



## Draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM

Recommendation

**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 Article 3 (6) of the Statute of the European Ombudsman (1) )

### SUMMARY

The complaint in this case concerns the alleged failure by the Council of the European Union to grant access to certain documents, namely legal opinions 8443/00 and 7594/00. The request for access to these documents should be dealt with in accordance with Council decision 93/731.

The Council contends that it has given adequate reasons for its decision refusing access to the documents in question. Access to documents 8443/00 and 7594/00 would in the Council's view undermine the protection of the public interest under Article 4(1) of Decision 93/731/EC and would undermine the Council's ability to obtain independent legal advice.

Document 8443/00 contains an opinion of the Council's legal service on a matter of law in the context of possible future court proceedings. The Ombudsman understands this opinion to be analogous to a written communication between a lawyer and a client. He therefore takes the view that the Council was entitled to consider that its disclosure would, as a matter of principle, be contrary to the public interest.

Document 7594/00 is 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. The Council refused access to this document on the basis of Article 4(1) of Decision 93/731 and the protection of independent legal advice. Under Article 207(3) of the EC Treaty (ECT), the Council shall define cases in which it is to be regarded as acting in its legislative capacity with a view to allowing greater access to documents in those cases. 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. The Ombudsman does not therefore consider that the Council has given adequate reasons for refusing access to the document in this case.

Failure to provide adequate reasons for refusal of access to a document is an instance of maladministration.

In these circumstances, the Ombudsman makes the following draft recommendation in which he asks the Council to re-examine the complainant's application and consider giving



access to document 7594/00, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.

#### THE COMPLAINT

Mr V. 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. In giving access, this protection would be undermined.

Given that the purpose of the essay for which the documents are needed is purely academic, the complainant considers that the *Norup Carlsen* case law (2) on which the Council bases itself is not pertinent in the present case. In the complainant's view, access to the requested documents does not undermine the stability of Community law nor does it create legal uncertainty with regard to the legality of Community acts or with regard to the functioning of the Community institutions. The complainant states that the Council has not given adequate reasons for its refusal to grant access to the two documents concerned.

The complainant considers that in refusing access, the Council has infringed the fundamental principle consisting of giving the public the widest possible access to Council documents. The complainant refers to the legal background regarding the right of access to documents. Declaration 17 of the Final Act of the Treaty on the European Union at Maastricht in 1992, the declarations of the European Council in Birmingham in October 1992 and Edinburgh in December 1992, the Charter of Fundamental Rights accepted by the European Council in Biarritz in October 2000, case law of the Community courts and the Council decision 93/731/EC of December 1993, affirm the right to the widest possible access to Council documents. The complainant stresses that the Court of First Instance has ruled that exceptions to the principle of transparency should be construed and applied strictly, in a manner which does not defeat the application of the general rule (3).

The complainant considers that the Council has 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 has breached the principle of proportionality in that the refusal goes beyond the limits of what is appropriate and necessary for achieving the aim in view.



The complainant moreover considers 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 his opinion, if the Council had correctly applied the principle of proportionality, according to which it has to examine whether or not to grant partial access to the information not covered by the exceptions, it would have concluded that partial access should be granted.

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 claims that the Council 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**

In its opinion, the Council made the following comments.

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) ECT 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.

Access cannot be granted under Article 4(1) in the Council's opinion 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. The court ruled in the Norup Carlsen case that in the context of interim relief proceedings, the Council was not in breach of the Decision 93/731/EC in so far as the 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'. 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 produced by an institution's legal service should not be used by others than the legal service itself in court proceedings. To do so would undermine public interest according to which the institutions must be able to rely on their independent legal advice (4) . The Council moreover bases itself on the opinion of the Advocate General in case Spain v Commission (5) 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 to access to documents as enshrined in Article 255 ECT has exceptions as stipulated in paragraphs 2 and 3 of the Article. Therefore, until such acts enter into force, the right to access to documents is limited by the conditions established by the institutions.

As far as partial access is concerned, the Council's opinion is that it is not obliged to examine whether partial access to the information not covered by the exceptions in Article 4(1) should be granted, as this matter is currently pending before the Court of Justice in the Hautala case (C-353/99 P). In this context, the Council furthermore claims that the Ombudsman does not have the competence to examine this aspect of the present case under Article 195(1).

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

In his observations, the complainant maintained his complaint and made the following further comments.

The complainant considers that the fact that there is an appeal against a judgment of the Court of First Instance does not mean that there is a suspension effect on that judgment. The Court of First Instance judgment in the Hautala case (6) is therefore applicable. The complainant refers to the Hautala case, in which the Court of First Instance ruled that "Article 4(1) of Decision 93/731/EC must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions" (7) .

The complainant moreover states that the Council has an obligation adequately to justify both full and partial refusal of access to its documents in accordance with the principle of proportionality and should therefore give partial access where the information requested is not covered by the exceptions in Article 4(1). In this context, the Council cannot, according to the complainant, take the view that legal opinions are globally excluded from the principle of right to access to information. The complainant points out that this would not only be contrary to the latter principle but also contrary to the political agreement concluded between the European Parliament and the Council in respect of the Regulation regarding public access based on Article 255 ECT (8) .

#### **THE DECISION 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 EC, 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 recalls 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 (9). 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 considers that he is competent to deal with the present complaint.

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

2.1 The complainant claims that the Council failed to provide the documents he had requested, that is to say documents 8443/00 and 7594/00, and that it did not adequately justify the refusal to grant full or partial access. The documents concerned are legal opinions from the Council's legal service.

2.2. The Council considers that it has adequately justified its refusal to give access to these documents. Document 8443/00 is 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, is 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 contains a detailed analysis of issues and recommendations to the Council with respect to the proposal. Disclosure of the latter documents would in the Council's view undermine the protection of these 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 notes that since the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992, steps have 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 notes 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 appears that it contains an opinion on a matter of law in the context of possible future court proceedings. The Ombudsman understands this opinion to be analogous to a written communication between a lawyer and a client. The Ombudsman considers 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 does therefore not constitute an instance of maladministration.

2.5 Regarding document 7594/00, the Council has refused access on the basis of Article 4(1) and protection of independent legal advice. The Council states that it contains 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 does 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 appears to relate to issues arising within the context of the preparatory legislative process of the proposal for the Regulation on public access, which was under way.

2.6 According to Article 207(3) ECT, 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 does not consider that the Council has given adequate reasons for refusing access to the document in this case.

### **3 Partial access to documents No 8443/00 and 7594/00**

3.1 The complainant considers that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions in Article 4(1) of Decision 93/731/EC.

3.2 As explained in part 2 of the decision above, the Ombudsman considers that the Council is justified in refusing access, as a matter of principle, to an opinion of its legal service on a matter of law in the context of possible future court proceedings. On the other hand, the Ombudsman considers that the public should normally have access to documents relating to the Council's actions in its legislative capacity. In view of these findings, no question of partial access appears to arise in this case.

### **4 Conclusion**

In light of the above, the Ombudsman considers that the Council of the European Union has not given sufficient reasons for refusing access to document 7594/00.

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 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 Secretary General and High Representative Mr Javier SOLANA of 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 before 31 January 2002. The detailed opinion could consist of an acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.



Strasbourg, 18 October 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) 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-124/96, Interporc Im- und Export GmbH v Commission [1998] ECR II-0231, and Case T-105/95 WWF UK v Commission [1997] ECR II-0313.
- (4) Case T-44/97, Ghignone e.a. v Commission [2000] ECR II-223, paragraphs 47 and 48.
- (5) Case C-350/92, Spain v Council [1995] ECR I-1985.
- (6) Case T-14/98, Hautala v Council [1999] ECR II-2489.
- (7) Ibid, paragraph 87.
- (8) See 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 L145/43 of 31.5.2001.
- (9) 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 292/168.