

*The Parliament shall allow the complainant to have access to her own marked examination papers.*

On 5 April 2001, the Ombudsman received the Parliament's reply to his letter of 8 February 2001. The Parliament underlined that the Selection Board of the competition in question had concluded its work on 21 October 1999, and that the only available opinion was the one expressed in its final note. However, the institution informed the Ombudsman of its acceptance of the Ombudsman's draft recommendation and that it has instructed the competition services to forward a copy of her original examination papers to the complainant.

The Parliament also informed the Ombudsman that its competition services are ready to forward a copy of their own marked examination papers to candidates upon request.

The measures described by the Parliament appear to be satisfactory and the Ombudsman therefore closes the case.

### 3.5.2 The Council of the European Union

#### THE COMPLAINT

The complaint was lodged by Statewatch, a private organisation, in July 2000.

#### Background

The complainant had asked the Council for access to (inter alia) agendas of the "Senior level Group" and the "EU-US Task Force" already in 1997. The Council refused to grant this access, arguing that the documents concerned had been prepared jointly by the Council's Presidency, the Commission and US authorities and thus not under the sole responsibility of the Council. In the Council's view, Article 2 (2) of Council Decision 93/731/EC of 20 December 1993 on public access to documents<sup>67</sup> was thus applicable.

This provision is worded 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 complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). During the inquiry, the Council expressly stated that it did not consider its Presidency to be "another institution or body" within the meaning of Article 2 (2) of Decision 93/731. In his decision of 30 June 1998<sup>68</sup>, the Ombudsman expressed the view that neither the wording of this provision nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). The Ombudsman concluded that the Council's position appeared to be based on a misapplication of Decision 93/731 and made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied.

#### The present complaint

The complainant wrote to the Council to renew its request for access on 9 July 1998. The Council replied on 29 July 1998, pointing out that in view of the lapse of time it consid-

<sup>67</sup> OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

<sup>68</sup> Annual Report of the Ombudsman for 1998, p. 172.

## ACCESS TO COUNCIL DOCUMENTS

### Decision on complaint 916/2000/GG against the Council of the European Union

ered this letter to be a new request. As to substance, it maintained its view that Article 2 (2) applied. The complainant sent a confirmatory application on 27 August 1998. In its decision of 28 September 1998 on this application, the Council noted that draft agendas for the meetings concerned were drawn up by the participating parties which remained drafts until they were agreed. According to the Council, the agendas were never considered by the Council as such and were therefore neither registered nor filed systematically in the Council's archives. The Council concluded that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731.

The complainant thereupon turned to the Ombudsman again, making the following allegations:

- 1) By introducing entirely new grounds for the refusal of access to the documents concerned, the Council failed to respect the decision of the European Ombudsman of 30 June 1998.
- 2) The Council erred when claiming that the General Secretariat was not part of the Council.
- 3) By failing systematically to register and file the documents concerned, the Council breached its duty to keep records.
- 4) The Council failed to give sufficient reasons for its decision.

### *THE INQUIRY*

The complaint was sent to the Council of the European Union for its comments.

#### **The Council's opinion**

In its opinion, the Council made the following comments:

- 1) The Council did not fail to respect the Ombudsman's decision of 30 June 1998

As the Ombudsman had pointed out himself, the only authority competent to give a final ruling on the interpretation of Community law was the Court of Justice. Certainly, the Ombudsman's views could provide useful guidance in this respect to the institution concerned which, in the light of the Ombudsman's views, would usually re-examine its position. In the present case, the Council did reconsider its first decision. While it left open its position as to the problem of documents of which the Council was one of the co-authors, it concluded, after careful consideration, that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision. This new decision could be the subject of a new complaint to the Ombudsman.

- 2) The General Secretariat was not "part of the Council"

This question was currently under examination by the Court of First Instance (in case T-205/00, *Spa Renco v. Council*). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

- 3) The obligation to register documents and the duty to keep records

For the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, the Council was not of the opinion that it was necessary or appropriate to keep a complete, centralised record and register of each paper which was held by one of its officials.

- 4) The Council gave sufficient reasons for its decision

The adequacy of the reasons given for a decision was a question that affected the legality of that decision, the review of which did not fall within the remit of the Ombudsman's competencies.

### **The complainant's observations**

In its observations, the complainant maintained its complaint and made the following further comments:

The Council's view that it was free to refuse access to the relevant documents on new grounds and that a complaint could then be brought against this new decision entailed the risk of a circular process that could go on for ever and that could potentially undermine the role of the Ombudsman. The complainant did not have any knowledge about case T-205/00. It was possible that the Council was simply making the same argument there that it had made in the present case. In any event, it was inconceivable that the Court would decide that the General Secretariat was not part of the Council. This argument of the Council could therefore only be viewed as an attempt to delay a decision.

Regarding the duty to give reasons, the issue at stake here was one of maladministration for which the Ombudsman was the statutory authority. In any event, it was necessary for an institution to provide sufficient reasoning to allow for judicial review. The Council had consistently failed to do so in the present case.

### **THE DRAFT RECOMMENDATION**

By decision dated 1 March 2001, the Ombudsman addressed a draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the European Ombudsman<sup>69</sup>. The basis of the draft recommendation was the following:

#### **1 Failure to respect the decision of the Ombudsman of 30 June 1998**

1.1 The complainant asked the Council of the European Union for access to certain documents (notably agendas of the "Senior level Group" and the "EU-US Task Force") under Council Decision 93/731/EC of 20 December 1993 on public access to documents<sup>70</sup>. The Council originally argued that the documents concerned had not been prepared under the sole responsibility of the Council and that Article 2 (2) of Council Decision 93/731 on access to documents was thus applicable. The complainant then turned to the European Ombudsman (complaint 1056/25.11.96/Statewatch/UK/IJH). In his decision of 30 June 1998, the Ombudsman took the view that neither the wording of Article 2 (2) of Decision 93/731 nor the case-law of the Community courts supported the Council's position that documents of which it was a joint author fell within the scope of Article 2 (2). When the complainant subsequently renewed its application for access, the Council informed it that the relevant documents were never considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731 but only by officials in the General Secretariat and therefore fell outside the scope of application of Decision 93/731. The complainant claimed that by introducing entirely new grounds for the refusal of access to the documents concerned, the Council had failed to respect the decision of the European Ombudsman of 30 June 1998.

1.2 The Council pointed out that while the Ombudsman's views could provide useful guidance, the only authority competent to give a final ruling on the interpretation of

<sup>69</sup> 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.

<sup>70</sup> OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

Community law was the Court of Justice. The Council further claimed that it had indeed reconsidered its position in the light of the Ombudsman's decision of 30 June 1998 and arrived at the conclusion that the documents in question were still to be refused, albeit for different reasons than those stated in its first decision.

1.3 In his decision of 30 June 1998 on complaint 1056/25.11.96/Statewatch/UK/IJH, the Ombudsman made a critical remark in which he invited the Council to reconsider the complainant's application and to grant access to the relevant documents, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applied. The Ombudsman considered that the Council had indeed, in its decision of 28 September 1998, reconsidered its position. Although Article 1 (2) of Decision 93/731 had not been invoked by the Council in reply to the complainant's first request for access to the documents concerned, the Ombudsman took the view that his decision of 30 June 1998 did not prevent the Council from subsequently relying on this provision if it arrived at the conclusion, upon having reconsidered its position in the light of the Ombudsman's comments, that it was applicable. The Ombudsman noted the complainant's concern that this might lead to a circular process that could go on forever. In his view, principles of good administration prevented an administration from arbitrarily substituting the reasons for its decision by new ones. The Ombudsman considered, however, that there was no evidence to show that this would have been the case here.

1.4 On the basis of the above, there appeared to have been no maladministration on the part of the Council in so far as the first allegation was concerned.

## 2 The General Secretariat as part of the Council

2.1 The Council claimed that the relevant documents had never been considered by the Council as such but only by the officials in its General Secretariat following the matter who kept copies for the purpose of their work. On this basis, the Council took the view that these documents were not "held by the Council" in the sense of Article 1 (2) of Decision 93/731. The complainant claimed that this was incorrect.

2.2 The Council claimed that the question as to whether the General Secretariat was an institution "different" from the Council was currently under examination by the Court of First Instance (in case T-205/00, Spa Renco v. Council). Pending these proceedings, the Council would therefore abstain from commenting further on it in the present context.

2.3 Article 1 (3) of the Statute of the European Ombudsman<sup>71</sup> provides that the Ombudsman may not intervene in cases before courts. This means that the Ombudsman is prevented from examining or continuing to examine a complaint where the relevant *facts* have also been submitted to a court<sup>72</sup>. The Ombudsman noted, however, that the case referred to by the Council concerned a different set of facts, as shown by the summary of case T-205/00 that was published in the Official Journal<sup>73</sup>. It was possible that in that case, the Council had made the same argument as in the present case, i.e. that a distinction should be made between the Council and its General Secretariat for the purposes of applying Decision 93/731. The Ombudsman did however not consider it necessary or appropriate to suspend his examination of this issue pending the proceedings before the Court.

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<sup>71</sup> 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.

<sup>72</sup> Cf. Article 2 (7) of the Ombudsman's Statute which reads as follows: "When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action."

<sup>73</sup> OJ 2000 C 285, p. 19.

2.4 Article 1 (1) of Decision 93/731 provides: “The public shall have access to Council documents under the conditions laid down in the Decision.” The term ‘Council document’ is defined in Article 1 (2) as meaning “any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2 (2).”

2.5 Decision 93/731 had to be seen in the context of the Code of Conduct concerning public access to Council and Commission documents<sup>74</sup> adopted by the Council and the Commission on 6 December 1993 to which the recitals of Decision 93/731 referred. This Code of Conduct provides, *inter alia*: “The public will have the widest possible access to documents held by the Commission and the Council.” On this basis, the Court of First Instance came to the following conclusion: “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”<sup>75</sup>.

2.6 The Ombudsman considered that this objective would not be attained if it were to be accepted that documents of which the Council was the author (or co-author) should not be covered by Decision 93/731 for the simple reason that they were not held by the Council itself but its General Secretariat. According to Article 207 (2) of the EC Treaty, the Council shall be assisted by a General Secretariat. The Ombudsman was however not aware of any provision in the Treaty or in Community law acts that would suggest that the General Secretariat ought to be considered as an institution or body separate from the Council. Decision 93/731 itself attributed an important role to the General Secretariat in so far as access to documents was concerned by directing applicants to write to “the relevant departments of the General Secretariat” and by charging the latter with dealing with such requests in the first place (*cf.* Article 7 of Decision 93/731). In the view of the Ombudsman, there was thus nothing that would warrant the conclusion that the Council’s General Secretariat should be considered as “another Community institution or body” within the meaning of Article 2 (2) of Decision 93/731. The Ombudsman thus took the view that documents held by the General Secretariat of the Council were documents “held by the Council” to which Decision 93/731 applied. It had to be recalled, however, that the highest authority on the interpretation of Community law is the Court of Justice.

### **3 Failure systematically to register and file the documents concerned**

3.1 The complainant claimed that by failing systematically to register and file the documents concerned, the Council had breached its duty to keep records.

3.2 The Council replied that for the reasons set out in more detail in its response concerning complaint 917/2000/GG lodged by the same complainant, it was not of the opinion that it is necessary or appropriate to keep a complete, centralised record and register of each paper which is held by one of its officials.

3.3 The relevant issue had also been raised in complaint 917/2000/GG. Both the Council and the complainant had made detailed comments on that issue in this complaint, and the Ombudsman would consider these arguments when he dealt with complaint 917/2000/GG. The Ombudsman therefore took the view that there was no need further to examine this issue in the context of the present inquiry.

### **4 Failure to give reasons**

4.1 The complainant claimed that the Council had failed to give sufficient reasons for its decision, given the way in which it had changed the justification for refusing access to the

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<sup>74</sup> OJ 1993 L 340, p. 41.

<sup>75</sup> Case T-174/95, Svenska Journalistförbundet v Council [1998] ECR II-2289, paragraph 66.

documents concerned during the procedure and that the reasoning had been unacceptably vague and confusing.

4.2 The Council took the view that the adequacy of the reasons given for a decision is a question that affected the legality of that decision, the review of which did not fall within the remit of the Ombudsman's competencies.

4.3 Article 195 of the EC Treaty entrusts the Ombudsman with the task of examining possible instances of maladministration. The term "maladministration" is not defined in the EC Treaty or the Ombudsman's Statute. It was useful to recall that in his Annual Report for 1997<sup>76</sup>, the Ombudsman had stated that he considered the following interpretation of the term "maladministration" to be appropriate: "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it." The Ombudsman added<sup>77</sup> that when investigating whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, the Ombudsman's "first and most essential task must be to establish whether it has acted unlawfully". The European Parliament adopted a resolution on 16 July 1998 welcoming the definition of maladministration. The Ombudsman thus considered that his mandate allowed him to examine complaints in which it was alleged that an institution has failed to give sufficient reasons for its decision.

4.4 The Ombudsman took the view, however, that the reasons given by the Council in its decision of 28 September 1998 were sufficient since the Council had made it clear that the refusal of access to the relevant documents was based on Article 1 (2) of Decision 93/731. The question as to whether the Council had acted properly when changing the reasons on which it based its refusal during the procedure had already been considered (see point 1.3 above).

4.5 On the basis of the above, there appeared to have been no maladministration on the part of the Council in so far as the fourth allegation was concerned.

## 5 Conclusion

The Ombudsman therefore considered that the Council's approach in the present case gave rise to an instance of maladministration in so far as it had based its refusal to grant the complainant access to the relevant documents on Article 1 (2) of Decision 93/731.

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

The Council of the European Union 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 Decision 93/731 applies.

### *THE COUNCIL'S DETAILED OPINION*

The Ombudsman informed the Council that, according to Article 3 (6) of the Statute, it should send a detailed opinion by 30 June 2001 and that the detailed opinion could consist of acceptance of the Ombudsman's draft recommendation and a description of how it had been implemented.

In its detailed opinion, the Council made the following comments:

*"The Council takes note of the Ombudsman's decision concerning the first, third and fourth grounds of complaint (...).*

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<sup>76</sup> At page 23.

<sup>77</sup> At page 24.



*As regards the Ombudsman's decision and draft recommendation on the second ground of complaint, which concerns the question of whether or not documents held by officials in the General Secretariat which have not been distributed to the members of the Council or their delegates in one of its preparatory bodies are to be considered as Council documents in the sense of Decision 93/731/EC, the Council decides to release the documents in question, as it appeared that their content is not covered by any of the exceptions laid down in Article 4 of Decision 93/731/EC."*

The Council's detailed opinion was forwarded to the complainant. In its observations, the complainant confirmed that he had received the documents in question. In its view, however, it was for the Ombudsman to decide whether the Council had met his recommendation, given that the latter had not replied directly to the third allegation. Regarding the second allegation, the complainant assumed that since the Council had applied Decision 93/731, it could be inferred that the Council accepted the recommendation although the Council did not expressly say so.

### *THE DECISION*

1 On 1 March 2001, the Ombudsman addressed the following draft recommendation to the Council in accordance with Article 3 (6) of the Statute of the Ombudsman:

*The Council of the European Union 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 Decision 93/731 applies.*

2 On 28 May 2001, the Council informed the Ombudsman that it had decided to release the documents in question since it had come to the conclusion that their content was not covered by any of the exceptions laid down in Article 4 of Decision 93/731/EC. The Ombudsman considered that the Council had thus accepted his draft recommendation. The measures described by the Council in its letter of 28 May 2001 appear to be satisfactory and satisfy the complainant<sup>78</sup>. The Ombudsman therefore closes the case.

### **3.5.3 The European Commission**

#### **SUPPLEMENTARY INSURANCE COVERAGE FOR LOCAL STAFF**

*Decision on complaint 367/98/(VK)GG against the European Commission*

### *THE COMPLAINT*

The complaint was lodged in April 1998 by two members of the local staff of the representation of the European Commission in Vienna (Austria). This representation is the successor of the delegation that the Commission maintained in Austria prior to the accession of this country to the European Communities on 1 January, 1995. The complainants claimed that the Commission had failed to set up supplementary insurance schemes for its local staff in Austria.

Article 14 of the "Framework rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereinafter the "Framework Rules") that were circulated on 22 June 1990 provides as follows:

*"The Commission shall be responsible for the social security contributions payable by employers under the rules in force at the place where the member of local staff is to perform his duties.*

*The Commission shall set up supplementary or independent sickness, accident or invalidity insurance or pension schemes where there is no local scheme or where the local scheme is judged to be inadequate.*

<sup>78</sup> As mentioned above, the complainant's third allegation will be considered in the Ombudsman's decision on complaint 917/2000/GG lodged by the same complainant.

## ACCESS TO COUNCIL DOCUMENTS - ONCE AGAIN

*Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 917/2000/GG*

The complainant, a private organisation (Statewatch) alleged that the Council of the European Union had failed (1) to grant access to certain documents that were put before various meetings of the Council in September 1998 and January 1999 and (2) to maintain a list of all the documents that are put before these meetings.

The Ombudsman took the view that the principle of openness obliged the Council to grant access to all the documents that are considered by it, unless one of the exceptions laid down in Decision 93/731 applies. However, such access was only possible if citizens know or are able to find out which documents have been considered by the Council. The Ombudsman thus considered that principles of good administration obliged the Council to maintain a list of all these documents. He also noted that there was evidence suggesting that the Council, when deciding on the complainant's request for access, had not considered all the relevant documents.

In these circumstances, the Ombudsman made a draft recommendation in which he asked the Council (1) to reconsider the complainant's application and (2) to establish a list of all the documents that are put before Council meetings and make this list or register available to citizens.

In its detailed opinion, the Council informed the Ombudsman that it accepted the two draft recommendations.

The Ombudsman considered, however, that it appeared that in practice the Council had not yet fully complied with his first draft recommendation to give the complainant access to the documents he had requested. He therefore decided to submit the matter to the European Parliament.

The Ombudsman welcomed the fact that the Council has accepted the second draft recommendation but noted that the considerations set out in the text of the Council's opinion raised doubts as to whether the draft recommendation would indeed be implemented. However, 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<sup>103</sup> now obliges these three institutions to provide public access to a register of documents. In the Ombudsman's view, this regulation could be interpreted in the sense that access has to be given to all documents that have been put before the Council in order to be taken into account or dealt with by the latter. The Ombudsman therefore considered that it was not necessary or appropriate for him to pursue his inquiry into this aspect of the complaint.

On 30 November 2001, the Ombudsman submitted a special report to the European Parliament in which he made the following recommendation to the Council:

*The Council of the European Union 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 Decision 93/731 applies.*

<sup>103</sup> OJ 2001 L 145, p. 43.