

Decision of the European Ombudsman on complaint 1053/25.11.96/STATEWATCH/UK/IJH against the Council

Decision

Case 1053/96/IJH - **Opened on** 15/01/1997 - **Decision on** 28/07/1998

Strasbourg, 28 July 1998 Dear Mr B. On 22 November 1996, you made five complaints to the European Ombudsman. This decision deals with one of those complaints: 1053/25.11.96/STATEWATCH/UK/IJH. Complaints 1054 and 1056 were closed with reasoned decisions dated, respectively, 14 November 1997 and 30 June 1998. The Ombudsman's inquiries are still continuing into two other complaints and into a sixth complaint made on 5 December 1996. On 15 January 1997, I forwarded your complaints to the Council for its opinion. On 26 March 1997, the Council sent a reply which contested the competence of the Ombudsman to deal with the complaints. On 15 April 1997, I wrote to the Council explaining my decision that the complaints fall within the jurisdiction of the Ombudsman. I forwarded copies of this correspondence to you for information. On 20 June 1997, the Council sent its opinion on the merits of the complaint. I forwarded the opinion to you with an invitation to make observations which you sent on 23 September 1997. I am writing now to let you know the results of the inquiries that have been made into complaint 1053/25.11.96/STATEWATCH/UK/IJH. The Ombudsman's decision on the jurisdictional point raised by the Council in its letter of 26 March 1997 is reported in Chapter 2 of the Annual Report for 1997, a copy of which has already been sent to you for information.

THE COMPLAINT

On 27 February 1996, you wrote to the Council requesting copies of the minutes of fourteen meetings of the "K4" Committee, which comes under the Council of Justice and Home Affairs ministers. Your application was made under the Council Decision on public access to Council documents (1) (hereafter "Decision 93/731"). On 3 April 1996, the General Secretariat of the Council replied to your application. The reply referred to Article 3 (2) of Decision 93/731 which reads as follows: *"The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents."* The reply went on to state that your request was *"a repeat application which relates as well to a very large number of documents"* and that, as a *"fair solution"*, the General Secretariat was providing five of the fourteen documents which you had requested. On 17 April 1996, you made a confirmatory application for the other nine documents. On 23 May 1996, the Presidency of the



Council replied upholding the original decision. In your complaint to the Ombudsman, you claimed that the Council was not entitled to rely on Article 3 (2) of Decision 93/731 as a reason to reject part of your application for documents because: (i) You had never applied for the documents in question before; in your view, the term "repeat applications" refers to a situation in which a person applies for the same document again and again; (ii) Article 3 (2) refers to "*very large documents*", not "*a very large number of documents*" as mentioned in the reply from the General Secretariat. Furthermore, in February 1996 the Council introduced a system of charging for documents supplied. You suggested that the size or number of documents requested had therefore become irrelevant.

THE INQUIRY

The Council's opinion The Council's opinion included, in summary, the following points : Mr B. uses a systematic technique to obtain access to all Council JHA documents. That technique consists of initially requesting the agendas of all the Council bodies dealing with JHA matters and subsequently requesting all the documents included on those agendas. Article 3 (2) must be interpreted in a way which gives it practical effect. If a person continues to request access to a document which has already been refused and the circumstances which motivated that refusal have remained unchanged, the General Secretariat is not obliged to find a fair solution but may adopt an identical solution, i.e. may withhold that document again. To restrict the concept of "repeat applications" to applications referring to the same document would therefore divest Article 3 (2) of practical effect. In the Council's opinion, the concept of a "repeat application" includes cases in which a person regularly and systematically requests over a long period of time access to a large number of documents of the same type, not necessarily identical. It is in this context that the number of documents requested is one of the criteria to be taken into consideration; as is clearly shown by the wording of Article 3 (2) of Decision 93/731/EC, the volume of documents requested is a separate criterion which may justify the application of a fair solution, even if the request is not a repeat one. It should be pointed out that the French version of Article 3 (2), which formed the basis for translation into all the other language versions, refers to a "*demande répétitive*", a term which has negative and pejorative connotations. In the Council's view, Article 3 (2) of Decision 93/731/EC is aimed at safeguarding efficiency in its administration in exceptional cases. It has been applied only to a limited extent to date. The charging of fees for the supply of documents is based on Article 3 (1) of Decision 93/731. It does not affect the rule of principle provided for in Article 3 (2). **Your observations** In your observations, you criticized the Council's opinion in detail and maintained your position that the Council was not entitled to rely on Article 3 (2) of Decision 93/731 as a reason to reject part of your application for documents.

THE DECISION

1 *Decision 93/731*. 1.1 Decision 93/731 implements principles laid down in the joint Code of Conduct concerning access to Council and Commission documents. (2) The objective of the Decision 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. (3) 1.2 The procedure to be followed by the Council in



dealing with applications for access to documents is laid down by Articles 3, 5, 6 and 7 of Decision 93/731. A two-stage procedure is foreseen. At the first stage, applications are dealt with by the General Secretariat and the Secretary General replies to the applicant. In the case of a negative reply, the applicant has the opportunity to initiate a second stage by making a confirmatory application. If the confirmatory application is rejected, the reply to the applicant comes from the Council.

2 The disputed provision: Article 3 (2). 2.1 According to Article 3 (2) of Decision 93/731: *"The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents."* The reference to the General Secretariat indicates that the possibility of a fair solution is envisaged at the stage of the initial application, as is also the case for the corresponding provision of the Code of Conduct which, moreover, foresees that a fair solution will be found *"in consultation with the applicants"*. (4) 2.2 Neither Article 3 (2) nor the corresponding provision of the Code of Conduct expressly provides an exception to the general rule of public access which could be used as a reason for rejecting any part of an application for access to documents. In this case, however, the Council cited Article 3 (2) as the reason for rejecting the complainant's confirmatory application for the nine documents which the General Secretariat had failed to provide to him. 2.3 The complainant contests the Council's interpretation of the term "repeat application." He also claims that the General Secretariat's reply to his initial application was wrong to consider that Article 3 (2) also applies to applications for a very large number of documents. 2.4 According to the Council's opinion to the Ombudsman: *"the concept of a "repeat application" refers inter alia to cases in which a person regularly and systematically requests over a long period of time access to a large number of documents of the same type, not necessarily identical."* The Council's opinion also claims that *"the volume of documents requested is a separate criterion which may justify the application of a fair solution, even if the request is not a repeat one."* 2.5 It appears therefore that the issue in dispute between the complainant and the Council is the interpretation of the terms *"repeat applications"* and *"very large documents"* as used in Article 3 (2) of Decision 93/731. Neither term is defined by the Decision itself, or by the Code of Conduct.

3 The meaning of the terms "repeat applications" and "very large documents" 3.1 If and to the extent that Article 3 (2) may lawfully be used by the Council as a reason for rejecting any part of an application for access to documents, the provision operates as an exception to the general rule contained in Decision 93/731. According to the case-law of the Court of First Instance, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. (5) 3.2 Decision 93/731 confers upon citizens rights of access to documents held by the Council. Any person is entitled to ask for access to any Council document without being obliged to put forward reasons for the request. (6) Access to documents cannot therefore legitimately be blocked by the Council because of a possible negative attitude towards the purposes for which a request has been made, or the person who has made it. 3.3 The term "repeat application" appears naturally to refer to applications for the same document. On this interpretation, the practical effects of Article 3 (2) include the possibility of a fair solution to allow the Council services to deal efficiently with cases in which the same person makes repeated applications for the same document, hoping or claiming that the circumstances which motivated previous refusals may have changed. 3.4 To extend the meaning of "repeat applications" so as to include applications by the same person for different documents could defeat the application of the general rule:



Decision 93/731 does not impose any limit on the number of documents for which a citizen may apply as of right. In the absence of such a limit, moreover, the Council's interpretation could infringe the principle of legal certainty, because it would not be possible to know in advance how many different documents could be requested before the Council would consider the application to be a "repeat application." 3.5 To interpret Article 3 (2) so as to bring all applications for a very large *number* of documents within its scope leads to the same practical result as interpreting "repeat application" to include applications by the same person for different documents. Similar arguments against such an interpretation therefore apply. 3.6 The Ombudsman therefore considers that the Council has wrongly interpreted Article 3 (2) of Decision 93/731 and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term "repeat applications" in Article 3 (2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large *number* of documents within its scope. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice. 4 *Conclusions* 4.1 On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remark: The Ombudsman considers that the Council has wrongly interpreted Article 3 (2) of Decision 93/731 and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term "repeat applications" in Article 3 (2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large *number* of documents within its scope. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice. 4.2 Article 7 (3) of Council Decision 93/731 expressly provides for an applicant whose confirmatory application for access to documents is rejected to be informed of the possibility of complaint to the Ombudsman. The Ombudsman's critical remark implies that the Council should reconsider the complainant's confirmatory application dated 17 April 1996 and give access to the documents requested, unless one of the exceptions contained in Article 4 of Decision 93/731 applies. Since it is for the Council to carry out this reconsideration and communicate the result to the complainant, the Ombudsman closes the case.

FURTHER REMARKS

The Council's opinion in this case referred to the introduction of a system of charging fees for documents supplied under Council Decision 93/731. The Ombudsman agrees with the Council's view that the system of charging is legally irrelevant to the interpretation of Article 3 (2) of Decision 93/731. However, the Council's opinion also expresses a legitimate concern to safeguard the efficiency of its administration. In this context, the Ombudsman notes that Member States which have long experience of administering a right of public access to documents often rely on the system of charging as a safeguard in dealing with requests for documents which impose a heavy administrative burden. Yours sincerely Jacob Söderman
(1) Council Decision 93/731/EC of 20 December 1993, 1993 OJ L 340/43.

(2) 1993 OJ L 340/41.

(3) Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998, paras 66.



(4) *"In consultation with the applicants, the institution concerned will find a fair solution to comply with repeat applications and/or those which relate to very large documents."*

(5) Cases T-194/94, *John Carvel and Guardian Newspapers v Council*, [1995] ECR II-2765; T-105/95, *World Wide Fund for Nature (WWF) v Commission*, [1997] ECR II-313; Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998.

(6) Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998, para 109.