

Decision of the European Ombudsman on complaint 1015/2002/(PB)IJH against the Council

Decision

Case 1015/2002/IJH - Opened on 01/07/2002 - Recommendation on 27/03/2003 - Decision on 17/09/2003

Strasbourg, 17 September 2003

Dear Mr B.,

On 29 May 2002, you made a complaint to the European Ombudsman against the Council concerning lack and refusal of information.

On 1 July 2002, the complaint was forwarded to the Secretary General of the Council. On 18 October 2002, the Council sent its opinion. On 28 October 2002, the Council's opinion was forwarded to you with an invitation to make observations, if you so wished. No observations appear to have been received from you.

On 27 March 2003, the Ombudsman made a draft recommendation to the Council in your case and informed you of this on the same day. On 26 May 2003, the Council sent its detailed opinion on the draft recommendation. On 12 June 2003, I forwarded the detailed opinion to you with an invitation to make observations, if you so wished. No observations appear to have been received from you.

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

THE COMPLAINT

In May 2002, a Danish Member of the European Parliament made a complaint against the Council concerning an application for access to documents, made on 3 December 2001 under Regulation 1049/2001 (1). The complainant asked the Council for documents of seven types, three of which gave rise to the complaint to the Ombudsman. The complainant described them as follows:

1 a full list of all committees and working parties in the European institutions in which representatives of the Council and/or the Member States take part, including lists of their members;



2 lists of those who, in the year 2000, received travel expenses and/or daily allowances from the Council or the Member States for attending meetings at the European institutions;

3 a full list of all meetings of the Council of Ministers and Council working parties concerning transparency in the Council of Ministers, along with working papers and reports, for the period during which the draft of Regulation 1049/2001 on public access to documents was discussed.

On 17 January 2002, the Council replied to the complainant's application. It began by stating that Regulation 1049/2001 applies only to existing documents.

As regards the first type of document, the Council informed the complainant that he can find a list of members attending each Council meeting in the press releases published immediately after each meeting. The Council also sent a document entitled "Extract from the Interinstitutional Directory - who's who in the European Union". This contains information on the Council itself and the latest list of committees and working parties involved in the Council's preparatory work.

As regards the second type of document, the Council informed that complainant that it does not keep such lists; that it does not, in fact, pay daily allowances to delegates; and that it reimburses travel expenses only on the basis of the actual expenses and upon production of supporting documents.

As regards the third type of document, the Council sent the following:

- a list of meetings of the Council and its preparatory bodies (in this case COREPER II and the Working Party on Information) held since 28 January 2000, which was the date when the Commission made its proposal for a Regulation regarding public access to European Parliament, Council and Commission documents;
- all working papers and reports concerning the meetings of the Working Party on Information, COREPER II and the Council covering the entire period of negotiation of Regulation 1049/2001, with the exception of the following opinions from the Council's Legal Service:
- document 7594/00 concerning the effect, form and scope of the act;
- document 7184/01 concerning the treatment of sensitive documents;
- document 8002/01, containing legal drafting remarks.

The Council gave as its reason for withholding these legal opinions that their release would undermine the protection of internal legal advice to the Council as provided for in Article 4 (2) of Regulation 1049/2001 and that, in the absence of any specific reasons pointing to a particular overriding public interest in disclosure, the Council had concluded that, on balance, the interest in protecting internal legal advice outweighed the public interest in disclosure.



The Council added that, apart from the document number and the subject of these legal opinions, the exception applies to their entire content. It was therefore not possible to grant partial access on the basis of Article 4 (6) of Regulation 1049/2001.

On 7 February 2002, the complainant made a confirmatory application. As regards the lists of committees and working groups, he stated that the information sent to him by the Council was not comprehensive or structured in such a way as to enable identification of all committees or working groups and their members. The complainant also repeated his request for lists of those who, in the year 2000, received travel expenses and/or daily allowances from the Council or the Member States for attending meetings at the European institutions. Concerning the three legal opinions, the complainant asked for the specific grounds for refusing access.

The Council replied on 8 April 2002. The Council repeated that the lists of committees and working groups requested by the complainant do not exist. It would be impossible or extremely cumbersome to create such lists, especially as the composition of committees and working parties frequently changes.

The requested lists of recipients of allowances do not exist either. The Council emphasised that rules of sound financial management are observed, and that the payment of allowances is subject to the scrutiny by the Court of Auditors.

As regards the three legal opinions, the Council repeated that Article 4 (2) of Regulation 1049/2001 requires that advice given by the Council's Legal Service shall remain undisclosed unless on balance the institution is satisfied that there is an overriding public interest in disclosure. The Council stated that an overriding public interest is not established by the fact that the legal opinions, as in this case, relate to the preparation of legislation. The Council supported its position by referring to case law under the former rules on public access to documents.

On the basis of the above, the complainant addressed the Ombudsman, making the following allegations against the Council:

- It is contrary to good administration that the Council has not established a list of all committees and working groups in the European institutions where representatives of the Council and the Member States participate. The list should include the names of the members of those committees and working groups;
- It is contrary to good administration that the Council has not established or identified a list of all those persons who have received travel allowances and/or daily allowances from the Council or the Member States in the year 2000 for meetings in the European institutions;
- The Council wrongly rejected access to the legal opinions requested by the complainant. In particular, the Council has breached the rules on public access to documents by rejecting access to the legal opinions as a matter of general practice, whereas the rules require an individual assessment of each request.

THE INQUIRY



The Council's opinion

The Council's opinion made, in summary, the following points:

List of committees and working groups

Regulation 1049/2001 concerns only existing documents. Where the institution concerned asserts that a document does not exist, there is a presumption that this assertion is correct (2). This presumption may be rebutted by relevant and consistent evidence, which in the present case has not been brought forward.

The complainant does not put forward any arguments why, as a matter of good administration, the Council should establish the lists requested. In fact, the Council does keep a list of its own preparatory bodies. The list is publicly available on the Internet and was sent to the complainant. It is adequate and sufficient for the Council's administrative purposes, and provides the public with a complete overview of all committees and working groups involved in the preparation of the Council's work. This list, together with the public register of documents, enables the citizens to make specific requests for documents submitted to those committees and working groups. The Council fails to see the need for it to keep lists of other committees or working groups which have nothing to do with its work and in which representatives of the Member States participate.

As regards the names of delegates participating in the Council's preparatory bodies, the composition of working parties is subject to continuous changes from one meeting to another and sometimes even during one meeting, as Member States are free to send the delegates of their choice. Keeping complete and up-to-date lists of all the participants would therefore pose a heavy administrative burden. Such lists are neither necessary for the internal purposes of the General Secretariat, nor has it been demonstrated that there is any significant public interest in having this information.

Lists of recipients of allowances

The Council repeated its earlier statements to the complainant. According to the Council, the Community's financial interests are adequately safeguarded by the provisions and control bodies already in place. It is therefore not necessary, in the interests of good administration, to keep the lists requested by the complainant.

Access to legal opinions

The Council confirmed the view it expressed in response to the complainant's confirmatory application. This view does not prejudice the individual examination of each document, with a view to determining whether disclosure is in fact likely to undermine one of the interests protected by the exceptions provided for, taking into account notably the possibility of granting partial access. Upon re-examination of its decision, the Council decided to grant access to points 1 to 10 of document 7184/01 and to the introduction and points 1 and 2 of document 7594/00.

As for the remaining parts of the documents, the Council confirmed the refusal contained in its reply to the complainant's confirmatory application.

The Council's opinion was forwarded to the complainant with an invitation to submit observations if he so wished. No observations were received.



The draft recommendation

By decision dated 27 March 2003, the Ombudsman addressed a draft recommendation to the Council concerning the complainant's third allegation. The basis of the draft recommendation, made in accordance with Article 3 (6) of the Statute of the European Ombudsman, was as follows:

- The complainant alleges that the Council wrongly rejected access to opinions of the Council Legal Service. He argues that the Council rejected access to the legal opinions as a matter of general practice, whereas the rules require an individual assessment of each request.
- The Council argues that Article 4 (2) of Regulation 1049/2001 requires that advice given by the Council's Legal Service shall remain undisclosed unless on balance the institution is satisfied that there is an overriding public interest in disclosure. In response to the complainant's application and confirmatory application, the Council took the view that the exception applied to the entire content of the three legal opinions in question: documents 7594/00, 7184/01 and 8002/01. In its opinion on the present complaint, the Council states that its general position does not prejudice the individual examination of each document and that, upon re-examination, the Council decided to grant partial access to documents 7594/00 and 7184/01.
- The Ombudsman notes that the refusal of public access to document 7594/00 is also the subject of another complaint made to the Ombudsman against the Council: 1542/2000/(PB)(SM)IJH. In that case, the Ombudsman made a draft recommendation to the Council, followed on 12 December 2002 by a Special Report to the European Parliament. The European Parliament has not yet taken a position on the Special Report. In these circumstances, the Ombudsman considers that no further inquiries are justified in the framework of the present complaint. The Ombudsman will however, inform the European Parliament that the Council has agreed to give the complainant in the present case partial access to document 7594/00.
- As regards the other two documents, the Ombudsman recalls that the above-mentioned draft recommendation and Special Report are based on the view that a distinction should be drawn between different kinds of legal opinion. Opinions given in the context of possible future court proceedings are analogous to a communication between a lawyer and a client. They should therefore normally be exempt from disclosure under Article 4 (2) of Regulation 1049/2001. In contrast, opinions on draft legislation should normally become available to the public when the legislative process has reached a conclusion. They should be exempt only if the institution can show, in accordance with Article 4 (3) of Regulation 1049/2001, that disclosure would seriously undermine its decision-making process and that there is no overriding public interest in disclosure.
- Applying the above distinction to the present case, it appears that documents 7184/01 and 8002/01 are opinions on draft legislation and that the legislative process concerned has reached a conclusion. The Ombudsman therefore made a draft recommendation, similar to that previously made in case 1542/2000/(PB)(SM)IJH, that the Council should reconsider the complainant's application and give access to documents 7184/01 and 8002/01, unless one or more of the exceptions other than Article 4 (2), second indent of Regulation 1049/2001 applies.

The Council's detailed opinion

The Council's detailed opinion informed the Ombudsman that the question of whether and under what conditions opinions of the Council Legal Service relating to draft legislative acts are covered by the exceptions laid down in Regulation 1049/2001, is currently the subject of the



legal proceedings before the Court of First Instance (Case T-84/03, *Maurizio Turco v Council*). The Council therefore abstained from commenting on the substance of the draft recommendation.

The Council's detailed opinion was forwarded to the complainant with an invitation to submit observations if he so wished. No observations were received.

THE DECISION

1 List of committees and working groups

1.1 The complainant alleges that it is contrary to good administration that the Council has not established a list of all the committees and working groups in the European institutions where representatives of the Council and the Member States participate. The list should include the names of the members of those committees and working groups.

1.2 According to the Council, there is no need for it to keep lists of committees or working groups that have nothing to do with its work. The Council keeps a list of its own preparatory bodies, which is adequate for the Council's administrative purposes. This list provides the public with a complete overview of all committees and working groups involved in the preparation of the Council's work and, together with the public register of documents, enables citizens to make specific requests for documents. As regards the inclusion of the names of delegates, the Council argues that keeping complete and up-to-date lists would be extremely cumbersome as the composition of working parties frequently changes. Such lists are neither necessary for the internal purposes of the General Secretariat, nor has it been demonstrated that there is any significant public interest in having this information.

1.3 The Ombudsman recalls the general principle of good administration that citizens should be provided with the information that they request (3) . The Ombudsman notes that the Council provides part of the information sought by the complainant in the form of a publicly available list of its own preparatory bodies. In the Ombudsman's view, the Council's explanation of why it does not maintain the other lists sought by the complainant appears reasonable. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

2 Lists of recipients of allowances

2.1 The complainant alleges that it is contrary to good administration that the Council has not established or identified a list of all those persons who have received travel allowances and/or daily allowances from the Council or the Member States in the year 2000 for meetings in the European institutions.

2.2 According to the Council, it does not pay daily allowances to delegates and no lists of recipients of allowances exist. The Council argues that the Community's financial interests are adequately safeguarded by the provisions and control bodies already in place and that it is therefore unnecessary, in the interests of good administration, to keep the lists requested by the complainant.

2.3 The Ombudsman notes that the complaint refers to travel allowances and daily allowances



paid either by the Council, or by the Member States. As regards travel allowances and daily allowances paid by the Member States, the Ombudsman is not aware of any rule or principle which would require the Council to maintain lists of the recipients of such allowances.

2.4 As regards travel allowances paid by the Council, the Ombudsman notes that the Council denies that a list of recipients exists. The Ombudsman recognises that the establishment of such a list and its public availability could promote greater accountability by enabling citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions, and thereby increase confidence in the administration. The Ombudsman is not aware however of any rule or principle binding on the Council which could justify a finding that failure to maintain such a list is maladministration. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

3 Access to legal opinions

3.1 The complainant alleges that the Council wrongly rejected his application for access to opinions of the Council Legal Service.

3.2 For reasons explained above, the Ombudsman made a draft recommendation that the Council should reconsider the complainant's application and give access to documents 7184/01 and 8002/01, unless one or more of the exceptions other than Article 4 (2), second indent of Regulation 1049/2001 applies.

3.3 The Council abstained from commenting on the substance of the Ombudsman's draft recommendation because a case pending before the Court of First Instance (Case T-84/03, *Maurizio Turco v Council*) raises the same issue of interpretation of Regulation 1049/2001. The Ombudsman therefore has to consider whether to make a Special Report to the European Parliament.

The Ombudsman recalls that the European Parliament has already been informed of the Ombudsman's views on the issues concerned by the Special Report presented on 12 December 2002 in case 1542/2000/(PB)(SM)JH. Moreover, the Ombudsman understands that, in view of the legal proceedings in Case T-84/03, the Committee on Petitions of the European Parliament has decided not to make a report on that Special Report.

Against this background, the Ombudsman considers that it would not be appropriate to make a further Special Report and that no further inquiries in the present case are therefore justified.

4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to be no maladministration by the Council as regards the complainant's first two allegations and no further inquiries appear to be justified as regards the third allegation. The Ombudsman therefore closes the case.

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

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) Regulation (EC) 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 2001 L 145 p. 43.

(2) Case T-311/00, *British American Tobacco v. Commission*, judgement of 25 June 2002, paragraph 35, and Case T-123/99, *JT's Corporation v. Commission* [2000] ECR II-3269, paragraph 58.

(3) See Article 22 of the European Code of Good Administrative Behaviour, available on the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link].