

## Decision of the European Ombudsman on complaint 2189/2003/(ADB)PB against the Council of the European Union

Decision

**Case 2189/2003/(ADB)PB - Opened on 12/12/2003 - Decision on 20/10/2004**

Strasbourg, 20 October 2004

Dear Mr M.,

On 11 November 2003, you made a complaint to the European Ombudsman concerning a refusal of the Council of the European Union to grant access to the *"final report of the 'Extreme Fundamentalism and Terrorism Group' "*.

On 12 December 2003, I forwarded the complaint to the Secretary-General of the Council. The Council sent its opinion on 23 February 2004 and I forwarded it to you with an invitation to make observations, if you so wished. By letter dated 16 April 2004, you informed me that you did not wish to make observations.

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

I wish to apologise for the length of time it has taken to deal with your complaint.

### THE COMPLAINT

On 3 September 2003, the complainant sent an initial request for access to the *"final report of the 'Extreme Fundamentalism and Terrorism Group' "*. The report, classified as "CONFIDENTIEL UE", was drafted by the *Extreme Fundamentalism and Terrorism Group* (EFTG), composed of a group of personal representatives of Ministers of Foreign Affairs commissioned by the Danish Presidency following discussions at the General Affairs and External Relations Council on 24 October 2002. The report analysed extreme fundamentalism and terrorism. It contained a number of recommendations.

In its reply dated 9 October 2003, the General Secretariat of the Council refused to release the above document on the basis of Article 4(l) of Regulation 1049/2001 (1), indicating that its disclosure could cause serious prejudice to the essential interests of the European Union or of one or more of its Member States in the framework of public security with regard to the fight



against terrorists and their organisations.

In reply to a confirmatory application made by the complainant the Council confirmed, on 4 November 2003, the decision of its General Secretariat and refused to release the document on the basis of Articles 4(1)(a) and 4(3) of Regulation 1049/2001. In the Council's view, disclosure of the information contained in the report could weaken the European Union's position in its international relations and seriously undermine its decision-making process on the issue.

In his complaint to the Ombudsman, the complainant stated that the Council's decision breached Regulation 1049/2001. He submitted the following arguments:

1. The report cannot contain secret information, insofar as the measures to fight terrorism must be adopted by the national legislators and are therefore subject to public debates in the Member States.
2. The Council's argument that the recommendations contained in the report are not finalised does not justify refusal of access to the whole document. Partial access could be given, with the recommendations deleted.

## THE INQUIRY

### **The Council's opinion**

In its opinion on the complaint, the Council stated that it agreed, in principle, that documents relating to ongoing discussions should be as widely accessible as possible, provided that their release does not prejudice the protection of the interests listed in Article 4 of Regulation 1049/2001. The Council considered, however, that since the document in question contained a detailed analysis and an assessment of extreme fundamentalism and terrorism throughout the world, including politically sensitive evaluations concerning a large number of foreign states, disclosure would be likely to cause complications in the European Union's relationships with those states.

The Council stated that the report contained recommendations for the reinforcement of the existing measures to prevent and/or to combat illegal and violent extremist organisations. To disclose these would, in the Council's view, provide potential perpetrators of attacks with comparative assessments of the effectiveness of the existing structures in the Member States or third countries concerned. According to the Council, this could seriously undermine the joint efforts to find constructive solutions to the core aspects of this challenge to the international community. The Council therefore considered that the exception of Article 4(1)(a), third indent, (protection of the public interest as regards international relations) of the Regulation applied.

The Council also referred to its meeting in Thessalonica on 19 and 20 June 2003, where the European Council had taken note of the report and indicated that it would be further discussed with a view to take its recommendations forward. Discussions on the document in the relevant Council working parties were, at the time of the present inquiry, still at a preliminary stage. The Council considered that release of the document would limit the Member States' ability to adapt



their negotiation positions and thereby seriously undermine the Council's decision-making process. The Council therefore considered that the exception of Article 4(3) of Regulation 1049/2001 also applied.

The Council further stated that it had examined whether partial access could be granted to the document in accordance with Article 4(6) of the Regulation. In this respect, the Council noted that the analyses and recommendations in the report had to be considered as a single indivisible working paper. The Council therefore concluded that the exceptions referred to above applied to the whole document.

#### **The complainant's observations**

The complainant informed the Ombudsman that he did not wish to make any observations.

## **THE DECISION**

### **1 Alleged breach of Regulation 1049/2001**

1.1 The complainant alleged that the Council's reply of 4 November 2003 to his confirmatory application for access to the *"final report of the Extreme Fundamentalism and Terrorism Group"* breached Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents. The Council had refused access on the basis of the exceptions in Articles 4(1)(a), third indent, and 4(3) of Regulation 1049/2001 because, in the Council's view, disclosure of the information contained in the report could weaken the European Union's position in its international relations and could seriously undermine the Council's decision-making process on the issue.

The complainant argued as follows:

1. The report cannot contain secret information, insofar as the measures to fight terrorism must be adopted by the national legislators and are therefore subject to public debates in the Member States.
2. The Council's argument that the recommendations contained in the report are not finalised does not justify refusal of access to the whole document. Partial access could be given, with the recommendations deleted.

1.2 In its opinion, the Council confirmed its reply of 4 November 2003 to the complainant's confirmatory application. The Council furthermore stated that it had examined whether partial access could be granted to the document in accordance with Article 4(6) of the Regulation. In this respect, the Council noted that the analyses and recommendations in the report had to be considered as a single indivisible working paper. The Council therefore concluded that the exceptions referred to above apply to the whole document.

1.3 The Ombudsman notes that a refusal to provide access under any of the exceptions in Regulation 1049/2001 must be based on valid and specific grounds.

1.4 In respect of the exception in Article 4(1)(a), third indent, the Council has explained that the



report contains a detailed analysis and an assessment of extreme fundamentalism and terrorism throughout the world, including politically sensitive evaluations concerning a large number of foreign states. In its view, disclosure would be likely to cause complications in the European Union's relationships with those states. The Council furthermore explained that the analysis in the report is followed by recommendations for the reinforcement of the existing measures to prevent and/or to combat illegal and violent extremist organisations. In its view, to disclose these recommendations would provide potential perpetrators of attacks with comparative assessments of the effectiveness of the existing structures in the Member States or third countries concerned. This, according to the Council, could seriously undermine the joint efforts to find constructive solutions to the core aspects of this challenge to the international community.

As regards the exception in Article 4(3), the Council has stated that the European Council decided that the report should be further discussed with a view to taking forward its recommendations. According to the Council, discussions on the document in the relevant Council working parties are, at the time of the present inquiry, still at a preliminary stage. The Council considers that release of the document would limit the Member States' ability to adapt their negotiation positions and thereby seriously undermine the Council's decision-making process.

1.5 The Ombudsman takes the view that the grounds referred to by the Council are valid and sufficiently specific within the framework of Regulation 1049/2001.

1.6 As regards the possibility of giving partial access under Article 4(6) of Regulation 1049/2001, the Council has stated that the analyses and recommendations in the report had to be considered as a single indivisible working paper, and that the exceptions referred to above apply to the whole document.

In the light of the submissions and findings in paragraphs 1.3 - 1.5 above, the Council's view that exceptions 4(1)(a) and 4(3) of Regulation 1049/2001 apply to the whole document appears to be reasonable.

## **2 Conclusion**

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

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS



(1) 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, Official Journal 2001 L 145 p. 43.