

Draft recommendation to the Council of the European Union in complaint 916/2000/GG

Recommendation

Case 916/2000/GG - Opened on 29/08/2000 - Recommendation on 01/03/2001 - Decision on 16/07/2001

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

SUMMARY

The complaint in this case concerns the failure by the Council of the European Union to grant access to certain documents (notably agendas of the "Senior level Group" and the "EU-US Task Force").

The Council had originally argued that the documents concerned had not been prepared under the sole responsibility of the Council and that Article 2 (2) of Council Decision 93/731 on access to documents was thus applicable. According to this provision, where a document was written by another legal or natural person, applications for access must not be sent to the Council, but direct to the author. The complainant had then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). In his decision of 30 June 1998, the Ombudsman had taken the view that neither the wording of Article 2 (2) of Decision 93/731 nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2).

The Council thereupon informed the complainant that the relevant documents were never considered by the Council as such but only by the officials in its General Secretariat who were following the matter kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731.

In these circumstances, the Ombudsman makes a draft recommendation in which he asks the Council to reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.



THE COMPLAINT

The complaint was lodged by Statewatch, a private organisation, in July 2000.

Background

The complainant had asked the Council for access to (inter alia) agendas of the "Senior level Group" and the "EU-US Task Force" already in 1997. The Council refused to grant this access, arguing that the documents concerned had been prepared jointly by the Council's Presidency, the Commission and US authorities and thus not under the sole responsibility of the Council. In the Council's view, Article 2 (2) of Council Decision 93/731/EC of 20 December 1993 on public access to documents (2) was thus applicable.

This provision is worded as follows:

"Where the requested document was written by a natural or legal person, a member state, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author."

The complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). During the inquiry, the Council expressly stated that it did not consider its Presidency to be "another institution or body" within the meaning of Article 2 (2) of Decision 93/731. In his decision of 30 June 1998 (3), the Ombudsman expressed the view that neither the wording of this provision nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). The Ombudsman concluded that the Council's position appeared to be based on a misapplication of Decision 93/731 and made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied.

The present complaint

The complainant wrote to the Council to renew its request for access on 9 July 1998. The Council replied on 29 July 1998, pointing out that in view of the lapse of time it considered this letter to be a new request. As to substance, it maintained its view that Article 2 (2) applied. The complainant sent a confirmatory application on 27 August 1998. In its decision of 28 September 1998 on this application, the Council noted that draft agendas for the meetings concerned were drawn up by the participating parties which remained drafts until they were agreed. According to the Council, the agendas were never considered by the Council as such and were therefore neither registered nor filed systematically in the Council's archives. The Council concluded that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731.

The complainant thereupon turned to the Ombudsman again, making the following allegations:

- By introducing entirely new grounds for the refusal of access to the documents concerned, the Council failed to respect the decision of the European Ombudsman of 30 June 1998
- The Council erred when claiming that the General Secretariat was not part of the Council
- By failing systematically to register and file the documents concerned, the Council breached



its duty to keep records

- The Council failed to give sufficient reasons for its decision

THE INQUIRY

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

The Council's opinion

In its opinion, the Council made the following comments:

1) The Council did not fail to respect the Ombudsman's decision of 30 June 1998

As the Ombudsman had pointed out himself, the only authority competent to give a final ruling on the interpretation of Community law was the Court of Justice. Certainly, the Ombudsman's views could provide useful guidance in this respect to the institution concerned which, in the light of the Ombudsman's views, would usually re-examine its position. In the present case, the Council did reconsider its first decision. While it left open its position as to the problem of documents of which the Council was one of the co-authors, it concluded, after careful consideration, that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision. This new decision could be the subject of a new complaint to the Ombudsman.

2) The General Secretariat was not "part of the Council"

This question was currently under examination by the Court of First Instance (in case T-205/00, Spa Renco v. Council). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

3) The obligation to register documents and the duty to keep records

For the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, the Council was not of the opinion that it was necessary or appropriate to keep a complete, centralised record and register of each paper which was held by one of its officials.

4) The Council gave sufficient reasons for its decision

The adequacy of the reasons given for a decision was a question that affected the legality of that decision, the review of which did not fall within the remit of the Ombudsman's competencies.

The complainant's observations

In its observations, the complainant maintained its complaint and made the following further comments:

The Council's view that it was free to refuse access to the relevant documents on new grounds and that a complaint could then be brought against this new decision entailed the risk of a circular process that could go on for ever and that could potentially undermine the role of the Ombudsman. The complainant did not have any knowledge about case T-205/00. It was possible that the Council was simply making the same argument there that it had made in the present case. In any event, it was inconceivable that the Court would decide that the General Secretariat was not part of the Council. This argument of the Council could therefore only be viewed as an attempt to delay a decision.



Regarding the duty to give reasons, the issue at stake here was one of maladministration for which the Ombudsman was the statutory authority. In any event, it was necessary for an institution to provide sufficient reasoning to allow for judicial review. The Council had consistently failed to do so in the present case.

THE DECISION

1 Failure to respect the decision of the Ombudsman of 30 June 1998

1.1 The complainant asked the Council of the European Union for access to certain documents (notably agendas of the "Senior level Group" and the "EU-US Task Force") under Council Decision 93/731/EC of 20 December 1993 on public access to documents (4). The Council originally argued that the documents concerned had not been prepared under the sole responsibility of the Council and that Article 2 (2) of Council Decision 93/731 on access to documents was thus applicable. The complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). In his decision of 30 June 1998, the Ombudsman took the view that neither the wording of Article 2 (2) of Decision 93/731 nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). When the complainant subsequently renewed his application for access, the Council informed it that the relevant documents were never considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731. The complainant claims that by introducing entirely new grounds for the refusal of access to the documents concerned, the Council failed to respect the decision of the European Ombudsman of 30 June 1998.

1.2 The Council points out that while the Ombudsman's views could provide useful guidance, the only authority competent to give a final ruling on the interpretation of Community law is the Court of Justice. The Council further claims that it did reconsider its position in the light of the Ombudsman's decision of 30 June 1998 and arrived at the conclusion that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision.

1.3 In his decision of 30 June 1998 on complaint 1056/25.11.96/Statewatch/UK/IJH, the Ombudsman made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied. The Ombudsman considers that the Council did indeed, in its decision of 28 September 1998, reconsider its position. Although Article 1 (2) of Decision 93/731 had not been invoked by the Council in reply to the complainant's first request for access to the documents concerned, the Ombudsman takes the view that his decision of 30 June 1998 did not prevent the Council from subsequently relying on this provision if it arrived at the conclusion, upon having reconsidered its position in the light of the Ombudsman's comments, that it was applicable. The Ombudsman notes the complainant's concern that this might lead to a circular process that could go on for ever. In his view, principles



of good administration prevent an administration from arbitrarily substituting the reasons for its decision by new ones. The Ombudsman considers, however, that there is no evidence to show that this would have been the case here.

1.4 On the basis of the above, there appears to have been no maladministration on the part of the Council in so far as the first allegation is concerned.

2 The General Secretariat as part of the Council

2.1 The Council claims that the relevant documents were never considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council takes the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731. The complainant claims that this is incorrect.

2.2 The Council claims that the question as to whether the General Secretariat is an institution "different" from the Council is currently under examination by the Court of First Instance (in case T-205/00, Spa Renco v. Council). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

2.3 Article 1 (2) of the Statute of the European Ombudsman (5) provides that the Ombudsman may not intervene in cases before courts. This means that the Ombudsman is prevented from examining or continuing to examine a complaint where the relevant *facts* have also been submitted to a court (6). The Ombudsman notes, however, that the case referred to by the Council concerns a different set of facts, as shown by the summary of case T-205/00 that was published in the Official Journal (7). It may be that in that case, the Council has made the same argument as in the present case, i.e. that a distinction should be made between the Council and its General Secretariat for the purposes of applying Decision 93/731. The Ombudsman does however not consider it necessary or appropriate to suspend his examination of this issue pending the proceedings before the Court.

2.4 Article 1 (1) of Decision 93/731 provides: "The public shall have access to Council documents under the conditions laid down in the Decision." The term 'Council document' is defined in Article 1 (2) as meaning "any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2 (2)."

2.5 Decision 93/731 has to be seen in the context of the Code of Conduct concerning public access to Council and Commission documents (8) adopted by the Council and the Commission on 6 December 1993 to which the recitals of Decision 93/731 refer. This Code of Conduct provides, inter alia: "The public will have the widest possible access to documents held by the Commission and the Council." On this basis, the Court of First Instance came to the following conclusion: "The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration." (9)

2.6 The Ombudsman considers that this objective would not be attained if it were to be accepted that documents of which the Council is the author (or co-author) should not be



covered by Decision 93/731 for the simple reason that they are not held by the Council itself but its General Secretariat. According to Article 207 (2) of the EC Treaty, the Council shall be assisted by a General Secretariat. The Ombudsman is however not aware of any provision in the Treaty or in Community law acts that would suggest that the General Secretariat ought to be considered as an institution or body separate from the Council. Decision 93/731 itself attributes an important role to the General Secretariat in so far as access to documents is concerned by directing applicants to write to "the relevant departments of the General Secretariat" and by charging the latter with dealing with such requests in the first place (cf. Article 7 of Decision 93/731). In the view of the Ombudsman, there is thus nothing that would warrant the conclusion that the Council's General Secretariat should be considered as "another Community institution or body" within the meaning of Article 2 (2) of Decision 93/731. The Ombudsman thus takes the view that documents held by the General Secretariat of the Council are documents "held by the Council" to which Decision 93/731 applies. It must be recalled, however, that the highest authority on the interpretation of Community law is the Court of Justice.

3 Failure systematically to register and file the documents concerned

3.1 The complainant claims that by failing systematically to register and file the documents concerned, the Council breached its duty to keep records.

3.2 The Council replies that for the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, it is not of the opinion that it was necessary or appropriate to keep a complete, centralised record and register of each paper which was held by one of its officials.

3.3 The relevant issue has also been raised in complaint 917/2000/GG. Both the Council and the complainant have made detailed comments on that issue in this complaint, and the Ombudsman will consider these arguments when he deals with complaint 917/2000/GG. The Ombudsman therefore takes the view that there is no need further to examine this issue in the context of the present inquiry.

4 Failure to give reasons

4.1 The complainant claims that the Council failed to give sufficient reasons for its decision, given the way in which it changed the justification for refusing access to the documents concerned during the procedure and that the reasoning was unacceptably vague and confusing.

4.2 The Council takes the view that the adequacy of the reasons given for a decision is a question that affects the legality of that decision, the review of which does not fall within the remit of the Ombudsman's competencies.

4.3 Article 195 of the EC Treaty entrusts the Ombudsman with the task of examining possible instances of maladministration. The term "maladministration" is not defined in the EC Treaty or the Ombudsman's Statute. It is useful to recall that in his Annual Report for 1997 (10), the Ombudsman stated that he considered the following interpretation of the term "maladministration" to be appropriate: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." The Ombudsman added (11) that when investigating whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, the Ombudsman's *"first and most essential*



task must be to establish whether it has acted unlawfully" . The European Parliament adopted a resolution on 16 July 1998 welcoming the definition of maladministration. The Ombudsman thus considers that his mandate allows him to examine complaints in which it is alleged that an institution has failed to give sufficient reasons for its decision.

4.4 The Ombudsman takes the view, however, that the reasons given by the Council in its decision of 28 September 1998 were sufficient since the Council made it clear that the refusal of access to the relevant documents was based on Article 1 (2) of Decision 93/731. The question as to whether the Council acted properly when changing the reasons on which it based its refusal during the procedure has already been considered (see point 1.3 above).

4.5 On the basis of the above, there appears to have been no maladministration on the part of the Council in so far as the fourth allegation is concerned.

5 Conclusion

The Ombudsman therefore considers that the Council's approach in the present case gave rise to an instance of maladministration in so far as it based its refusal to grant the complainant access to the relevant documents on Article 1 (2) of Decision 93/731.

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

The draft recommendation

The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.

The Council and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Council shall send a detailed opinion by 31 May 2001. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 1 March 2001

Jacob Söderman

(1) 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, page 15.

(2) OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).



- (3) Annual Report of the Ombudsman for 1998, p. 172.
- (4) OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).
- (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, page 15.
- (6) Cf. Article 2 (7) of the Ombudsman's Statute which reads as follows: "When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action."
- (7) OJ 2000 C 285, p. 19.
- (8) OJ 1993 L 340, p. 41.
- (9) Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 66.
- (10) At page 23.
- (11) At page 24.