

Draft recommendation to the European Commission in complaint 1128/2001/IJH

Recommendation

Case 1128/2001/IJH - Opened on 04/09/2001 - Recommendation on 27/06/2002 - Decision on 09/12/2002

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

THE COMPLAINT

In July and August 2001, Mr H. complained against the Commission on behalf of Corporate Observatory Europe, a Netherlands-based NGO. The complaint is against the Commission's refusal to give access to certain documents relating to the Commission's dealings with the Transatlantic Business Dialogue (TABD). The complainant requested the documents under Commission Decision 94/90.

The documents in question are briefing notes of the European Commission delegations to the Mid-Year Meeting of the TABD held in Washington on 10 May 1999 and the TABD Conference held in Berlin on 28-29 October 1999.

The complainant alleges that the Commission failed to give sufficient weight to the public interest in disclosure of the documents. To support the allegation, the complainant argues that the TABD and particularly its annual conference, is a forum where EU policies that later have a far-reaching impact on all European citizens are proposed and discussed. According to the complainant, the Commission should not keep essential documents related to its involvement in the forum secret. Proposals made by the US government and the private sector and the Commission's responses are an integral part of the Commission's decision-making process. These proposals are discussed at length with representatives of the business sector and it is therefore not legitimate to deny transparency to members of civil society.

The complainant claims access to the documents and also mentions that the case law of the Community courts requires the institutions to grant partial access where a document contains both confidential and non-confidential information.

THE INQUIRY



The Ombudsman forwarded the complaint to the Commission for an opinion. The Ombudsman requested that the Commission's opinion should take into account the length of time that has elapsed since the relevant TABD meetings took place.

The Commission's opinion

In summary, the Commission's opinion was as follows.

The briefings in question consist of two binders containing a number of elements such as steering notes, suggested speaking points, proposed draft communiqués, briefing notes for side-meetings with US government ministers as well as recommendations from the TABD to the Commission and the Commission services' comments and responses to those recommendations.

The Commission gave the complainant access to the Commission's comments and responses to the TABD's recommendations. However, steering notes, briefings for meetings with US government representatives, other comments by Commission staff and recommendations to the Commissioner are covered by the exception for protection of the confidentiality of the Commission's proceedings.

Having weighed the complainant's interest in obtaining these documents against the Commission's interest in preserving the confidentiality of its proceedings it was felt that the latter outweighed the former. Depending on the general context of the discussions and appropriate political discretion, the position taken by the Commissioner may not always entirely correspond to the advice and proposed speaking points. Therefore giving access to these documents would be inappropriate and misleading to the public. Moreover, disclosure would compromise or complicate relations with the US.

The complainant's argument that essential documents related to the Commission's involvement in the TABD are kept secret is incorrect. In fact, the complainant has been given access to all the TABD's recommendations to the Commission and all the Commission's opinions on and replies to those recommendations.

Proposals made by the US government are not made in writing and the Commission holds no documents with respect to these proposals.

The matters discussed between the Commission and the business sector are covered by the Commission's response papers to the TABD recommendations, to which the complainant has received access. Since these documents were part of the briefings the complainant has, in effect been given partial access.

The fact that two years have now elapsed does not enable the Commission to release the documents as the issues and opinions contained in them are still valid.

The complainant's observations

In summary, the complainant's observations made the following points.

The complainant does not seek access to US government proposals but to all documents



reflecting the Commission's reactions to TABD recommendations.

The Commission's opinion implies that the briefings prepared for the Berlin meeting have a different content from the Commission's official written replies to TABD, copies of which were sent to the complainant. This contradicts the Commission's argument that the release of the official response papers in effect gave the complainant partial access.

The briefings are essential for understanding the Commission's relationship with TABD and the role of this body in EC decision-making. They were prepared for presentation at a private sector conference and should be made available to other parts of civil society as well.

The Commission's argument that the documents do not necessarily constitute the Commission's final position is not relevant. The briefings form the background of Commission decisions that affect all citizens. Calling the release of these documents inappropriate or misleading to the public is merely patronising.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

The Ombudsman therefore requested the Commission to respond to the points made by the complainant in his observations.

The Commission's second opinion

The Commission's second opinion included, in summary, the following points.

The Commission has released all documents requested by the complainant, except steering notes, advice, opinions and other comments from members of the Commission staff.

The documents to which access was denied only contain opinions and recommendations from members of staff, who would not feel free to give personal assessments on matters of policy if their views were to be disclosed to the public. Such a situation would seriously undermine the Commission's decision-making capacity. Moreover these documents shed no additional light on the positions taken by the Commission vis-à-vis TABD proposals. There is no real public interest in disclosure and the interest of keeping such documents internal prevails.

The time elapsed since the events for which the briefings were prepared does not enable the Commission to release the documents, as the opinions and recommendations contained in them could still be valid in future negotiations.

If the documents came into the public domain, personal views from members of staff could mistakenly be considered as reflecting the views of the Commission. Disclosure of the documents would therefore harm relations with the US. Public access must be denied where disclosure of the document concerned would undermine the protection of international relations.

The documents to which the complainant has been denied access have not been disclosed to representatives of the business sector. They are exclusively intended for internal use in the



Commission and therefore there is no ground for the request to make them available for other parts of civil society.

There is no secrecy surrounding business recommendations and the Commission's position with respect to these recommendations. The complainant has access to the TABD's proposals to Governments, which are publicly available on the internet, and the Commission's responses have been disclosed to the complainant.

The complainant's observations

In summary, the complainant's observations were as follows.

The briefing notes are the only way to shed light effectively on the nature of the relationship between the Commission and the TABD. If they would reveal that TABD exerts undue power over the decision-making process it is essential that they be made available to the public.

Briefing notes are not simply personal opinions of Commission Staff. The complainant has previously obtained Commission briefing notes from the Multilateral Agreement on Investment negotiations at the OECD. These contain official Commission positions and shed far more light on how the process was conducted than documents available to the general public.

It is surprising that the Commission seems to consider the TABD conferences to be negotiations since they are organised by a private sector lobby group and have no role in the EU decision-making process under the Treaties. This makes the need for transparency more urgent and reinforces the right to get access to the documents.

Briefing notes are essential documents for understanding the policy making process. The Commission's view that there is no real public interest in disclosing them shows a lack of understanding for the democratic gap felt so strongly by EU citizens.

THE DECISION

1 The legal framework

1.1 The complaint contests the Commission's refusal of access to certain documents. The request for access was made in December 1999 and the complainant's confirmatory application was refused in May 2000. The Ombudsman's examination of whether the Commission's refusal of access is an instance of maladministration will therefore be based on Decision 94/90 (2) which was the applicable legal framework at the time.

1.2 From 3 December 2001, access to Commission documents is governed by Regulation 1049/2001 (3) and by the detailed rules annexed to the Commission's rules of procedure by its Decision of 5 December 2001 (4), which repealed Commission Decision 94/90. The Ombudsman considers, therefore, that reconsideration by the Commission of the complainant's application must be based on Regulation 1049/2001.

2 The arguments presented by the complainant and the Commission

2.1 The complainant contests the Commission's refusal to give access to all the briefing notes of the Commission delegations to the Mid-Year Meeting of the Transatlantic Business Dialogue



(TABD) held in Washington on 10 May 1999 and the TABD Conference held in Berlin on 28-29 October 1999.

2.2 The complainant alleges that the Commission's refusal fails to give sufficient weight to the public interest in disclosure. According to the complainant, the TABD and particularly its annual conference, is a forum where EU policies that later have a far-reaching impact on all European citizens are proposed and discussed. The briefing notes are essential for understanding the Commission's relationship with TABD and the role of this body in EU decision-making. The notes were prepared for presentation at a private sector conference and should also be made available to other parts of civil society.

2.3 The complainant claims access to the documents and mentions that case law requires the institutions to grant partial access where a document contains both confidential and non-confidential information.

2.4 According to the Commission, the documents in question consist of two binders containing steering notes, suggested speaking points, proposed draft communiqués, briefing notes for side-meetings with US government ministers as well as recommendations from the TABD to the Commission and the Commission services' comments and responses to those recommendations. The Commission has released all documents requested, except steering notes, advice, opinions and other comments from members of the Commission staff.

The Commission argues that the documents to which access was denied contain only opinions and recommendations from members of staff, who would not feel free to give personal assessments on matters of policy if their views were to be disclosed to the public. This would seriously undermine the Commission's decision-making capacity. Moreover these documents shed no additional light on the positions taken by the Commission vis-à-vis TABD proposals. There is no real public interest in disclosure and the interest in keeping such documents internal prevails.

In addition, if the documents came into the public domain, personal views from members of staff could mistakenly be considered as reflecting the views of the Commission. Disclosure of the documents would therefore harm relations with the US. Public access must be denied where disclosure of the document concerned would undermine the protection of international relations.

The Commission also argues that the TABD's proposals to Governments are publicly available on the internet and the Commission's responses have been disclosed to the complainant. The documents to which the complainant has been denied access have not been disclosed to representatives of the business sector either. They are exclusively intended for internal use in the Commission and therefore there is no ground for the request to make them available for other parts of civil society.

As regards partial access, the Commission argues that the matters discussed between the Commission and the business sector are covered by the Commission's response papers to the TABD recommendations, to which the complainant has received access. Since these



documents were part of the briefings the complainant has, in effect been given partial access.

Finally, the Commission argues that the time elapsed since the events for which the briefings were prepared does not enable the Commission to release the documents, as the opinions and recommendations contained in them could still be valid in future negotiations.

2.5 In observations, the complainant argued that briefing notes are not simply personal opinions of Commission staff. Other such briefings contain official Commission positions and shed more light on how the relevant process was conducted than documents available to the general public.

The complainant expressed surprise that the Commission seems to consider the TABD conferences to be negotiations, since they are organised by a private sector lobby group and have no role in the EU decision-making process under the Treaties. This makes the need for transparency more urgent and reinforces the right to get access to the documents.

According to the complainant, the Commission's view that there is no real public interest in disclosing the briefing notes shows a lack of understanding of the democratic gap felt so strongly by EU citizens.

3 The Ombudsman's findings

3.1 Commission Decision 94/90 sets out two categories of exception to the public's right of access to Commission documents. The first category is mandatory and concerns protection of the public interest. The Commission has invoked this exception by arguing that disclosure of the documents concerned would damage the public interest as regards international relations. According to the Commission, disclosure would harm relations with the US, because personal views from members of Commission staff could mistakenly be considered as reflecting the views of the Commission.

3.2 The Ombudsman points out that it is not obvious why the US authorities would make such a mistake and the Commission provides no evidence to show any likelihood that they would do so.

3.3 The Ombudsman therefore finds that the reason given by the Commission does not show that the Commission has genuinely considered whether, in the light of the information available to it, disclosure is in fact likely to undermine the public interest as regards international relations. This is an instance of maladministration.

3.4 The Commission has also invoked the second category of exception under Decision 94/90, which is to protect its interest in the confidentiality of its proceedings. According to established case law, in applying this exception the institution must strike a genuine balance between the interest of the citizen in obtaining access to the documents and any interest of its own in maintaining the confidentiality of its deliberations.

3.5 The Ombudsman considers as well-founded the Commission's argument that the documents to which access was denied contain opinions and recommendations from members



of staff, who would not feel free to give personal assessments on matters of policy if their views were to be disclosed to the public and that this would seriously undermine the Commission's decision-making capacity.

3.6 The Ombudsman does not consider, however, that the Commission's argument that there is no real public interest in disclosure can be accepted. In this context, the Ombudsman first recalls that the principle of openness is intended to secure a more significant role for citizens in the decision-making process and to ensure that the administration acts with greater propriety, efficiency and responsibility vis-à-vis the citizens in a democratic system (5) . Moreover, the widest possible access to documents, which Commission Decision 94/90 aims to secure, enables citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions (6) .

3.7 The Ombudsman notes that according to information available on the Commission's website, the TABD traces its origins to 1995, when the then U.S. Secretary of Commerce and Commissioners BRITTAN and BANGEMANN organised a conference for company CEOs from both sides of the Atlantic in Seville. The TABD's own website describes TABD as "an informal process whereby European and American companies and business associations develop joint EU-US trade policy recommendations, working together with the European Commission and US Administration."

3.8 The Ombudsman considers that the complainant is entitled to invoke a public interest in disclosure of documents concerning the Commission's relationship with TABD. Nor is it for the Commission to say which documents might or might not be useful to citizens in carrying out monitoring of the Commission's exercise of its powers.

3.9 The Ombudsman therefore finds that in applying the discretionary exception of Decision 94/90, the Commission has failed to show that it has struck a genuine balance between the interest of the citizen in obtaining access to the documents and its own well-founded interest in confidentiality. This is an instance of maladministration.

3.10 As regards the question of partial access, the Ombudsman points out that the Commission should consider partial access in accordance with Article 4 (6) of Regulation 1049/2001 in reconsidering the complainant's application.

4 Conclusion

4.1 For the reasons given above, the Ombudsman considers that the reasoning of the Commission's refusal of the complainant's application for access to briefing notes of the European Commission delegations to the Mid-Year Meeting of the TABD held in Washington on 10 May 1999 and the TABD Conference held in Berlin on 28-29 October 1999 is inadequate. This is an instance of maladministration.

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

The draft recommendation

The Commission 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 Regulation 1049/2001 applies. The reconsideration should include the possibility of partial access, in accordance with Article 4 (6) of Regulation 1049/2001.

The Commission 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 October 2002. The detailed opinion could consist of the acceptance of the Ombudsman's draft recommendation and a description of how it has been implemented.

Strasbourg, 27 June 2002

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) Commission Decision 94/90 of 8 February 1994 on public access to Commission documents OJ 1994 L 46/58.

(3) Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43.

(4) 2001 OJ L 345/94.

(5) Case T-211/00, Aldo Kuijer v Council, Judgment of the Court of First Instance (Fourth Chamber) of 7 February 2002, paragraph 52.

(6) Case T-92/98, Interporc Im- und Export GmbH v Commission ("Interporc II"), [1999] ECR II-3521, paragraph 39.