

## **Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM**

Special Report

**Case 1542/2000/(PB)(SM)IJH - Opened on 13/12/2000 - Recommendation on 13/12/2000 - Special report on 13/12/2000 - Decision on 21/07/2003**

*(made in accordance with Art. 3(7) of the Statute of the European Ombudsman)*

### **Summary**

The complainant, a student, requested access to four Council documents. The Council granted access to two documents and refused access to the two others which contained legal opinions from the Council's Legal Service. In the complainant's view, the Council had not given adequate reasons for its refusal to grant access to these two documents. In its first opinion, the Council held the view that it had provided adequate reasons and that both opinions in question could not be disclosed in order to avoid undermining the Council's ability to obtain independent legal advice. The Ombudsman considered that the Council had provided adequate reasons for its refusal to disclose the first document containing an opinion on a matter of law in the context of possible future court proceedings. The Ombudsman however took the view that the Council had not given sufficient reasons for refusing to release the second document, an opinion concerning the proposal for Regulation 1049/2001. The Ombudsman therefore made a draft recommendation to the Council asking it to reconsider the complainant's application. In its detailed opinion, the Council maintained its view that it had to refuse access to the document in question under Article 4(2), second indent of Regulation 1049/2001, because disclosure of it would undermine the Council's ability to obtain independent legal advice.

The Ombudsman however is not convinced that the Council's position is correct. In the light of Article 255 of the EC Treaty, access to documents under Regulation 1049/2001 is the main rule and any exception to this rule should be construed narrowly. The Ombudsman does not accept the Council's argument that all opinions from its Legal Service should automatically be exempt from disclosure. In the Ombudsman's view, a distinction should be made between different



kinds of legal opinion. This does not mean that some legal opinions would not be protected from disclosure at all. The Ombudsman considers that, when the legislative process has finished, a legislative opinion should be exempt only if Article 4(3) of the Regulation applies. This requires the institution to show that disclosure of the document would seriously undermine the institution's decision-making process. The Ombudsman considers in this regard that the latter requirement seems difficult to fulfil merely by reference to a category of document to which the document in question belongs.

The Ombudsman therefore addresses this Special Report to the European Parliament in which he renews his draft recommendation to the Council on the basis of the new Regulation applicable:

The Council of the European Union should reconsider the complainant's application and give access to the document requested, unless one or more of the exceptions other than Article 4(2), second indent of Regulation 1049/2001 applies.

## **The complaint**

The complainant, a student, lodged the complaint on 25 October 2000. According to the complainant, the relevant facts may be summarised as follows.

By e-mail of 20 June 2000, the complainant requested access to documents 9862/99, 12521/99, 7594/00 and 8443/00 held by the Council. His request was made for the purpose of writing a post-graduate essay regarding public access to Council documents. The Council granted access to documents 9862/99 and 12521/99 but refused access to 8443/00 and 7594/00 containing legal opinions from the Council's legal service. These opinions concern, respectively, a Court of First Instance judgment and the Commission's proposal for a regulation on public access to European Parliament, Council and Commission documents. The complainant sent a confirmatory application by e-mail of 11 July 2000 asking for access to the two documents concerned. By letter of 19 September 2000, the Council informed the complainant that access to the documents was refused on the basis of Article 4(1) of Council Decision 93/731/EC. The Council stated that legal certainty and stability of Community law and the Council's ability to obtain independent legal advice needed protection. By giving access, this protection would be undermined.

The complainant considered that by refusing access, the Council infringed the fundamental principle consisting of giving the public the widest possible access to Council documents. He stressed that the Court of First Instance had ruled that exceptions to the principle of transparency should be construed and applied strictly, in a manner which did not defeat the application of the general rule. [1]

The complainant considered that the Council had infringed the fundamental principle as enshrined in Article 255 in the Treaty according to which any European Union citizen has a right of access to European Parliament, Council and Commission documents. Limits on grounds of



public interest should, in the complainant's view, be proportionate. The Council had breached the principle of proportionality in that the refusal went beyond the limits of what was appropriate and necessary for achieving the aim in view.

The complainant moreover considered that the Council has infringed Article 4(1) of Decision 93/731/EC when refusing access to parts of the documents in question which would not fall within the scope of the derogation of protection of public interest under Article 4(1).

In substance, the complainant made the following allegation:

The Council's reasons for refusing full or partial access to the documents fail to justify the refusal adequately.

The complainant claimed that the Council's decision should be annulled and that he should be granted access to the documents in question.

## **The inquiry**

The complaint was sent to the Council of the European Union for its comments.

## **The Council's opinion**

As a preliminary remark, the Council comments on the Ombudsman's scope of competences. The Council is of the opinion that the Ombudsman's mandate under Article 195(1) of the EC Treaty only covers cases of maladministration. In the present case, which concerns the legality of a Council decision, only the Community courts are competent to carry out a review.

As regards the complainant's allegations, the Council argues that it has given adequate reasons for its decision refusing access to the documents in question. It then states the reasons for refusing access:

Apart from containing a summary of the judgment of the Court of First Instance in case T-188/98, document 8443/00 contains an analysis by the Council's Legal Service as to how the Council should act in analogous cases in the future. The second document, 7594/00, is a legal opinion of the Council's Legal Service relating to the proposal for the Regulation regarding public access to European Parliament, Council and Commission documents. It contains a detailed analysis of issues and recommendations to the Council with respect to the proposal.

In the Council's opinion, access cannot be granted to these two documents, as a disclosure would undermine the protection of the public interest under Article 4(1) of Decision 93/731/EC and the Council's ability to obtain independent legal advice from its Legal Service.

In refusing access, the Council relies on an order of the President of the Court of First Instance



in the Norup Carlsen case [2] according to which the Council was not in breach of Decision 93/731/EC in so far as the refusal to grant access was based on the 'requirement of ensuring maintenance of legal certainty and stability of Community law' and also of ensuring that 'the Council is able to obtain independent legal advice'. The Council states that the Norup Carlsen case law was confirmed by the Ghignone case, which is a staff case. The Court found in this case that legal opinions drawn up by an institution's legal service should not be used by others in court proceedings. To use legal opinions in this way would undermine public interest according to which the institutions must be able to rely on their independent legal advice. [3] The Council moreover bases itself on the opinion of the Advocate-General in case Spain v Commission [4] in which the Advocate-General recognised the need for special protection of legal opinions from the institutions' legal services.

The Council points out that the right of access to documents as enshrined in Article 255 of the EC Treaty has exceptions as stipulated in paragraphs 2 and 3 of the Article. Therefore, until such acts enter into force, the right of access to documents is limited by the conditions established by the institutions.

## The complainant's observations

In his observations, the complainant maintained his complaint.

## The Ombudsman's draft recommendation

By decision dated 18 October 2001, the Ombudsman addressed a draft recommendation to the Council in accordance with Article 3(6) of the Statute of the European Ombudsman [5]. The basis of the draft recommendation was the following [6] :

### 1 The Ombudsman's competence to deal with the complaint

1.1 In its opinion, the Council expressed the view that the complaint, which concerns the adequacy of the Council's reasons for a decision to refuse access to certain documents, relates to the legality of that decision. According to the Council, review of legality does not fall within the Ombudsman's mandate under Article 195 of the EC Treaty, which authorises the Ombudsman to inquire into maladministration in the activities of Community institutions and bodies, with the exception of the Court of Justice and Court of First Instance acting in their judicial role.

1.2 The Ombudsman recalled that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it. Furthermore, in inquiring into possible maladministration in the activities of a Community institution or body, the Ombudsman's first and most essential task must be to establish whether it has acted unlawfully. [7] In doing so, the Ombudsman is always mindful of the fact that the Court of Justice is the highest authority regarding the interpretation and validity of Community law.



1.3 According to the established case law of the Community courts, Community institutions and bodies have an obligation adequately to reason their decisions. The Ombudsman therefore considered that he was competent to deal with the present complaint.

## 2 Access to documents 8443/00 and 7594/00

2.1 The complainant claimed that the Council had failed to provide the documents he had requested, that is documents 8443/00 and 7594/00, and that it had not adequately justified the refusal to grant access. The documents concerned were legal opinions from the Council's Legal Service.

2.2. The Council considered that it had adequately justified its refusal to give access to these documents. Document 8443/00 was an information note containing an analysis by the Council's Legal Service as to how the Council should act in analogous cases in the future. The second document, 7594/00, was an opinion of the Council's Legal Service relating to the proposal for the Regulation regarding public access to European Parliament, Council and Commission documents. It contained a detailed analysis of issues and recommendations to the Council with respect to the proposal. Disclosure of these two documents would in the Council's view have undermined the protection of the interests under Article 4(1) of Decision 93/731/EC and the Council's ability to obtain independent legal advice from its Legal Service.

2.3 The Ombudsman noted that since the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992, steps had gradually been taken to implement the principle of the right of public access to documents. The Code of Conduct of 6 December 1993 aimed at establishing the principles to govern access to Council and Commission documents. It stipulated that the public would have the widest possible access to these documents. With a view to implementing the Code of Conduct, the Council adopted specific provisions in Decision 93/731/EC permitting access to Council documents unless the exceptions in Article 4(1) applied. The Ombudsman furthermore noted that in accordance with Article 1(2) of the Treaty on European Union, decisions by the institutions should be taken as "openly as possible".

2.4 As regards document 8443/00, it appeared that it contained an opinion on a matter of law in the context of possible future court proceedings. The Ombudsman understood this opinion to be analogous to a written communication between a lawyer and a client. The Ombudsman considered that the Council was entitled in the present case to consider that its disclosure would, as a matter of principle, be contrary to the public interest. The Council's refusal to grant access to this document did therefore not constitute an instance of maladministration.

2.5. Regarding document 7594/00, the Council refused access on the basis of Article 4(1) and protection of independent legal advice. The Council stated that it contained an analysis of public access issues and advice by its Legal Service as to how the Council should act in this respect. In the Ombudsman's view, this document did not appear to fall within the category of documents protected from disclosure by analogy with legal professional privilege as in a case of written



communications between lawyer and client. On the contrary it appeared to relate to issues arising within the context of the preparatory legislative process of the proposal for the Regulation on public access, which had been under way.

2.6. According to Article 207(3) of the EC Treaty, greater access to Council documents could be allowed in cases where the Council is to be regarded as acting in its legislative capacity. In the Ombudsman's view, the public should therefore normally have access to a document of the kind in question, at least when the legislative process has reached a conclusion. Under these circumstances, the Ombudsman considered that the Council had not given adequate reasons for refusing access to the document in this case.

### 3 Conclusion

The Ombudsman therefore considered that the Council had not given sufficient reasons for refusing access to document 7594/00.

The Ombudsman therefore made the following draft recommendation to the Council, in accordance with Article 3(6) of the Statute of the Ombudsman:

The Council should reconsider the complainant's application and provide access to document 7594/00, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.

### The Council's detailed opinion

In its detailed opinion, the Council made the following comments:

*"1. The Council notes the Ombudsman's conclusion that the Council's refusal to grant access to document 8443/00 does not constitute an instance of maladministration. It agrees that in principle the exchanges between the Council and its Legal Service relating to Court proceedings are analogous to written communications between a lawyer and a client whose disclosure would be contrary to the public interest. However, in view of the subsequent developments in this dossier, notably the judgment of the Court of First Instance of 7 February 2002 in Case T-211/00 ( Kuijer v. Council ) and the judgment of the Court of Justice of 6 December 2001 in Case C-353/99 P ( Council v. Hautala ), the Council found that this document is not entirely covered by any of the exceptions laid down in 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. It therefore decided to release it, with the exception of its page 3, which contains legal advice from the Legal Service.*

*2. The Council disagrees with the Ombudsman's view that, in principle, the public should have access to document 7594/00 and other documents of that kind when the legislative process has reached a conclusion. In order to comply with the Ombudsman's findings that the Council has failed to give adequate reasons for refusing access to the document in this case, the Council will*



*hereafter develop in detail the reasons for its position.*

*3. By virtue of Article 207(3) EC, greater access to documents should be allowed in cases in which the Council acts in its legislative capacity. The Council has taken far-reaching steps in this direction. [8] However, Article 207(3) EC also provides that the Council is to strike a balance between greater access to documents relating to its legislative activities and the interest of preserving the effectiveness of its decision-making process in general. The Council considers that the release of opinions of its Legal Service relating to legal questions in the context of the Council's deliberations on a legislative act could, even after the adoption of that act, be prejudicial to the Council's decision-making process, as it would make it practically impossible for the Council to draw on independent legal advice by its Legal Service.*

*4. As the Council pointed out in its comments on the complaint, on the basis of Decision 93/731/EC the need to grant particular protection to Legal Service opinions was already recognised in the conclusions of Advocate-General Jacobs in the case in which judgment was given by the Court of Justice on 13 July 1995, Spain/Council (C-350/92, ECR p. I-1985, paragraph 35), in the order of the President of the Court of First Instance of 3 March 1998, Carlsen e.a./Council, (T-610/97 R, ECR p. II-485, paragraphs 45 to 47), and, most recently, in the judgment of the Court of First Instance of 8 November 2000 in Case T-44/97, Ghignone e.a./Council, paragraphs 47 and 48, in which the Court of First Instance stated that it would be contrary to the public interest, which requires that the institutions be able to draw on opinions from their legal service given in all independence, to allow such documents to be produced by persons, other than the departments at whose request they have been drawn up in a case before the Court, without their production having been authorised by the institution concerned or ordered by the Court.*

*5. The Council maintains its view that the Ghignone judgment is relevant a fortiori where a request for access is made pursuant to Decision 93/731/EC, since once a Council document has been released under that Decision, it is regarded as being in the public domain for all purposes. [9]*

*6. The Council considers that the reasoning which underlies this case law is still pertinent under Regulation 1049/2001, which provides in its Article 4(2) that "the institutions shall refuse access to a document where disclosure would undermine the protection of....legal advice, ....unless there is an overriding public interest in disclosure."*

*7. It must be noted that this rule applies both to internal and external legal advice. The advice given by the Council's Legal Service, which is part of the Council's Secretariat, is therefore covered by this provision, and any document or parts of it containing legal advice falls under this rule, unless on balance the institution is satisfied that there is an overriding public interest in disclosure.*

*8. In this respect, the Council considers that an overriding public interest is not constituted by the mere fact that the release of those documents containing the Legal Service's advice on legal questions arising in the debate on legislative initiatives would be in the general interest of*



*increasing transparency and openness of the institution's decision-making process. In fact, this criterion would apply to virtually all written opinions or similar documents of the Legal Service, thereby making it practically impossible for the Council to refuse access to any Legal Service opinion under Regulation 1049/2001. The Council considers that such a result would be clearly contrary to the will of the legislator as it is expressed in Article 4(2) of Regulation 1049/2001, as it would deprive that provision of any "effet utile".*

*9. On the contrary, the Council holds the view that, in contrast to preparatory documents revealing the Council's discussions on political choices in the context of a legislative procedure which are, as a rule, made public after the adoption of the act concerned [10], the public interest pleads in general in favour of not releasing documents containing advice of its Legal Service on legal questions, even after the adoption of the act to which they refer. It will show below that it is indeed in the public interest for the Council to be in a position to receive independent legal advice and that to disclose the opinions of the Legal Service could indeed go against that public interest.*

*10. Since the Council, in exercising its powers, is obliged to comply with the rules established by the Treaties and secondary legislation, the independent advice of its Legal Service is an important instrument to enable it to be sure of the lawfulness of its legal acts and to move forward the discussion of the legal aspects of a dossier. If the Council were deprived of this instrument, the effectiveness of its work and the lawfulness of its acts could be jeopardised. That is why it is in the public interest for the Council to have access to independent legal advice, regardless of the fact that its fifteen members may have access to advice from the legal services of their own national administrations.*

*11. In this context it should be noted that a Council act can be unlawful despite the efforts of the Legal Service: either the advice of the Legal Service to the effect that the act is lawful may be mistaken, or the Council may disagree with a legal opinion that a certain act or a part of it would not be legally correct. Such opinions, which are purely internal to the institution, could be used by others to mount legal challenges to the acts of the Council.*

*12. One of the principles of the Community legal order is that even unlawful acts remain valid and applicable until they are annulled by the Court of Justice or the Court of First Instance. This principle answers the need to ensure the legal certainty and stability of the Community legal order, which are especially important when a legal act affects a large number of persons and/or has major financial implications, which is often true of Council acts. But it is precisely the security and stability of the legal order that would be seriously jeopardised by the disclosure of the Legal Service's opinions, even though these opinions merely reflect the views of certain officials. The uncertainty regarding the lawfulness of legislative acts which would follow from such disclosure would have consequences harmful to the public interest.*

*13. In this context, it would not be feasible to distinguish between opinions that were "positive" and those that were "negative" as regards the legality of an act.*

*14. Disclosing a "negative" opinion would amount to an invitation to challenge the legality of the*



*act in question before the Court of First Instance or the Court of Justice and would give arguments to the applicants in proceedings. It should be remembered that it is the Council's Legal Service that represents the Council before the Court of First Instance or the Court of Justice. It would therefore be difficult for members of the Legal Service, acting in their capacity as agents of the Council, to refute those arguments credibly when it had been the same Service that issued the disclosed negative opinion. The situation becomes more complex still where a text has evolved in the course of the discussions and a negative written opinion has been refined or revised orally at a later stage of discussion within the Council, since such a fact would not become public knowledge.*

*15. It would be impossible to disclose only the Legal Service's positive opinions, since it would follow a contrario that those opinions to which the public was refused access contained negative opinions on the act concerned. In addition, even statements which appear legally innocuous at first sight may operate against the Council's interests in cases where the Council decides some years later to change its practice.*

*16. To look at the problem from another angle, one could say that if the individuals who draft an opinion for the Council's attention know that that opinion could be made public, they have a choice between either creating a risk of jeopardising the institution's interests, which in the end amount to the interests of the public in the certainty and stability of the Community legal order, or ceasing to deliver written opinions. Ultimately their independence and the reliability of their opinions could be put at risk.*

*17. The Council's confidence in this reasoning is reinforced by the findings of the judge hearing the application for interim relief, in the order of 3 March 1998 in the aforementioned case of Carlsen e.a. v. Council (paragraphs 45 and 46); the President of the Court stressed that disclosure of the opinions of legal services "would have the effect of making public discussions and exchanges of views of an internal nature on the legality and scope of the legal act to be adopted and hence, as the Council has noted, could lead an Institution to decide that there is no point in requesting written Opinions from the Legal Services. In other words, it would seem, at first sight at least, that releasing such documents might create uncertainty as to the legality of Community acts and have adverse consequences on the functioning of the Community institutions. It follows that this would undermine the stability of the Community order and the proper functioning of the Institutions, which are matters of public interest which must on no account be subverted."*

*18. In the present case, the opinion in question concerns a Regulation that had already been adopted. That said, the lawfulness of the Regulation can still be called into question at any point, by means of a preliminary ruling or an objection of illegality. It is not unusual for the legality of legislative acts ten or fifteen years old to be so challenged. Regarding this aspect of the problem too, the judge hearing the application for interim relief follows the Council's reasoning, at paragraph 50 of the order of 3 March 1998 cited earlier: "given the special nature of opinions of the Legal Services, it would not appear that those documents are bound, over the years, to lose their confidential character. Their disclosure could still be detrimental to the public interest in the stability of the Community legal order and the proper functioning of the Community*



*institutions inasmuch as time is not likely to alter the reasons, mentioned above, justifying such an exception to the right of access."*

*In the light of the foregoing, the Council is firmly of the opinion that in the absence of any particular reasons pleading in favour of releasing document 7594/00 other than the general interest assuring transparency and openness of the Council's decision-making process, and, thereby, of any overriding interest in disclosure, the content of the document cannot but lead it to conclude that this is covered by the exception laid down in Articles 4(2), second indent, of Regulation 1049/2001."*

## The complainant's observations

No further observations were received from the complainant.

## The Ombudsman's evaluation of the Council's detailed opinion

On 18 October 2001, the Ombudsman addressed a draft recommendation to the Council inviting the latter to reconsider the complainant's application and to provide access to document 7594/00, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied. The Ombudsman notes that Decision 93/731/EC is no longer in force and has been replaced by Regulation 1049/2001 of 30 May 2001. In its detailed opinion, the Council maintains its initial position. The Council stresses that in practice, the release of such documents would make it impossible for the Council to draw on independent legal advice by its Legal Service.

Under Article 255 of the EC Treaty, any citizen of the Union shall have a right of access to European Parliament, Council and Commission documents subject to the conditions that were subsequently laid down by Regulation 1049/2001. The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents. Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, while at the same time preserving the effectiveness of the institutions' decision-making process. [11] The Ombudsman notes in this regard that wider access to legislative documents under the Regulation is the rule and that any exception to this rule should be construed narrowly.

In the light of the above, the Ombudsman questions whether the Council's approach in the present case was correct, according to which opinions of its Legal Service should always be covered by Article 4(2), second indent of Regulation 1049/2001, regardless of whether they concern court proceedings, draft legislation or adopted legislation. The Ombudsman considers that this indiscriminate approach fails to do justice to the need, acknowledged by Article 207(3) of the EC Treaty, to grant greater access to documents relating to the Council's activity as a legislator. The draft recommendation made by the Ombudsman therefore draws a distinction between, on the one hand, legal opinions drawn up in relation to potential future court proceedings and, on the other hand, legal opinions drawn up as part of the legislative process.



In the Ombudsman's view, only the first type of legal opinions should be considered as "legal advice" within the meaning of Article 4 (2), second indent of Regulation 1049/2001. This does not mean that legal opinions relating to the Council's activity as a legislator would always have to be disclosed since they may still qualify for protection under Article 4(3) of Regulation 1049/2001.

In order to justify its approach, the Council relies on three cases that have been decided by the Community courts, that is to say, the *Spain v Council* [12], *Ghignone e.a. v Council* [13] and *Carlsen e.a. v Council* [14] cases. The Ombudsman takes the view that his own approach is compatible with this case-law.

It is true that in the *Spain v Council* case, the Advocate-General stated in his conclusions that in principle, advice given by the Council's Legal Service should not be invoked in proceedings before the Court unless the Council expressly authorises it. In the Advocate-General's view, the public interest as regards the protection of independent legal advice would otherwise be harmed. [15] It should be noted that the Court itself did not deal with this question. In any event, the issue discussed by the Advocate-General was not whether opinions of the Council's Legal Service could and should be disclosed to the public but whether such opinions could be used in Court proceedings without first having obtained authorisation by Council to do so. In other words, this issue related to procedural aspects, not the right of access as such.

The same conclusion applies to the *Ghignone and others v Council* case. The Court of First Instance ruled that it would be contrary to the public interest, which requires that the institutions be able to draw on opinions from their legal service given in all independence, to allow such documents to be produced by persons, other than the departments at whose request they have been drawn up in a case before the Court, without their production having been authorised by the institution concerned or ordered by the Court. [16]

Finally, in the *Norup Carlsen v Council* case, the President of the Court of First Instance found that the Council's refusal to grant access to the opinions of legal services concerning particular draft legislation did not appear to breach the Code of Conduct or Council Decision 93/731 in so far as that refusal was based on the requirement of ensuring maintenance of legal certainty and stability of Community law and also of ensuring that the Council is able to obtain independent legal advice. [17] The Order does not, therefore, appear to be decisive for the question of how Regulation 1049/2001 should be applied to legal opinions. The Ombudsman also notes that this decision was taken within the context of interim proceedings. A reference to its provisional nature is given by the President of the Court himself in paragraph 46 of the Order, according to which "it appears, at least on an initial examination", that disclosure would have a negative effect on the functioning of the Community institutions. Indeed it is hard to see which other conclusion the Court could have reached. If it had accepted that access to the relevant documents was to be granted within the context of the proceedings concerning the plaintiff's application for interim relief, this decision would have prejudged the result of the main proceedings.

In his draft recommendation, the Ombudsman noted that document 7594/00 related to the



preparatory legislative process of the proposal for the Regulation on public access, which had been under way. He further noted that under Article 207(3) of the EC Treaty, wider access to Council documents could be allowed in cases where the Council acts in its legislative capacity. It therefore appears that Article 207(3) suggests more transparency in relation to legislative documents and that, in the Ombudsman's view, the public should therefore normally have access to a document of the kind in question, at least when the legislative process has reached a conclusion. In this context, regard should also be had to the fact that the cases referred to by the Council were decided on prior to the coming into force of the Amsterdam Treaty and of Article 207(3) of the EC Treaty.

As mentioned before, the Ombudsman does not consider that opinions drawn up by the Council's Legal Service in the context of the latter's legislative activity have to be disclosed in every case. He takes the view, however, that the appropriate provision on the basis of which access to such documents could be refused would appear to be Article 4(3) of the Regulation. The Ombudsman considers that, when the legislative process has finished, access to an opinion drawn up for its purposes could only be refused if the institution was able to show that disclosure of the document would seriously undermine its decision-making process. Many of the arguments put forward by the Council in its opinion would in fact appear to relate to Article 4(3) of the Regulation rather than to its Article 4(2), second indent.

The Ombudsman would finally like to point out that the refusal to give access in the present case is particularly surprising since it concerns an opinion drawn up in relation to the draft for Regulation 1049/2001, that is to say the regulation on public access to documents.

## **The Ombudsman's recommendation**

In the Ombudsman's view, the Council's detailed opinion fails to provide sufficiently adequate reasons for its refusal to grant access to document 7594/00. The Ombudsman therefore renews his draft recommendation to the Council on the basis of the new Regulation applicable:

The Council of the European Union should reconsider the complainant's application and give access to the document requested, unless one or more of the exceptions other than Article 4(2), second indent of Regulation 1049/2001 applies.

The European Parliament could consider adopting the recommendation as a resolution.

Strasbourg, 12.12.2002

Jacob SÖDERMAN



- [1] Case T-124/96, *Interporc Im- und Export GmbH v Commission* [1998] ECR II-231, and Case T-105/95 *WWF UK v Commission* [1997] ECR II-313.
- [2] Case T-610/97 R, [1998] ECR II-0485, order of the President of the Court of First Instance of 3.3.1998.
- [3] Case T-44/97, *Piera Ghignone e.a. v Council* [2000] ECR I-A - 223, II - 1023, paragraphs 47 and 48.
- [4] Case C-350/92, *Spain v Council* [1995] ECR I-1985.
- [5] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's duties, OJ 1994 L 113, p. 15.
- [6] The Ombudsman took the view that no question of partial access appeared to arise and therefore the issue of partial access is not considered any further in the Special Report. For the full text of the draft recommendation, see <http://www.euro-ombudsman.eu.int/recommen/en/001542.htm>
- [7] See the Ombudsman's Annual Report for 1997. The European Parliament welcomed this definition of maladministration in its resolution on the 1997 annual report: OJ 1998 C 292, p. 168.
- [8] See in particular Article 11 of Annex III to the Council's Rules of Procedure, as amended by Council Decision 2001/840/EC of 29 November 2001, OJ L 313 of 30.11.2001, p. 40.
- [9] See Article 10 of Annex III to the Council's Rules of Procedure.
- [10] See Article 11(6) of Annex III to the Council's Rules of Procedure.
- [11] See preamble of Regulation 1049/2001, points 4 and 6.
- [12] Case C-350/92, *Spain v. Council* [1995] ECR p. I-1985, paragraph 35.
- [13] Case T-44/97, *Piera Ghignone e.a. v Council* , [2000] ECR I-A - 223, II - 1023.
- [14] Case T-610/97 R *Norup Carlsen v Council* [1998] ECR II-485.
- [15] Paragraph 35.



[16] Paragraphs 47 and 48.

[17] Paragraph 47.