

Decision of the European Ombudsman on complaint 1795/2002/IJH as it relates to the European Convention

Decision

Case 1795/2002/IJH - Opened on 28/10/2002 - Decision on 12/06/2003

Strasbourg, 12 June 2003

Dear Mr V.,

On 14 October 2002, you made a complaint to the European Ombudsman against the European Convention and the Council. Your complaint is made on behalf of the European Citizen Action Service (ECAS) and concerns the refusal of your application for access to the agendas and minutes of the Praesidium of the Convention.

On 28 October 2002, I forwarded the complaint to the President of the European Convention and the Secretary General of the Council. They sent their opinions on 16 January 2003 and 21 January 2003 respectively. I forwarded the opinions to you with an invitation to make observations, which you sent on 27 February 2003.

On 11 March 2003, I informed you by letter of my decision closing the case against the Council with a finding of no maladministration. On the same date, I requested further information from the European Convention and informed you of this further inquiry. On 29 April 2003, the European Convention replied to my request for further information. I forwarded the reply to you with an invitation to make observations, which you sent on 27 May 2003.

I am writing now to let you know the results of the Ombudsman's inquiry into your complaint against the European Convention.

THE COMPLAINT

In October 2002, a complaint was made to the Ombudsman on behalf of the European Citizen Action Service (ECAS) against the European Convention and the Council.

The present decision deals only with the complaint against the Convention. The Ombudsman's inquiry into the complaint against the Council was closed on 11 March 2003, with a finding of no maladministration.



According to the complainant, the relevant facts are, in summary, as follows:

The complainant applied to the Council for access to the agendas and minutes of the Praesidium of the European Convention. In July 2002, the Council replied to the complainant stating, amongst other things, that the European Convention is a body distinct from the Council and that the Council's General Secretariat had forwarded the applicant's request to the Secretariat of the Convention.

The complainant then wrote to the Secretary General of the Convention, Sir John KERR, referring to the above mentioned request to the Council for access to the agendas and minutes of the Praesidium. The Secretary General replied to the complainant on 18 September 2002 stating, amongst other things, that he would *"see a real problem about publishing draft material produced by this Secretariat which the Praesidium has not, or has not yet approved, or its instructions to the Secretariat for amendments. The Convention recognises that in order to do its job the Praesidium has to enjoy a degree of ex ante confidentiality; its product is totally public but the preparatory process has to be reasonably private."*

The complainant expresses his complaint to the Ombudsman in the form of requests to investigate, ascertain or establish certain matters. The complainant also explains that the reason for the request for access to agendas and minutes of the Praesidium is to give NGOs adequate advance warning of what is coming up in the Convention.

In summary, the complaint seems to contain the following allegation against the European Convention:

The Secretariat of the European Convention failed to respond correctly to the complainant's request for access to agendas and minutes of the Praesidium.

THE INQUIRY

The Ombudsman first examined the admissibility of the complaint. For the reasons stated in section 1 of the Decision below, the Ombudsman came to the provisional conclusion that the European Convention is a Community body in the sense of Article 195 EC and thus within the mandate of the Ombudsman as regards possible maladministration in its activities.

The Ombudsman therefore forwarded the complaint to the President of the European Convention, M. Valéry GISCARD D'ESTAING, for an opinion. The Ombudsman stated that the views of the President on the question of the admissibility of the complaint would be welcome and expressed the hope that he would, in any event, respond to the complainant's allegation.

The opinion of the President of the European Convention

In summary, the President of the European Convention gave the following opinion:

The Convention's documents do not fall within the scope of application of Regulation 1049/2001 on public access to documents of the European Parliament, Council and Commission.



Nevertheless, it has been the continuous policy of the Convention to make as much material as possible (including all official Convention documents) available to the general public, largely through prompt publication on the website.

The Praesidium's role is to prepare the work of the Convention. It can only carry out this function effectively if it has the possibility to deliberate in private. All documents which result from the Praesidium's discussion are made available immediately through publication on the Convention website. If the agendas and minutes of the Praesidium were also to be made available, this would run the risk of it becoming the object of, rather than a stimulus to, the Convention's debates. Experience so far suggests that this is largely understood and accepted by Members of the Convention, who do not themselves have access to the agendas and minutes of the Praesidium.

The complainant also states that, without access to Praesidium agendas and minutes, NGOs have difficulty in obtaining advance warning of what is coming up in the Convention. I do not accept this. I invariably announce at the end of each plenary session the main issues for the following (and sometimes even subsequent) session. These are recorded in the summary notes prepared by the Secretariat and published on the website. Furthermore, detailed agendas for each plenary session are published as soon as they are approved by the Praesidium. The public is therefore as well informed as Convention members on the future schedule and content of plenary sessions.

The complainant's observations

In summary, the complainant made the following points on the opinion given by the President of the Convention:

The European Convention is a body subject to the Treaty and Regulation 1049/2001 should apply to it. Although Article 255 EC is limited to European Parliament, Council and Commission documents, this should be placed in the historical context, which is that codes of conduct on access to documents have spread, with the encouragement of the European Ombudsman, from the three Institutions to agencies they set up. The Council and the European Parliament therefore took care in the legislation based on Article 255 EC to extend its scope beyond the three Institutions.

Paragraph 8 of the preamble to Regulation 1049/2001 states that *"In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the Institutions should apply the principles laid down in this Regulation."* This highlights the intention of the Council and the European Parliament to ensure the widest possible access to documents by extending the scope of the Regulation to cover all activities.

This intention is supported by the Joint Declaration of 30 May 2001, paragraph two of which makes clear that the aim is to ensure that all institutions and bodies, and thus the Convention, are covered by the Regulation.

As regards the ability of NGOs to obtain advance warning of what is coming up in the Convention, the complainant acknowledges and appreciates the fact that the President



announces at the end of each plenary session the main issues for the following (and sometimes even subsequent) session, but it can still be extremely difficult to obtain advance warning of what is coming up in the Convention. Warning from one session to the next is insufficient. This problem should also be considered with particular reference to NGOs outside of Brussels and in the candidate countries. If such organisations wish to attend a Convention plenary session, far more advance warning of what will be coming up would be desirable.

The complainant understands that the Praesidium is only able to prepare the work of the Convention and function effectively if it retains the possibility of deliberating in private. The complainant also understands the need for confidentiality in the drafting of texts at the formative stage. It is more difficult to understand how the Praesidium's agendas could be so controversial that publishing them could disturb the work of the Convention. The minutes are perhaps more susceptible to such problems. However, these could be overcome by allowing partial access. The complainant is not seeking to ascertain views of individual members of the Praesidium, but simply to obtain advance warning of what is coming up.

It has become apparent that a number of Convention members are not satisfied with the situation as it stands in relation to access to documents and the secrecy of the Praesidium. A number of Convention members, whose parties are the four smallest parties in the Convention and are not represented in the Praesidium, have circulated a complaint about access to Praesidium documents.

In the light of the above, the complainant requests the European Ombudsman:

- To consider that the Convention is not outside the scope of the Treaties and to investigate whether Regulation 1049/2001 applies to it.
- To consider the complainant's request for full access to the agendas of the Praesidium meetings and the complainant's suggestions in respect of access to the minutes or reports of the Praesidium meetings.
- To consider that at the end of the Convention's work in June, full access should be granted to all documents not in the public domain at present. This will be to the benefit of many, particularly the large number of academics and researchers following the Convention's work.

Further inquiries

After carefully considering the opinion given by the President of the European Convention and the complainant's observations, the Ombudsman considered it necessary to make further inquiries. He asked the President of the European Convention to comment on the complainant's point concerning the difficulties which may arise for NGOs in obtaining information about what will be coming up in the Convention sufficiently far in advance to plan their activities. The Ombudsman also asked to be informed whether the agendas and minutes of the Convention's Praesidium will be made publicly available at the end of the Convention's work.

The European Convention's reply

The Secretary General of the Convention, Sir John KERR, replied to the Ombudsman's request for further information.

As regards the possibility for NGOs to obtain advance information, the Secretary General's reply notes that the complainant fairly acknowledges that it has been the practice of the President of



the Convention systematically to announce at the end of each plenary session the main issues for the next session, or sessions. The nature of the Convention means that it is difficult for the Praesidium to programme its work very far ahead with any degree of certainty (whether a specific issue addressed in a Convention paper, or by a Working Group, or raised by a Praesidium proposal, will need extended plenary debate depends on the Convention's reaction to it). However insofar as such planning has been possible, the Convention has been informed, and all such information has been publicly available on the Convention website.

As regards the question whether, at the end of the Convention's work, the Praesidium's agendas and minutes will be made available to the public, the Secretary General of the Convention stated that he sees no reason why these documents should not be made public at that stage. This is, however, an issue on which the Praesidium itself will need to take a view at the end of the Convention, when it decides on how best to ensure that the workings of the Convention, which have been highly transparent to participants and those concerned now, remain accessible and comprehensible to those who follow us, and to the historians who will judge how well we responded to the responsibilities laid on us.

The complainant's observations

In summary, the complainant made the following points:

The complainant fully recognises and appreciates the open way the Convention operates, including the rapid publication of Praesidium papers. The complaint is limited to the confidentiality of agendas and minutes of Praesidium meetings.

The complainant welcomes the suggestion by the Secretary General that, subject to a decision by the Praesidium, its agendas and minutes could be made available at the end of the Convention's work.

The complainant requests the Ombudsman to recommend to the Convention Praesidium that, after the end of the Convention's work, all the documents should be classified and organised in such a way as to facilitate public access. For example, the public should be advised where they can consult Convention documents in paper or electronic form at a central library or through the registers of documents. The complainant also expresses the fear that in the final stages of negotiations in the Convention this important issue may not be satisfactorily solved.

THE DECISION

1. The admissibility of the complaint against the European Convention

1.1 The present case concerns a complaint made on behalf of the European Citizen Action Service (ECAS) against lack of public access to agendas and minutes of the Praesidium of the European Convention.

1.2 In examining the admissibility of the complaint, the Ombudsman noted that the origin of the European Convention is the Laeken declaration of the European Council and that there appears to be no legal instrument under national, international, or Community law that formally establishes the Convention. However, the Convention has its own structure and functions and



should thus be considered as separate from both the European Council and the Council of the European Union. Moreover, the Convention seems to be funded, indirectly at least, from the Community budget. The Ombudsman therefore came to the provisional conclusion that the Convention is a Community body in the sense of Article 195 EC and thus within the mandate of the Ombudsman as regards possible maladministration in its activities.

1.3 The Ombudsman recognises, however, that the Convention, like the European Parliament, is engaged in political work and that a complaint against its political work would not raise an issue of possible maladministration. The present case concerns the Secretariat's response to a request for access to documents, which is an administrative matter.

1.4 The Ombudsman informed the President of the European Convention of the above analysis and invited his views on the admissibility of the complaint. The President's reply did not comment on this point. The Ombudsman therefore sees no reason to revise his provisional conclusion that the European Convention is a Community body in the sense of Article 195 EC and thus within the mandate of the Ombudsman as regards possible maladministration in its activities.

2. The complainant's request for access to the agendas and minutes of the European Convention's Praesidium

2.1 The complainant alleges that the Secretariat of the European Convention failed to respond correctly to his request for access to agendas and minutes of the Praesidium. The reason for the complainant's request is to give NGOs adequate advance warning of what is coming up in the Convention.

2.2 In his observations, the complainant argues that the aim of the Joint Declaration of 30 May 2001 is to ensure that all institutions and bodies, and thus the Convention, are covered by Regulation 1049/2001. The complainant requests that, at the end of the Convention's work, full access should be granted to all documents not in the public domain at present.

2.3 According to the President of the Convention, the Convention's documents do not fall within the scope of application of Regulation 1049/2001. Nevertheless, it has been the continuous policy of the Convention to make as much material as possible available to the public. The role of the Praesidium is to prepare the work of the Convention. It can only carry out this function effectively if it retains the possibility to deliberate in private. If the agendas and minutes of the Praesidium were to be made available, this would run the risk of it becoming the object of, rather than a stimulus to, the Convention's debates. The wider public is as well informed as Convention members on the future schedule and content of plenary sessions.

As regards the question whether, at the end of the Convention's work, the Praesidium's agendas and minutes will be made available to the public, the Secretary General of the Convention sees no reason why these documents should not be made public at that stage. This is, however, an issue on which the Praesidium itself will need to take a view at the end of the Convention.

2.4 The Ombudsman notes that Regulation 1049/2001 (1) applies to documents held by the



European Parliament, Council and Commission and that Regulation 58/2003 extends its provisions to executive agencies (2) . The Convention is not part of the European Parliament, Council or Commission, nor is it an agency in the sense of Regulation 58/2003. The Ombudsman therefore considers that Regulation 1049/2001 does not, as such, apply to documents held by the Convention.

2.5 The Ombudsman recalls, however, that following two own initiative inquiries, draft recommendations were addressed to Community institutions and bodies to adopt rules on public access to documents as a matter of good administration (3) . Almost all of them have done so (4) .

2.6 The Ombudsman notes that the Convention's declared policy is to make as much material as possible available to the public. The Ombudsman points out that this policy accords with the aim of Regulation 1049/2001, which is to ensure the widest possible access to documents. In this context, the Ombudsman notes that the Joint Declaration of 30 May 2001 (5) of the European Parliament, Council and Commission calls on institutions and bodies to adopt internal rules on public access to documents which take account of the principles and limits in Regulation 1049/2001.

In the light of the foregoing, the European Ombudsman considers that, in examining whether there is maladministration in the implementation of the Convention's declared policy of making as much material as possible available to the public, it is useful to refer, by analogy, to the exceptions contained in Regulation 1049/2001.

2.7 According to the first paragraph of Article 4 (3) of Regulation 1049/2001, access to a document drawn up by an institution for internal use which relates to a matter where the decision has not been taken by the institution shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The Ombudsman considers that the President of the Convention has given a reasonable explanation as to why disclosure of the agendas and minutes of the Praesidium before the Convention completes its work would seriously undermine the Convention's decision-making process. Furthermore, the Ombudsman does not consider that the complainant's arguments establish an overriding public interest in disclosure. The Ombudsman therefore finds no maladministration in the refusal of public access to the agendas and minutes of the Praesidium before the Convention completes its work.

The Ombudsman points out that the above finding relates only to the refusal of public access to agendas and minutes of the Praesidium. The Ombudsman takes no position as regards disputed questions of openness in the relationship between the Praesidium and Members of the Convention, since these questions relate to the Convention's political work.

2.8 As regards the question whether, at the end of the Convention's work, the Praesidium's agendas and minutes should be made available to the public, the Ombudsman notes that the



second paragraph of Article 4 (3) of Regulation 1049/2001 provides that access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

It seems difficult to argue that the Convention's decision-making process could be undermined once it has reached the end of its work. The Ombudsman therefore agrees with the Secretary General of the Convention that there is no reason why the documents concerned should not be made public at that stage.

2.9 In his final observations, the complainant expresses the fear that in the final stages of negotiations in the Convention this important issue may not be satisfactorily solved.

The Ombudsman understands that the Convention is expected to complete its work by the end of June 2003. For this reason, the Ombudsman considers that it would not be useful to delay a decision in order to inquire into the fear expressed by the complainant.

The Ombudsman's letter to the President of the Convention informing him of the present decision will mention the finding, set out in the second paragraph of 2.8 above, concerning public access to the Convention's documents once the Convention has finished its work. The letter will also express the Ombudsman's view that it would be in accordance with the principles of good administration for the Convention to make the appropriate arrangements as soon as possible to ensure such access. The Ombudsman will also forward to the President of the Convention the complainant's practical suggestions, made in his final observations, concerning future public access to the Convention's documents.

3 Conclusion

For the reasons explained in paragraphs 2.7 and 2.9 above, the European Ombudsman considers that there has been no maladministration by the European Convention and that no further inquiries into the complaint are justified. The Ombudsman therefore closes the case.

The President of the European Convention will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43.

(2) Council Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, 2003 OJ L 011/1.



(3) See the Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents, 15 December 1997, as well as the decisions concerning the European Central Bank, the European Agency for Safety and Health at Work, the Community Plant Variety Office and Europol, following own initiative inquiry OI/1/99/IJH.

(4) For example, the Court of Auditors, 1998 OJ C 295/1; the European Central Bank, 1999 OJ L110/30; the European Investment Bank, 1997 OJ C 243/13; the Economic and Social Committee, 1997 OJ L 339/18; and the Committee of the Regions, 1997 OJ L 351/70.

(5) Joint declaration relating to 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 145 of 31.5.2001, P. 43) 2001 OJ I 173/5.