacked legal and objective justification. According to the European Council, in addition to falling within the European Council's sphere of responsibility, a disclosable document must also (i) not be ephemeral or short-lived and (ii) contain substantial information, which must have been exchanged, registered, saved and eventually archived in accordance with the applicable rules.

38. However, these criteria go beyond the wording and clear purpose of the Regulation. The Regulation does not reference the requirement for a document not to be "ephemeral" or "short-lived". Neither does it prescribe the requirement to archive and register its content. The European Council has commonly released information such as email exchanges relating to Donald Tusk's social media platform.²⁸ In the Complainants' submission, those types of communications should also be deemed as short-lived and ephemeral: like SMSs, emails can be deleted, like an SMS can be found in the President's own phone device, similarly an email can be found in his own laptop. The European Ombudsman has established that ensuring the right of public access to documents should be consistent with technological development.²⁹ The Complainants therefore submit that there is no substantive difference in disclosing such other types of short-lived information to the public. It follows that the European Council's previous practice directly contravenes its arguments to the Complainants in relation to the criteria of the Regulation.

²⁸ Response to Request for Information relating to e-mail exchanges concerning Donald Tusk's social media platform: <https://www.asktheeu.org/en/request/5910/response/19044/attach/7/TUSK%20I%20m%20back%20video%20clip.pdf>.

²⁹ See European Ombudsman's letter on public access to information in EU databases, 10 December 2008, available at: <https://www.ombudsman.europa.eu/en/letter/en/4160>.

39. The interpretation applied by the European Council effectively limits the scope of the Regulation by confining its application to documents that satisfy specific criteria. This approach is not reasonably justified, as these criteria are not derived from the Regulation, do not appear to be supported by CJEU case law and, in any event, based on the European Council's past practice, do not disqualify the production of SMS or other text-based messages.
40. As noted in paragraph 37 above, the mere fact that it is not in the practice of the European Council to exchange substantial information via text-based messages does not mean that this does not happen in practice. In the Complainants' submission, by interpreting the Regulation in this manner, the European Council implies that it applies the Regulation only to those documents that it is willing to provide, as opposed to *all* documents which would and should be captured by the Regulation.
41. Pursuant to the CJEU's case-law, the Regulation is intended to give the fullest possible effect to the right of public access to documents of the EU Institutions.³⁰ This right is subject to limitations on grounds of public or private interest.³¹ However the European Council did not justify its refusal on any of the permissible grounds. It rather decided to limit its interpretation of the notion of "document" from the outset. In this way, it excluded from the application of the Regulation documents that would have otherwise been captured, as they fulfil the criteria set out therein (see sections 3.1.1 to 3.1.2 above).
42. Such a restrictive interpretation is not only without legal justification, but it is also contrary the very purpose of the Regulation and the general principles of transparency under EU law.
- 3.1.4. *The European Council failed to properly address the Complainants' arguments and evidence*
43. The EU Institutions are under an obligation to respond to a request for access to documents and to duly justify or motivate (responding to arguments raised by an applicant) any refusal to disclose the said documents by stating the reasons why such arguments are not apt to lead to the disclosure thereof.³²
44. In their confirmatory application, the Complainants put forward arguments to support its request for access to documents. The Complainants argued that (i) according to publicly available information,³³ "substantial information" is being (has been) exchanged through

³⁰ Judgment of 13 January 2017, *Deza, a.s. v European Chemicals Agency*, EU:T:2017:4, para. 33.

³¹ *Ibid.*

³² See Judgment of 2 October 2014, *Strack v Commission*, Case C-127/13 P, EU:C:2014:2250, para. 41-42, and Judgment of 27 November 2007, *Pitsiorlas v Council and ECB*, Joined Cases T-3/00 and T-337/04, EU:T:2007:357, para. 276.

³³ See for example Yahoo news report from 18 January 2019 claiming that "*May and Juncker hadn't spoken since the 'meaningful vote' but had been in contact by text message*"; The Guardian's article from 22 March 2019, stating that "*Europe's most senior diplomats and officials pored over a text message from inside the room*"; and an AP News story from 16 July 2015, stating that "*Dutch Premier Mark Rutte [...] waiting outside with other leaders, sent European Union President Donald Tusk an SMS proposing a compromise on the last sticking point keeping the two sides apart*" (emphasis added).

The articles are available at: <https://finance.yahoo.com/news/may-calls-eu-leaders-cross-party-talks-break-brexit-impasse-142426594.html>

SMS (and/or other text-based messaging services) between Heads of Governments; (ii) the requirements introduced by the European Council of the documents being "substantial" and "short-lived" are not supported by the language and purpose of the Regulation; and (iii) other types of non-substantial and short-lived information has been disclosed in the past under the Regulation.

45. Accordingly, as outlined at paragraph 40 above, the disclosure of email correspondence further demonstrates that the European Council's criterion for a disclosable document not to be "ephemeral" or "short-lived" is simply unworkable, given the destructible or deletable nature of email. Instead of addressing these arguments, in its response of 16 January 2020, the European Council merely refused access to documents by citing its grounds without further justification to support them.
46. As a result, by bluntly rejecting the Complainants' confirmatory application without providing the reasons for such rejection, the European Council breached its obligation to respond to the Complainants' questions with due justification.

3.1.5. *The European Council failed to abide by the principle of transparency*

47. Pursuant to CJEU case law, it would be contrary to the requirement of transparency, which underlies the Regulation, for EU Institutions to rely on the premise (in this case, an unsubstantiated assumption) that documents do not exist in order to avoid the application of the Regulation.³⁴ By maintaining that it is not in its practice to exchange information with substantial content by instant messaging communication of its President, and by failing to examine whether the requested documents were indeed in its possession, the European Council failed to address situations in which substantial information is *de facto* exchanged through non-formally registered means. This undermines the principle of transparency and, as noted above, implies that the Regulation is applied in a limited manner only to those documents that the European Council is willing to disclose.
48. In order that the right of access to documents may be exercised effectively, the EU Institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities.³⁵ From a broader policy perspective, it is vital that all documents pertaining to the European Council's actions, including those held by its President, are accessible. Further, in an era in which remote working is increasingly applied by the EU in light of the current COVID-19 pandemic, the principle of transparency should be upheld more than ever before, to ensure and guarantee the proper functioning and accountability of the EU Institutions.
49. In the Complainants' submission and in line with the purpose of the Regulation, the principle of transparency should be upheld through an expansive interpretation of the definition of "document" rather than a narrow one.

at: <https://www.theguardian.com/politics/2019/mar/22/it-was-not-clear-if-she-had-a-plan-at-all-how-mays-night-at-the-summit-unfolded>; and

at: <https://apnews.com/420b699b2dae44808f148699781d642a> respectively.

³⁴ Judgment of 25 April 2007, *WWF European Policy Programme v Council*, Case T-264/04, EU:T:2007:114, para. 61.

³⁵ *Ibid.*

CONCLUSION

50. It follows from the aforementioned reasons that the European Council erred in refusing to disclose the documents requested by the Complainants.
51. First, the European Council failed to comply with its obligations under the Regulation as defined by the CJEU's case law. It did not assess whether it was in fact in possession of the requested documents nor whether the requested documents fell within its sphere of responsibility. It also did not address the Complainants' arguments and evidence showing that the requested documents were clearly in its possession within the meaning of the Regulation and had to be disclosed accordingly. The European Council's refusal to disclose the requested documents went contrary to the word and purpose of the Regulation and breached the principle of transparency that guides the EU throughout its action.
52. The Complainants therefore respectfully request that the European Ombudsman take the necessary steps to ensure that the European Council (i) reconsider its refusal to disclose the requested documents, and (ii) fully comply with the Regulation in the present and future cases.
