

Decision of the European Ombudsman on complaint 1057/25.11.96/STATEWATCH/UK/IJH against the Council

Decision

Case 1057/96/IJH - Opened on 15/01/1997 - Decision on 30/07/1998

Strasbourg, 30 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: 1057/25.11.96/STATEWATCH/UK/IJH. Complaints 1053, 1054 and 1056 were closed with reasoned decisions dated respectively, 28 July 1998, 14 November 1997 and 30 June 1998. The Ombudsman's inquiries are still continuing into one other complaint 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 1057/25.11.96/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 15 February 1996, the complainant wrote to the Council requesting copies of 24 reports considered at the meeting of the Council of Justice and Home Affairs held on 9-10 March 1994 and of 17 reports considered at the meeting of the "K4" Committee held on 3-4 March 1994. The application was made under the Council Decision on public access to Council documents (1) (hereafter "Decision 93/731"). On 15 March 1996, the General Secretariat of the Council gave access to 17 of 41 documents requested and refused access to the 24 others. On 2 April 1996, the complainant made a confirmatory application for 23 of the documents to which access had been refused. On 2 May 1996, the Presidency of the Council replied granting access to a further 7 documents, but confirming the refusal of access to the other 16 documents. The complaint to the Ombudsman concerned 15 of the documents to which access was refused by the reply to the confirmatory application. The Council explained the refusal of access to these



documents as follows: *"With regard to documents 5375/95; 5406/95+COR1, 5405/95; 5354/95; 5319/95; 11020/93; 11565/93; 11151/93; 10448/93; SN 1100/94, consideration of your request involved balancing your interest in gaining access to these particular documents against the interest of the Council in maintaining the confidentiality of its deliberations. The Council concluded that the latter interest outweighed the former in this case, particularly since the documents in question record detailed national positions with regard to Conventions which have only recently been established or other legal instruments still under discussion or very recently adopted. They also contain internal information on procedures for the recruitment of staff to the institutions and the choice of consultants in the JHA field. Moreover, one of these documents is a working document for internal organisation purposes on protection of classified information, and others contain opinions of the Council Legal Service, which are for the exclusive use of the Council in its deliberations although they are not binding on it. With regard to the other documents, the relevant considerations under Article 4 (1) of the Council Decision 93/731/EC are the following: - protection of the public interest (public security) docs. 12247/1/94; SN 1053/54; 10166/4/94; 9908/2/93+ADD 1 - protection of the public interest (international relations) doc. 5121/1/95. The nature of the information contained in these documents, particularly with regard to the fight against organized crime within and outside the European Union, has led the Council to the conclusion that access to these documents must not be allowed."* The complaint to the Ombudsman was that the Council's reasoning, quoted above, was inadequate. Specifically, the complainant mentioned that the terms *"only recently been established"* and *"very recently adopted"* have no basis in Decision 97/731.

THE INQUIRY

The Council's opinion In summary the Council claimed in its opinion that it had respected the obligation to give reasons for refusal of access to the documents in question, in accordance with the principles laid down by established case law. *"(A)ccess to a clearly identified set of documents was refused to protect the confidentiality of the Council's proceedings pursuant to Article 4 (2) of Decision 93/731/EC, while access to another clearly identified set of documents was refused for reasons of public interest (public security and international relations) pursuant to Article 4 (1) of Decision 93/731/EC. (...) With regard to documents to which access was refused pursuant to Article 4 (1) of Decision 93/731/EC, the letter of 2 May 1996 adduces sufficient imperative reasons justifying application of the exception on grounds of protection of the public interest. With regard to documents to which access was refused pursuant to Article 4 (2) of Decision 93/731/EC, it should be noted that the Council did not refuse access to the documents on the grounds that they 'had only recently been established', as Mr B. claims in his complaint. The justification for the refusal of access to the documents resides in the fact that they contain detailed national positions and that the Council's interest in protecting the confidentiality of its proceedings therefore outweighed Mr B.'s interest in obtaining access to those documents."* **The complainant's observations** The complainant's observations on the Council's opinion accepted that access to some of the documents could properly be refused. However, he maintained the complaint in relation to documents 10448/93, 5354/95, 5319/95, SN 1053/94 and 5121/95 and asked the Ombudsman to examine whether refusal of access to these documents was justified.

THE DECISION



1 The complainant's claims 1.1 The complainant claimed that the Council's reasoning for refusing access to some of the documents which were the subject of a confirmatory application dated 2 April 1996 was inadequate. In his observations, the complainant accepted the refusal of access to certain documents but maintained his claims in relation to others.

2 The legal principles 2.1 Article 4 of Decision 93/731 provides for two categories of exception to the principle of general access for citizens to Council documents. 2.2 Article 4 (1) provides that access to a Council document cannot be granted if its disclosure could undermine the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations). In order to demonstrate that the disclosure of particular documents could undermine the protection of the public interest, the Council is obliged to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected. If that is the case, the Council is obliged to refuse access to the documents in question. (2) 2.3 Article 4 (2) provides that the Council may also refuse access in order to protect the confidentiality of its proceedings. The Council must exercise the margin of discretion it enjoys in applying Article 4 (2) by striking a genuine balance between on the one hand, the interest of the citizen in obtaining access to the documents and, on the other, any interest of its own in maintaining the confidentiality of its deliberations. (3) 2.4 According to established case-law, the statement of reasons for a decision refusing access to a document must contain - at least for each category of documents concerned - the particular reasons for which the Council considers that disclosure of the requested documents comes within the scope of one of the exceptions provided for in Decision 93/731.

3 The refusal of access under Article 4.1 3.1 Access to two of the documents in dispute was refused under Article 4 (1). In reply to the confirmatory application, the Council explained that: *"The nature of the information contained in these documents, particularly with regard to the fight against organized crime within and outside the European Union, has led the Council to the conclusion that access to these documents must not be allowed."* 3.2 According to the Court of First Instance, the concept of public security could encompass situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities. (4) The Council's reference to the fight against organized crime is therefore relevant to one of the facets of the public interest protected by Article 4 (1). 3.3 In its reply to the complainant's confirmatory application, the Council mentioned "the fight against organized crime" but provided no further explanation of its reference to the "nature of the information" contained in the documents. The Ombudsman therefore considers that the Council failed to comply with the requirement to provide the complainant with the particular reasons which led it to consider that disclosure of the requested documents came within the scope of Article 4.1.

4 The refusal of access under Article 4.2 4.1 In its reply to the complainant's confirmatory application, the Council appeared to refer to several different factors which it had taken into account in reaching its decision to refuse access to 10 documents under Article 4.2. However, in its opinion to the Ombudsman the Council stated that: *"The justification for the refusal of access to the documents resides in the fact that they contain detailed national positions and that the Council's interest in protecting the confidentiality of its proceedings therefore outweighed Mr B.'s interest in obtaining access to those documents."* 4.2 The Council's justification of its refusal of access to documents under Article 4 (2), in particular the use of the word "therefore", implies that access should be refused to every document which contains detailed national positions, regardless of how insignificant a proportion of the



document this element may constitute, or of what the other contents of the documents may be. The Ombudsman does not consider that this reasoning allows it to be confirmed that the Council complied with the obligation to strike a genuine balance between the interests involved.

5 Conclusions 5.1 On the basis of the Ombudsman's inquiries into this complaint, it appears necessary to make the following critical remarks: A) In its reply to the complainant's confirmatory application, the Council mentioned "the fight against organized crime" but provided no further explanation of its reference to the "nature of the information" contained in the documents. The Ombudsman therefore considers that the Council failed to comply with the requirement to provide the complainant with the particular reasons which led it to consider that disclosure of the requested documents came within the scope of Article 4.1. B) The Council's justification of its refusal of access to documents under Article 4 (2), in particular the use of the word "therefore", implies that access should be refused to every document which contains detailed national positions, regardless of how insignificant a proportion of the document this element may constitute, or of what the other contents of the documents may be. The Ombudsman does not consider that this reasoning allows it to be confirmed that the Council complied with the obligation to strike a genuine balance between the interests involved. In relation to both the above critical remarks, it must be recalled that the highest authority on the meaning and interpretation of Community law is the Court of Justice. 5.2 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 2 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. Yours sincerely Jacob Söderman

(1) Council Decision 93/731/EC of 20 December 1993, 1993 OJ L 340/43.

(2) Case T-124/96 *Interporc v Commission*, judgement of 6 February 1998, para 52; Case T-83/96; Case T-83/96, *Gerard van der Wal v Commission*, judgment of 19 March 1998, para 43; Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998.

(3) Case T-194/94 *John Carvel and Guardian Newspapers v Council*, [1995] ECR II-2765, paras 64 and 65.

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