

Decision of the European Ombudsman on complaint 201/2001/OV against the Council

Decision

Case 201/2001/OV - Opened on 23/02/2001 - Decision on 04/02/2002

Strasbourg, 4 February 2002

Dear Mr B.,

On 1 February 2001, you made a complaint to the European Ombudsman on behalf of Eurowatch (hereafter "the complainant") concerning the refused access to the Europol Work Programme 2001 (Document 11523/00 EUROPOL 25).

On 23 February 2001, I forwarded the complaint to the Secretary-General of the Council of the European Union. The Council sent its opinion on 11 May 2001. I forwarded it to you with an invitation to make observations, which you sent on 29 June 2001.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant is a research office on European justice and home affairs. On 26 October 2000 it made a request to the Council for access to the Europol Work Programme for 2001 (Document 11523/00 EUROPOL 25). On 14 November 2000, the Council refused access for the following reasons: The Council observed that the requested document was a note from the Presidency to the Article 36 Committee on Europol's Work Programme for 2001 which contained information on planned activities and priorities. More particularly, the document discusses the possibilities to increase the fight against organised crime and illegal immigration. It also contains comments on operational measures against Euro-counterfeiting. Releasing this information would undermine the effectiveness of these measures and would be contrary to the public interest. The Council refused therefore the access to the requested document on basis of Article 4.1 (public security) of the Decision 93/731/EC (1) .

On 22 November 2000 the complainant made a confirmatory application, but on 15 December 2000 the Council confirmed its refusal. The Council stated that:



"The Work Programme 2001 of Europol (document 11523/00) concerns the future working methods and the general modus operandi of the organisation. It contains details on some particular projects that will be undertaken in the year 2001, the general knowledge of which could undermine the effectiveness of such projects. The specific tasks of Europol in the field of crime prevention and law enforcement in accordance with the Europol Convention create a legitimate need to restrict public access to such information. In order to enable Europol and the law enforcement authorities of the Member States to work effectively, it is necessary to withhold information on what Europol plans to be working on and how Europol is planning to do it. Consequently, access to this document must be refused on the basis of Article 4(1) of the Decision (public security).

As concerns the remarks by the applicant related to the Work Programme 2000, it should be noted that the content of the Work Programme 2001 is different from the previous one in the sense that, at the request of the Member States' authorities, it includes more details related to Europol's concrete activities.

The question of whether or not the Council is legally obliged under Article 4 of Decision 93/731/EC to examine whether partial access should be granted to the information contained in a document is currently under examination by the Court of Justice (Case C-353/99 P).

On 1 February 2001, the complainant therefore lodged a complaint with the Ombudsman alleging that the refusal of the Council to grant access to the Europol work programme 2001 was unjustified because previous work programmes had been released. The complainant observed that it was doubtful whether the document contained confidential and operational information, and that it is not correct that a whole work programme becomes confidential because one section would contain operational information.

THE INQUIRY

The Council's opinion

In its opinion, the Council stated that the arguments put forward by the complainant were not of such a nature as to make it reconsider its decision of 14 December 2000.

In reply to the complainant's first argument that previous work programmes had been released, the Council already stated in its decision of 14 December 2000 that the content of the work programme 2001 was different from the previous one in the sense that, at the request of the Member States' authorities, it included more details relating to Europol's concrete activities. Indeed, as previous work programmes submitted by Europol to the Council had been criticised by delegations as giving no or too little information on operational aspects of Europol's work, the work programme for 2001 included more detailed information on Europol's planned operations. It is quite obvious that disclosure of information on Europol's planned operations in the current year before they have actually taken place could indeed jeopardise their effectiveness and thereby undermine the protection of the public interest as regards public security.



The fact that the work programme was criticised in the parliamentary discussion in the Netherlands for its vagueness does not allow to draw inference on the question of whether or not it contains information disclosure of which could be prejudicial to the effectiveness of Europol's operations. In most Member States, there are specific procedures for the treatment of confidential information by the national parliaments, which make sure this information does not become public by the simple transmission to them. Hence, the fact an authorised recipient of the document in question - who is bound by the relevant rules protecting its confidentiality - wishes to be informed in still more detail of Europol's activities does not allow to conclude that the actual work programme can be made accessible to the public. In this context, the Ombudsman's attention is drawn to Article 3 of Council Decision 2000/23/EC of 6 December 1999 on the improvement of information on the Council's legislative activities and the public register of Council documents (2) , according to which the documents which have already been released to the public are made available on the Internet.

The Council also stated that the question of whether or not it is legally obliged under Article 4 of Decision 93/731/EC to examine whether partial access should be granted to the information contained in a document is currently under examination by the Court of Justice (cases C-353/99 P and C-239/00 P). The Council therefore abstained from commenting further on this issue.

The complainant's observations

The complainant observed that the work programme of Europol for the year 2002 is accessible for the public. According to the Council, the work programme for 2001 contained more operational information at the request of the Member States. However, in the work programme 2002 this is not the case, so Member States appear not to need it anymore.

The complainant concluded that the work programme 2001 should normally be accessible for the public and it is highly improbable that it contains operational information which could harm the interests of the Union.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

On 6 December 2001 the Court of Justice pronounced its judgement in the Hautala case (3) . The Court confirmed the judgement of the Court of First Instance of 19 July 1999 in case T-14/98 (4) , by stating that *"that Court was right to hold in paragraph 87 of the contested judgement that Article 4(1) of Decision 93/731 must be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions (.)"* .

Taking into account the recent judgement of the Court of Justice in the case mentioned above, it seemed reasonable to consider that a partial access to the document might be granted. The Ombudsman's office therefore contacted the complainant by telephone on 19 December 2001 asking whether he could agree with a friendly solution which could consist of partial access to the document. The complainant however indicated that he could not agree with a friendly solution, as he maintained his request to get access to the entire document and not only to a



part of it. Therefore the Ombudsman did not propose any friendly solution.

THE DECISION

1 The refusal of access to the Europol Work Programme for 2001

1.1 The complainant alleged that the refusal of the Council to grant access to the Europol work programme 2001 was unjustified because previous work programmes had been released. The complainant observed that it was doubtful whether the document contained confidential and operational information, and that it is not correct that a whole work programme becomes confidential because one section would contain operational information.

1.2 The Council observed that that the content of the work programme 2001 was different from the previous one in the sense that, at the request of the Member States' authorities, it included more details relating to Europol's concrete activities and planned operations. The disclosure of information on Europol's planned operations in the current year before they have actually taken place could indeed jeopardise their effectiveness and thereby undermine the protection of the public interest as regards public security.

1.3 The Ombudsman considers that the grounds invoked by the Council in its refusal of 14 November 2000 and in its confirmatory refusal of 15 December 2000, as well as in its opinion to the Ombudsman, appeared to be reasonable. No instance of maladministration was thus found with regard to this allegation.

1.4 This decision is taken by applying the rules that were in force when the Council took the decisions mentioned in the complaint. It should however be noted that the new Regulation (EC) 1049/2001 (5) regarding public access to European Parliament, Council and Commission documents is applicable from 3 December 2001.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Council. The Ombudsman therefore closes the case.

The Secretary General of the Council will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Council Decision 93/731/EC on public access to Council documents (OJ 1993 L 340/43).

(2) OJ 2000 L 9/22.

(3) Judgement of 6 December 2001 in case C-353/99 P, *Council v. Hautala*, not yet published.



(4) Case T-14/98, *Hautala v. Council* , [1999] ECR II-2489.

(5) Regulation (EC) n° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.