

Draft recommendation of the European Ombudsman on the own initiative inquiry into public access to documents(616/PUBAC/F/IJH)

Recommendation

Case 616/96/(PD)IJH - Opened on 05/06/1996 - Recommendation on 05/06/1996 - Special report on 05/06/1996 - Decision on 21/09/1998

Background to the inquiry

In June 1996, I began an own-initiative inquiry into public access to documents held by the Community institutions and bodies, other than the Council and Commission.

The focus of the inquiry

There is at present no Treaty provision, or general Community legislation, about public access to documents. However, Declaration 17 attached to the Final Act of the Treaty on European Union is in the following terms:

The conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

The Commission and the Council have subsequently adopted their own, publicly available, rules about access to documents that they hold (1) .

Such rules can promote transparency and good relations between citizens and the Community institutions and bodies in three ways:

- the process of adopting rules requires the institution or body to examine, for each class of documents, whether confidentiality is necessary or not. In the context of the Union's commitment to transparency, this process itself may help encourage a higher degree of openness;
- if rules are adopted and made publicly available, people who request documents can know



what their rights are. The rules themselves can also be subject to public scrutiny and debate;

- clear rules can promote good administration, by helping officials deal accurately and promptly with public requests for documents.

I therefore decided to focus the own-initiative inquiry on the question of whether Community institutions and bodies other than the Council and Commission had established publicly available rules on access to the documents they hold.

It is important to note that, in the present state of Community law, I have confined my inquiry to whether rules exist and are publicly available. I have not asked whether the rules themselves are the right ones to ensure the degree of transparency that European citizens increasingly expect of the Union. In fact, the Commission and Council rules are quite limited compared to the rules governing some national administrations. In particular, they do not require registers of documents to be published. Nor do they give any right of access to documents held by one body, but originating in another.

The institutions and bodies covered by the inquiry

The inquiry was addressed to fifteen Community institutions and bodies, consisting of:

- the Community institutions in the sense of Article 4 of the Treaty, other than the Council and Commission,
- four bodies established by the Treaty, and
- eight of the ten "decentralized Community agencies". (The remaining two decentralized agencies - the Community Plant Variety Office and the European Agency for Safety and Health at Work - were excluded from the inquiry because they were not yet operational).

The full list of institutions and bodies covered by the inquiry is:

- The European Parliament
- The Court of Justice
- The Court of Auditors
- The European Investment Bank
- The Economic and Social Committee
- The Committee of the Regions
- The European Monetary Institute
- The Office for Harmonization in the Internal Market
- The European Training Foundation
- The European Centre for the Development of Vocational Training (Cedefop)
- The European Foundation for the Improvement of Living and Working Conditions
- The European Environment Agency
- The Translation Centre for Bodies of the European Union
- The European Monitoring Center for Drugs and Drug Addiction
- The European Agency for the Evaluation of Medicinal Products



The inquiry

I asked the institutions and bodies to inform me about their situation as regards public access to documents and in particular whether they had issued general rules which are easily available to the public or internal guidelines to staff on public access and confidentiality. The replies contained information about requirements of confidentiality and information policies, as well as about rules and guidelines on public access to documents.

Confidentiality requirements

Some of the replies referred to requirements of Community law that certain types of document should be confidential. This information is important, because rules about access to documents that are adopted as a matter of internal organisation must be consistent with existing legal obligations of confidentiality. However, it did not appear that any of the institutions or bodies gave public access to all documents that were not specifically covered by legal obligations of confidentiality.

Information policies

Several replies informed me about the information policy of the institution or body. In many cases, it appears that there is a strong commitment to providing information in a usable and easily accessible form, both to specific interested audiences and to the general public. In some cases, a commitment to openness and transparency is part of the mandate of the institution or body. In others, it is the result of a policy decision. A commitment to openness and transparency in information policy was emphasised in replies from the European Parliament about its political work, from the Court of Justice about its judicial work, and from the Economic and Social Committee, the European Investment Bank, the European Centre for the Development of Vocational Training, the European Environment Agency and the European Agency for the Evaluation of Medicinal Products about their activities in their various policy fields.

The provision of information is an important contribution to transparency and is essential in order to facilitate participation by groups and individual citizens in the work of the Community. I therefore welcome the information that I have received about the positive information strategies of Community institutions and bodies.

However, it is important to recognize that an information strategy is not a substitute for rules about what to do when citizens take the initiative by asking for documents that have not been put in the public domain. In particular, citizens have a legitimate interest in the organisation and functioning of institutions and bodies that are paid for from public funds. This may lead to requests for administrative documents, which are not usually covered by an information strategy.



The adoption of rules and guidelines on public access to documents

From its reply, it appeared that the Office for Harmonization in the Internal Market had already adopted rules about public access to documents. I therefore decided that the inquiry did not need to be pursued further in relation to that body.

The replies from the European Training Foundation, the European Foundation for the Improvement of Living and Working Conditions, the European Monitoring Centre for Drugs and Drug Addiction indicated that they intended to adopt rules and guidelines on public access to documents in the near future. The Court of Justice and the European Investment Bank informed me that they were willing to consider the adoption of such rules and, in the case of the Bank, that a study of the question was under way.

The European Monetary Institute explained that it deals with highly sensitive issues in the monetary and financial field and that Article 11.2 of its Statute provides that all documents drawn up by the EMI shall be confidential unless its Council decides otherwise. This reply appears to relate to documents in the monetary field.

The reply from the Committee of the Regions indicated that it had adopted as an internal guideline the Council and Commission Joint Code of Conduct and that it is currently preparing the necessary steps to inform the public of the applicability of the Code to requests for documentation of the Committee of the Regions.

The reply from the European Agency for the Evaluation of Medicinal Products indicated that its staff are briefed on public access and that it uses the same classification system as the Commission for at least some documents.

Further inquiries

On 9 September 1996, I wrote to the three bodies which had indicated that they were planning to adopt rules and guidelines and to the European Investment Bank, which had indicated it was studying the question, to ask for a copy of the rules eventually adopted. On the same date, I wrote to the European Parliament, European Monetary Institute, European Environment Agency, the Translation Centre for Bodies of the European Union and the European Agency for the Evaluation of Medicinal Products to ask about access to documents of an administrative kind, which had not been mentioned in the replies to my original letter, and whether the institution or body concerned would adopt in relation to such documents rules similar to those of the Commission and Council.

On the same date, I wrote to the Court of Justice, the Court of Auditors, the Economic and Social Committee and the European Centre for the Development of Vocational Training to suggest they consider the adoption of rules on public access to documents similar to those of the Commission and Council.



Replies were requested by the end of October 1996.

Summary of the present position concerning rules on public access to documents

On the basis of replies to both the original and further inquiries, it appears that:

- the Office for Harmonization in the Internal Market has already adopted rules which are easily available to the public concerning access to documents,
- the following eight institutions and bodies have agreed to adopt such rules:
 - The Court of Justice
 - The Court of Auditors
 - The Committee of the Regions
 - The European Training Foundation
 - The European Foundation for the Improvement of Living and Working Conditions
 - The Translation Centre for Bodies of the European Union
 - The European Monitoring Center for Drugs and Drug Addiction
- the following bodies are currently considering the adoption of such rules:
 - The European Parliament
 - The European Investment Bank
 - The Economic and Social Committee

Decision of the European Ombudsman

On the basis of the information supplied to the Ombudsman by the institutions and bodies covered by the enquiry it appears that most, but not all, intend to follow the good example set by the Council and Commission in adopting rules governing public access to documents.

In considering this position, it is important to recall the requirements of Community law as declared by the Court of Justice (2) :

"So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration."

It therefore appears that, in relation to requests for access to documents, Community institutions and bodies have a legal obligation to take appropriate measures to act in conformity with the interests of good administration. It must be recalled, however, that the Court of Justice is the highest authority on questions of Community law.



Good administration requires that all Community institutions and bodies should take into account the Union's commitment to transparency. This commitment appears from Declaration n° 17 attached to the Final Act of the Treaty on European Union and from numerous subsequent acts including, in particular, the Interinstitutional Agreement on democracy, transparency and subsidiarity of 25 October 1993 (3) . Transparency requires not only that documents should be publicly available to the maximum extent possible, but also that any denial of access to documents should be justified by reference to rules laid down in advance.

Furthermore, Article C of the Treaty on European Union provides that "the Union is served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives (...)". European citizens are therefore entitled to expect a consistent approach to the question of public access to documents. This does not necessarily require a single set of rules that applies to all Community institutions and bodies. However, it does exclude arbitrary differences as to whether or not rules exist and are made publicly available. None of the Community institutions or bodies covered by the inquiry has presented evidence that the adoption of rules governing public access to documents would be impractical or unduly burdensome in its specific circumstances. The adoption of such rules is therefore an appropriate measure in relation to the processing of requests for documents.

Conclusion

On the basis of the above analysis, the Ombudsman concludes that failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration.

Recommendations

In view of the above, the European Ombudsman makes the following draft recommendations to the institutions and bodies covered by the inquiry that have not already adopted rules concerning public access to documents:

- The institutions and bodies should adopt rules concerning public access to documents within three months.
- The rules should apply to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality.
- The rules should be made easily available to the public.

As regards the Court of Justice, the European Parliament and the European Monetary Institute, these recommendations apply only to administrative documents.

The relevant institutions and bodies will be informed of these draft recommendations. In accordance with Article 3 (6) of the Statute of the Ombudsman, they shall send a detailed opinion within three months. The detailed opinion could consist of acceptance of the



Ombudsman's decision and a description of the measures taken to implement the recommendations.

(1) The Council and Commission adopted a joint Code of Conduct (OJ 1993 L 340/ 41), implemented through Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340/43) and Commission Decision of 8 February 1994 on public access to Commission documents, OJ 1994 L 46/58.

(2) Case C-58/94, Netherlands v Council, judgement of 30 April 1996.

(3) JO 1993 C 329/133.