Defensor del Pueblo Europeo

Decisión en el asunto 523/2009/(TS)OV - Presunta falta de razones que sustenten una decisión por la que se deniega el acceso a documentos clasificados del Consejo

Decisión
Caso 523/2009/(TS)OV - **Abierto el** 30/03/2009 - **Decisión de** 14/10/2010

El demandante solicitó acceso público a una nota de la Presidencia del Consejo dirigida a Coreper2 (Comité de los Representantes Permanentes de los Estados miembros ante la UE) elaborada como respuesta a una carta del Parlamento Europeo en relación con la transferencia de información a la Comisión Temporal del Parlamento sobre la Supuesta Utilización de Países Europeos por la CIA de Estados Unidos para el Transporte y la Detención Ilegal de Presos.

El Consejo denegó el acceso invocando la excepción relativa a la protección del interés público en relación con las relaciones internacionales (artículo 4, apartado 1, letra (a), tercer inciso del Reglamento 1049/2001). Asimismo, el Consejo declaró que, en vista del contenido sensible del documento, su revelación iría en detrimento de las buenas relaciones entre la UE y los Estados Unidos. Dicha revelación, siempre según el Consejo, entorpecería los esfuerzos diplomáticos que se realizan continuamente para encontrar soluciones constructivas a asuntos políticos de gran importancia, como la legislación en materia de derechos humanos y el derecho humanitario internacional. El Consejo declaró que no era posible conceder acceso parcial al documento porque la información en él contenida formaba una unidad indivisible.

La investigación del Defensor del Pueblo se centró en la presunta falta de razones fundamentadas para denegar la concesión de acceso parcial al documento. El Consejo se reafirmó en su postura, y se remitió a la jurisprudencia, según la cual, las excepciones del artículo 4, apartado 1, letra (a) del Reglamento son de cumplimiento obligatorio y la institución tiene un amplio poder de apreciación a la hora de denegar el acceso para proteger el interés público en relación con las relaciones internacionales. El Consejo alegó que no era posible ofrecer más razones debido a la necesidad de mantener la confidencialidad sin desvelar el contenido del documento ya que, de lo contrario, la excepción quedaría privada de la finalidad para la que se estableció.

Tras estudiar el documento, el Defensor concluyó que, a pesar de la relativa brevedad del razonamiento del Consejo que explicaba su decisión de denegar el acceso, la presentación de los motivos era adecuada a la vista del contenido de dicho documento y del hecho de que, tal como el estudio del documento por parte del Defensor confirmó, el contenido del documento

forma *una unidad indivisible* . Por lo tanto, el Consejo cumplió debidamente con su obligación de ofrecer una explicación adecuada de los motivos que justificaron dicha decisión. El Defensor consideró que no había habido mala administración por parte del Consejo y archivó el asunto.

The background to the complaint

1. The complaint concerns a request for public access to a document held by the Council of the European Union (the 'Council'). The requested document is a note from the Presidency of the Council to Coreper2 [1] in response to a letter from the European Parliament concerning the transfer of information to Parliament's Temporary Committee [2] on the alleged use of European Countries by the United States' Central Intelligence Agency ("the CIA") for the transportation and illegal detention of prisoners. The note was registered by the Council under reference number 14483/06 and classified as 'RESTREINT UE' [3] .

2. The complainant submitted an initial application to the Council for public access to " *a listing of all written/electronic reports, memoranda, protocols, minutes and notes by the Council which had been written between 11 September 2001 and 22 July 2008 with regard to all aspects of the so-called 'extraordinary U.S. rendition program.* " In reply to this initial application, the Council's Secretariat-General provided the complainant with full access to twenty-one documents and partial access to two documents. As regards document 14483/06, public access was refused in its entirety pursuant to Article 4 (1) (a), third indent (protection of the public interest with regard to international relations) of Regulation 1049/2001 [4] . On 4 December 2008, the complainant submitted a confirmatory application to the Council. He contested the Secretariat-General's reply to his initial application and requested the Council to review its position regarding document 14483/06.

3. By letter dated 19 January 2009, the General Secretariat of the Council informed the complainant that the Council had decided to confirm the General Secretariat's initial reply denying public access to document 14483/06 pursuant to Article 4(1)(a), third indent [5] , of Regulation 1049/2001 (protection of the public interest with regard to international relations). The Council reasoned the refusal to grant public access by stating that, in view of the sensitive content of the document, its disclosure would be detrimental to the good functioning of the relations between the EU and the US. The disclosure would hinder the continuous diplomatic efforts to find constructive solutions to issues in areas of the highest political importance, including the areas of human rights law and international humanitarian law. The Council recalled that the requested document was classified as 'RESTREINT UE' which means that its unauthorised disclosure could be disadvantageous to the interests of the EU or one or more of its Member States. The Council stated that it had looked into the possibility of disclosing parts of the document pursuant to Article 4(6) of the Regulation. However, partial access could not be granted because the information contained in the document formed an inseparable whole.

The subject matter of the inquiry

4. The complainant submitted a complaint to the Ombudsman on 2 March 2009.

5. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation:

The Council failed to provide sufficient reasoning for its refusal to grant partial access to the relevant parts of document 14483/06 (RESTREINT UE) with regard to the CIA rendition program.

Claim:

The Council should give partial access to the relevant parts of document 14483/06 (RESTREINT UE) which contain information on the CIA rendition program.

The inquiry

6. On 30 March 2009, the Ombudsman forwarded the complaint to the Council. The Council then provided its opinion, which was forwarded to the complainant with an invitation to make observations. The complainant submitted his observations on 28 November 2009. On 8 December 2009, the Ombudsman inspected the document in question at the premises of the Council. The report of the inspection was subsequently forwarded to the complainant and to the Council [6] .

The Ombudsman's analysis and conclusions

A. Allegation that the Council failed to provide sufficient reasoning for its refusal to grant partial access to the relevant parts of document 14483/06 (RESTREINT UE) with regard to the CIA rendition program and the related claim

Arguments presented to the Ombudsman

7. In its opinion, the Council first recalled that the exceptions provided for in Article 4(l)(a) of Regulation 1049/2001, including the protection of public interest as regards international relations, are mandatory. Therefore, once it is established that a requested document falls within the sphere of international relations, and that the protection of the invoked interest would

be impaired if the document were to be disclosed, the institution must refuse public access [7] . Furthermore, the Council pointed out that, according to the established case-law, the institution enjoys a wide discretion in the context of refusing access to protect the public interest concerning international relations [8] .

8. The Council then recalled that the requested document relates to an "I" item note [9] containing a draft reply to a letter dated 3 October 2006 from the European Parliament's Temporary Committee on the alleged use of European Countries by the CIA for the transportation and illegal detention of prisoners. In the said letter, the Temporary Committee requested information from the Council regarding discussions between the Council bodies and the US authorities on measures to combat terrorism and the legal approach followed by both sides. The Council noted that the partially accessible version of Temporary Committee's letter to the Council, as set out in document 14396/06, had been sent to the applicant with the Council's initial reply. The Council then pointed out that, as can be seen from that letter, information on this subject was exchanged between the Council and the European Parliament on a confidential basis in order to preserve the sensitive information.

9. The Council stated that the requested document contains elements for a draft reply to the procedural and substantive issues raised in the letter from Parliament's Temporary Committee regarding the Committee's request for information on the cooperation between the EU and US authorities on activities falling within the Temporary Committee's remit. The Council recalled that the document is classified as 'RESTREINT UE', which indicates that its unauthorised disclosure could be disadvantageous to the interests of the EU or one or more of its Member States. The Council pointed out that it is precisely because of the sensitive nature of the issues involved that the transmission of information contained in the draft reply was made conditional upon confidential treatment by the European Parliament.

10. The Council recalled the statement of reasons, which stated that disclosure would be " *detrimental to the good functioning of the relations between the EU and the US* ", and that it would, in particular, " *hinder the diplomatic efforts continuously being made in order to find constructive solutions to issues in areas of the highest political importance, including the areas of the highest political importance, including human rights law and international humanitarian law.* " The Council argued that, notwithstanding the brevity of the statement of reasons, it fully enabled the complainant to understand and ascertain the reasons justifying the refusal of the requested documents. It was not possible to give more extensive reasons without disclosing the content of the document and thereby depriving the exception of its very purpose.

11. The Council stated that the above statement of reasons for refusing the disclosure of document 14483/06 in its entirety was extended to the applicant's request for partial access at the confirmatory stage. The Council had examined the possibility of granting partial access to the relevant parts under Article 4(6) of the Regulation. However, the Council decided that it was impossible to grant partial access, because the content of the document formed an inseparable whole.

12. The Council emphasised that, in view of the particular circumstances of the case, the mere

fact that the statement of reasons is short may not amount to a failure to state reasons. In fact, the complainant requested partial access to information manifestly falling under the exception under the third indent of Article 4(1)(a) of Regulation 1049/2001, notably information concerning a " *CIA rendition programme* ". The Council concluded that, in view of the sensitivity of the issues covered in the requested document, it would have been impossible to provide more complete and individualised reasons justifying the refusal of the relevant passages without disclosing the essential aspects of its content and thereby depriving the exception of its very purpose.

13. In his observations, the complainant argued that the Council is using Article 4(1) of Regulation 1049/2001 as a pretext in order to hide information about " *organised and widespread criminal activities* " from public scrutiny. He argued that, instead of serving the public interest, the Council "serves the interest of the US federal agencies and individual European agencies" which have been involved in the " *illegal kidnapping, detention, and, most probably, the torture of EU and non-EU citizens* ". Furthermore, the complainant argued that the Council refuses to acknowledge that there is a public interest in the information contained in the document and that the public has the valid right of access to these documents, which contain information about such illegal activities. The complainant claimed that the document should be released to the public in order for them to know the extent of the " *criminal activities* " that have taken place in the territory of the European Union.

The inspection of the document

14. On 8 December 2009, the Ombudsman's services carried out an inspection of the document which forms the subject of the present complaint. A report of the inspection was sent to the complainant and to the Council [10] .

The Ombudsman's assessment

15. The complainant argues that the Council was wrong not to take into account the public interest in obtaining access to the information contained in the document. The Ombudsman recalls that Articles 4(2) and 4(3) of Regulation 1049/2001 require the institution holding a requested document to balance the public interest in disclosure with the interests protected by these provisions. Thus, for example, if disclosure of a document is shown to undermine the purpose of inspections, investigations and audits (Articles 4(2), third indent), the document may still be disclosed to the public if there is an overriding public interest in disclosure. To determine whether such an interest exists, the institution holding the document must carry out a balancing exercise, taking into account, on the one hand, the harm caused by disclosure and, on the other hand, the public interest in disclosure. While Articles 4(2) and 4(3) of Regulation 1049/2001 envisage the possibility of an overriding public interest in disclosure, Article 4(1) of Regulation 1049/2001 does not. Thus, if an institution holding a document demonstrates that the public disclosure of a document would undermine the protection of an interest set out in Article 4(1) of Regulation 1049/2001, including the public interest as regards international relations, the

institution must refuse public access to the document. The institution does not need to give any further justifications in this regard and, in particular, it is not required to balance the protected interest against the public interest in disclosure [11] .

16. The Court of Justice has held that a statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question. The statement of reasons must also enable the persons concerned to ascertain the reasons for the measure and the competent review body to exercise its functions. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given, and the interest that the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that article must be assessed with regard not only to its wording, but also to its context and to all the legal rules governing the matter in question [12] .

17. Furthermore, it follows from the case-law that, when an institution refuses a request for public access, it must demonstrate – in each individual case, and on the basis of the information at its disposal – that the documents to which access is sought indeed fall within the exceptions listed in Regulation 1049/2001 [13] . However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby depriving the exceptions of their very purpose [14] .

18. The case-law also provides that the institution refusing access to a document has to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied upon and, second, whether the need for protection relating to that exception is genuine [15] .

19. In the present case, with regard to document 14483/06, the Council refused access specifically by relying on Article 4(1)(a), third indent of Regulation 1049/2001. It clarified how that exception was relevant in relation to the document concerned by stating that the disclosure would be " *detrimental to the good functioning of the relations between the EU and the US* ", and that it would, in particular, " *hinder the diplomatic efforts continuously being made in order to find constructive solutions to issues in areas of the highest political importance, including the areas of the highest political importance, including human rights law and international humanitarian law* ".

20. As a result of the inspection of the document in question, the Ombudsman was able to check whether the Council's statement of reasoning was sufficient in light of the contents of the document. The document in question contains a draft reply to a letter dated 3 October 2006 from the European Parliament concerning the Council's contacts with the US administration and, as an annex, an analysis regarding the applicable legal framework. The document deals with several highly sensitive issues concerning the fight against terrorism, and it sets out

positions of both parties to the discussions. It contains a detailed analysis of the various issues which were discussed. On this basis, the Ombudsman concludes that, in this case, the statement of reasons set out by the Council for applying the exception based on the protection of public interest as regards international relations was sufficient. The Ombudsman considers that the brevity of the statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the contents of the document concerned beyond what is stated above, would negate the purpose of the exception.

21. With regard to the refusal of partial access to the document, the Council expressly stated, first, that this possibility had been considered, and, second, that the reason for rejecting that possibility was that that the content of the document forms an inseparable whole. In light of the contents of the document, the Ombudsman considers that the reason given by the Council for rejecting partial access is adequate.

22. In light of the foregoing, the Ombudsman considers that, despite the relative brevity of the Council's statement of reasons for the decision refusing access, the statement of reasons was adequate in view of the contents of the document and of the fact, confirmed by the Ombudsman's inspection, that the contents of the document form an inseparable whole. The Council therefore duly complied with the obligation to provide an appropriate statement of reasons for those decisions.

23. On the basis of the above, the Ombudsman concludes that there was no maladministration by the Council.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There was no maladministration by the Council.

The complainant and the Council will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 14 October 2010

[1] Coreper2 is a committee made up of the Member States' ambassadors (Permanent Representatives) to the European Union. Coreper2 is chaired by the Member State holding the Council Presidency.

[2] Parliament's Temporary Committee on the alleged use of European countries by the CIA for

the transportation and illegal detention of prisoners was set up by a **decision of the European Parliament that was adopted on 18 January 2006** . The Committee's competencies included collecting and analysing information to find out whether the CIA or other US agents or intelligence services of other third countries carried out abductions, " *extraordinary renditions* ", detentions at secret sites, detentions incommunicado or torture or other cruel, inhuman or degrading treatment of prisoners on the territory of the European Union, including accession and candidate countries, or used that territory to those ends, for example through flights. Moreover, the Committee was responsible for deciding whether such actions, allegedly carried out in the territory of the European Union in the framework of the fight against terrorism, could be considered as a violation of the EU Treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the EU-US agreements on extradition and on mutual legal assistance and other international treaties and agreements concluded by the European Union/Community and its Member States, including the North Atlantic Treaty and its related agreements on the status of forces and the Convention on International Civil Aviation. In the fulfilment of its tasks, the Committee had to liaise and cooperate as closely as possible with the Council of Europe and its Secretary-General, Parliamentary Assembly and Commissioner for Human Rights, the United Nations representatives, and the national parliaments. The European Parliament adopted the resolution concluding the Committee's work on 14 February 2007.

[3] The Council's classification system is based on Council decision 2001/264/EC adopting the Council's security regulations (OJ 2001 L 101, p. 1). The four levels of classification are set out in Section II of Part II of the security regulations. RESTREINT UE is the lowest level of classification. It is applied to information and material, the unauthorised use of which could be " *disadvantageous to the interests of the European Union or one or more of its Member States* ".

[4] 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 2001 L 145 p. 43.

[5] Article 4(1)(a), third indent of Regulation (EC) 1049/2001 stipulates that:

" [1.] *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) the public interest as regards: … -international relations …"

[6] The report did not contain any information about the contents of the document inspected.

[7] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 46.

[8] Case T-188/98 *Kuijer v Council* [2000] ECR II-1959, paragraph 53.

[9] "I" item notes are agreed in the relevant Council Working Group, which means that they can

be approved by Coreper without any debate.

[10] The report did not contain any information about the contents of the document inspected.

[11] Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 46: "[i] *t is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is* **mandatory** *where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests* ". See also Case T-264/04 *WWF v Council* [2007] ECR II-911, paragraph 44: "[T] *he exceptions set out in Article 4(1) of Regulation No 1049/2001 are framed in* **mandatory** *terms and it follows that the institutions are obliged to refuse access to documents falling under any one of those mandatory exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 WWF UK v Commission [1997] ECR II-313, paragraph 58). Those exceptions are therefore different from the exceptions relating to the interest of the institutions in maintaining the confidentiality of their deliberations laid down in Article 4(3) of Regulation No 1049/2001, in the application of which the institutions enjoy a discretion which allows them to balance, on the one hand, their interest in maintaining the confidentiality of their deliberations against, on the other hand, the interest of the citizen in gaining access to documents …*"

[12] Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 55: "[I] *t must be observed that it is settled case-law that the statement of reasons required by Article 190 of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question …*"

[13] Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 60. See, by analogy, Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 24.

[14] Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 60. See, by analogy, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 65.

[15] Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429,

paragraph 61.