

## **Decision of the European Ombudsman on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council**

Decision

**Case** 1056/96/IJH - **Opened on** 15/01/1997 - **Decision on** 30/06/1998

Strasbourg, 30 June 1998 Dear Mr B. On 22 November 1996, you made five complaints to the European Ombudsman. This decision deals with one of those complaints: 1056/25.11.96/STATEWATCH/UK/IJH. Complaint 1054 was previously closed with a reasoned decision dated 14 November 1997. The Ombudsman's inquiries are still continuing into three other complaints and into a sixth complaint that you 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 all the complaints. I forwarded the opinion to you with an invitation to make observations. On 5 July 1997, you wrote asking the Ombudsman to obtain clarification of one aspect of the Council's opinion on complaint 1056/25.11.96/STATEWATCH/UK/IJH. On 21 July 1997, I requested further information from the Council concerning this matter. On 23 September 1997, you sent me your observations on the Council's opinion of 20 June 1997. On 9 October 1997, the Council replied to my letter of 21 July 1997 and I forwarded the reply to you for observations, which you sent on 8 November 1997. In the light of those observations, I requested further information from the Council on 20 November 1997. The Council's reply, dated 20 January 1998, was forwarded to you and on 24 February 1998 you sent me your observations concerning the reply. I am writing now to let you know the results of the inquiries that have been made into complaint 1056/25.11.96/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 is enclosed for your information.

### **THE COMPLAINT**

The facts relating to your complaint are as follows: On 11 July 1996, you wrote to the Secretary General of the Council requesting a copy of the calendar of meetings of Council steering groups and working parties in the field of Justice and Home Affairs for the period of the Irish Presidency (July-December 1996). Your request was made under the Council Decision on



public access to Council documents (1) (hereafter "Decision 93/731"). By letter dated 29 July 1996, the General Secretariat of the Council rejected your request. Its letter referred to Article 2 (2) of Decision 93/731 which reads 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 letter stated that the responsibility for the Calendar of meetings lies with the Presidency and not with the Council's General Secretariat, and you must therefore ask the Irish Presidency directly. On 15 August 1996, you wrote to the Irish Permanent Representation to the European Union requesting the calendar of meetings. Your request was refused on the grounds that *"it is not proposed to make publicly available the information in question"*. You claimed that the General Secretariat was wrong to refuse your request by reference to Article 2 (2) of Decision 93/731 because the Presidency is not "another Community institution or body" but rather a function or office of the Council itself.

## THE INQUIRY

**The Council's opinion** The Council's opinion on the complaint included the following: *"In this case, the General Secretariat considered that the detailed timetable was only an informal tool for organizing the Council's proceedings, being constantly updated by the Presidency and neither systematically distributed nor filed by the Secretariat. The dates of meetings scheduled in the timetables are provisional and are formalized only by convening the meeting officially by telex. As the General Secretariat was therefore unable to determine precisely whether the version of the timetable for meetings in its possession was the final version of that document, it asked Mr B. to address himself directly to the Presidency which alone is able to provide precise information concerning the current state of its planning. In the light of Mr B.'s arguments, the Secretary-General is now reconsidering its practice and its interpretation of Article 2(2) of Decision 93/731/EC with regard to requests for access to documents of this kind."* In reply to a request from the Ombudsman for further information, the Council confirmed that it had already changed its practice and that the General Secretariat had granted access to the calendars circulated by the Luxembourg presidency. It also stated its intention to follow the same policy in similar cases in the future. The Council also made clear that these calendars have no official and binding character and are subject to modifications throughout the term of the Presidency and that the official convocation of meetings is done by means of telexes setting out the dates and agendas. **Your observations** In your observations, you made in summary the following points: (i) The Council's response had clarified that the Council is now supplying copies of the timetables of justice and home affairs meetings held under each Presidency. This element of your complaint was therefore satisfied; (ii) The Council had failed to respond to your claim that the Presidency is not *"another Community institution or body"* within the meaning of Article 2 (2) of Decision 93/731; (iii) The Council was continuing to refuse access to certain documents on this ground. You referred in particular to the agendas of the "Senior level Group" and the "EU-US Task Force". Your confirmatory application for access to these documents, dated 28 July 1997, had been refused by the Council on the grounds that the agendas in question were established jointly by the Presidency, the Commission and the US authorities and that Article 2 (2) of Decision 93/731 applied because the agendas in question were not prepared under the sole responsibility of the Council or its Presidency. **Further inquiries** After careful consideration of the Council's opinion and your observations, it appeared that further inquiries



were necessary: firstly, in order to clarify the Council's position concerning the status of its Presidency within the meaning of Article 2 (2) of the Decision on public access to documents and, secondly, because your observations had raised a new issue; i.e. the refusal of your confirmatory application of 28 July 1997 for access to the agendas of the "Senior level Group" and the "EU-US Task Force". The Council's response In its response to the Ombudsman's request for further information about these matters, the Council stated that it does not consider its Presidency to be "another institution", separate from the Council, within the meaning of Article 2 (2) of Decision 93/731. The Council went on to state that a distinction should be drawn between: *"documents written by the Member State holding the Presidency in its capacity as Presidency of the Council and documents written by that Member State not relating to its role as Presidency of the Council."* The Council also expressed the view that Article 2 (2) of Decision 93/731 is applicable to the second category of documents. As regards the agendas of the "Senior level Group" and the "EU-US Task Force", the Council stated as follows: *"The negative response to Mr B.'s request dated 28 July 1997 ... was not motivated by the fact that the Presidency, which contributed to the establishment of the document, was considered as" another institution" within the meaning of Article 2 paragraph 2 of Decision 93/731/EC. In this particular case the agendas in question were not prepared under the sole responsibility of the Presidency, but jointly by the Presidency, the Commission and the US authorities."* Your observations on the Council's response In observations on the Council's response, you stated that you were pleased to see that the Council no longer considered its Presidency to be another institution separate from the Council. You also made, in summary, the following points: (i) A document written by a Member State which is put on the formal agenda of a justice and home affairs Council and which is subsequently agreed or adopted thereby becomes part of the justice and home affairs *acquis* and should be open to an application under Decision 93/731; a document which is not subsequently agreed or adopted but which forms part of the process of making or implementing policies should also be open to such an application; (ii) The Council's reasoning of its refusal of access to agendas of the "Senior level Group" and the "EU-US Task Force" was unacceptable: European citizens should be able to apply to the Council under Decision 93/731 for access to documents of which the Council Presidency is a joint author.

## THE DECISION

*1 Access to calendars of Council meetings* 1.1 The original complaint concerned a refusal of access to the calendars of Council meetings planned for the Luxembourg Presidency (July-December 1996). 1.2 The Ombudsman's inquiry established that the Council had changed its practice and granted access to the calendars circulated by the Luxembourg Presidency. The Council also stated its intention to follow the same policy in similar cases in the future. The complainant declared that he was satisfied with this response. 1.3 The Council has therefore taken steps to settle this aspect of the complaint and has thereby satisfied the complainant. *2 The status of the Presidency* 2.1 The Council's refusal of the complainant's request for access to calendars of Council meetings referred to Article 2 (2) of Council Decision 93/731/EC on public access to Council documents. The complainant claimed that the Council's reasoning was wrong, because the Presidency is not "another institution or body" within the meaning of Article 2 (2). 2.2 During the Ombudsman's inquiry, the Council expressly stated that



it does not consider its Presidency to be "another institution" within the meaning of Article 2 (2) of Decision 93/731. The complainant stated that he was pleased by this response. 2.3 The Council has therefore taken steps to settle this aspect of the complaint and has thereby satisfied the complainant. 2.4 In its response to the Ombudsman's request for further information, the Council drew a distinction between documents written by a Member State in its capacity as Presidency of the Council and other documents written by that Member State. The complainant also made observations concerning the status of documents written by a Member State and placed on the formal agenda of justice and home affairs meetings. Both the Council's distinction and the complainant's observations appear to refer to hypothetical cases rather than to the documents which were the subject of the complaint. It is not appropriate, therefore, for the Ombudsman to take a position on the matter in this decision.

*3 The refusal of access to documents of which the Council is a joint author.* 3.1 The complainant's application, dated 28 July 1997, for access to agendas of the "Senior level Group" and the "EU-US Task Force" was rejected by the Council on the grounds that the agendas in question were established jointly by the Council's Presidency, the Commission and the US authorities and that Article 2 (2) of Decision 93/731 applied because the agendas in question were not prepared under the sole responsibility of the Council or its Presidency. 3.2 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. (2) 3.3 Article 2 (2) is not presented in the form of an exception to the general rule of public access. In practice, however, it functions as an exception, since its consequence is that incoming documents are completely excluded from the range of application of the general rule. To include documents of which the Council is a joint author within the scope of Article 2 (2) would considerably broaden the scope of this de facto exception. 3.4 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. (3) 3.5 Neither the express wording of Article 2 (2) nor the above-mentioned case-law supports the Council's position that documents of which it is a joint author fall within the scope of Article 2 (2). It appears therefore that the Council's rejection of the complainant's application for access to agendas of the "Senior level Group" and the "EU-US Task Force" was based on a misapplication of Decision 93/731. 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 The Council has taken steps to settle the aspects of the complaint dealt with in parts 1 and 2 of this decision and has thereby satisfied the complainant. 4.2 As regards the aspect of the case dealt with in part 3 of this decision, it appears necessary to make the following critical remark: Neither the express wording of Article 2 (2) nor the case-law of the Court of First Instance supports the Council's position that documents of which it is a joint author fall within the scope of Article 2 (2). It appears therefore that the Council's rejection of the complainant's application for access to agendas of the "Senior level Group" and the "EU-US Task Force" was based on a misapplication of Decision 93/731. It must be recalled, however, that the highest authority on the meaning and interpretation of Community law is the Court of Justice. 4.3 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 28 July 1997 and give access to the documents requested, unless one or more 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 thereof to the complainant, the Ombudsman closes the case. Yours sincerely Jacob Söderman  
(1) Council Decision 93/731/EC of 20 December 1993, OJ 1993 L 340/43.

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

(3) See cases T-194/94, *John Carvel and the Guardian Newspapers v Council*, [1995] ECR II-2765; T-105/95, *World Wide Fund for Nature (WWF) v Commission*, [1997] ECR II-313; T-174/95 (note 2 above).