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INF 013

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29. 28.9.98 CoM response to confirmatory (received 8.10.98)

Statewatch

PO Box 1516, London N16 0EW
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e-mail: statewatch-off@geo2.poptel.org.uk

11 July 1996

Dear Secretary-General,

I would be grateful if you could send me a copy of the following documents under the Council's code of access:

1. Copies of the Agendas (A & B) for the meeting of the Council of Justice and Home Affairs Ministers in Luxembourg on 4 June 1996.
2. The Calendar of Meetings (Steering Groups, Working Parties etc) under Justice and Home Affairs for the Irish Presidency (July-December 1996).

Yours faithfully,

Tony Bunyan
Editor
(member International Federation of Journalists)

received 13/8/96
15 days!

(2)

EUROPEAN UNION
THE COUNCIL
General Secretariat

Brussels, 29 JUL. 1996

Mr. Tony Bunyan
E d i t o r
Statewatch
P.O. Box 1516
London N16 0EW 7279
Royaume-Uni

Dear Mr. Bunyan,

I refer to your letter dated 11 July 1996 and received by the General Secretariat of the Council the 18 July, requesting:

1. "Copies of the Agendas (A & B) for the meeting of the Council of Justice and Home Affairs Ministers in Luxembourg on 4 June 1996;
2. The Calendar of Meetings (Steering Groups, Working Parties etc.) under Justice and Home Affairs for the Irish Presidency (July-December 1996)."

Public access to such documents is governed by Council Decision 93/731/EC (OJ L 340/43 of 31.12.1993 - hereafter referred to as "the Decision"), in accordance with which your application for access to documents has been considered.

With regard to the first point, your attention is drawn to Article 4(2) of the Decision providing:

"Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings."

As a result of this consideration:

- You may get access to the following documents:
7798/96 and 7799/96, herewith enclosed.

With regard to the second point, the provisions of Article 2(2) of the Decision state that:

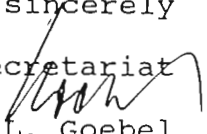
"where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author."

..2..

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.

Yours sincerely

For the General Secretariat


L. Goebel

Enclosures

Statewatch

3

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e-mail: statewatch-off@geo2.poptel.org.uk

15 August 1996

Dear Sir/Madam,

I would be grateful if you could send me a copy of the Calendar of Meetings (K4 Committee, Steering Groups, Working Parties etc) under Justice and Home Affairs for the Irish Presidency.

I have been referred to you to make this request by the General Secretariat of the Council who, under Article 2.2 of the Council Decision 93/731/EC, 31.12.93 regarding access to document, say they are not the author of this document and therefore cannot supply it.

Yours sincerely,

Tony Bunyan,
Editor
(member International Federation of Journalists)

To: Irish Delegation
in Brussels

REPRÉSENTATION PERMANENTE
DE L'IRLANDE
AUPRÈS DE
L'UNION EUROPÉENNE



4
RUE FROISSART 89-93
1040 BRUXELLES
TÉL. 230 85 80
FAX 230 32 03

15 October 1996

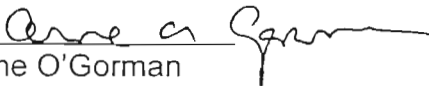
Dear Mr. Bunyan

I refer to your recent letter requesting a copy of the calendar of meetings in the Justice and Home Affairs area during the Irish Presidency of the European Union.

I regret to have to inform you that it is not proposed to make publicly available the information in question.

The delay in replying to your letter is also regretted.

Yours sincerely


Anne O'Gorman
First Secretary

Tony Bunyan
Statewatch
PO Box 1516
London N16 0EW

COMPLAINT No 4

This complaint concerns lack of information.

Following the response received on 1 July 1996 (see complaint no 3) to the effect that "Calendars of Meetings" under Justice and Home Affairs were not "conserved" I, logically, wrote requesting said "Calendar" for the current Presidency of the Council (July-December 1996) on 11 July 1996.

The Council replied on 29 July 1996 (ref: 7279), citing Article 2.2 of the Decision:

"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 went to say:

"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."

I duly wrote to the Irish Delegation in Brussels for a copy of the "Calendar" on 15 August 1996. They replied two months later on 15 October 1996 saying: "I regret to have to inform you that it is not proposed to make publicly available the information in question."

As the "Presidency" was being represented as a separate "institution" to the Council no appeal mechanism existed.

Analysis

- 1. Following this correspondence I took legal advice. This was that the "Presidency" is not "another Community institution or body". The Presidency is rather a function and an office of the Council. It appears therefore that the response from the Council's General Secretariat on 29 July 1996 was totally misleading.

Complaint

- 1. In the light of previous attempts - partly documented in these complaints - by the Council to restrict my access to information the complaint of maladministration is based on: lack of information and unfairness.



JACOB SÖDERMAN

15.01.1997*000509

Mr Tony Bunyan
Statewatch
PO Box 1516
UK - London N16 0EW

Strasbourg,

1053/25.11.96/STATEWATCH/UK/IJH; 1054/25.11.96/STATEWATCH/UK/IJH;
1055/25.11.96/STATEWATCH/UK/IJH 1056/25.11.96/STATEWATCH/UK/IJH;
1057/25.11.96/STATEWATCH/UK/IJH; 1087/10.12.96/STATEWATCH/UK/IJH

Dear Mr Bunyan,

I am writing to you with reference to the above six complaints that you have made against the Council of the European Union concerning responses that you have received to requests to the Council for documents.

The examination of your complaints is under way and I shall let you know the preliminary outcome as soon as possible.

In accordance with Articles 2.2 and 3.1 of the Statute of the European Ombudsman, I have informed the Secretary General of the Council of your complaints and asked him to submit comments on them before the end of March 1997.

Yours sincerely,

Jacob SÖDERMAN

REPLY TO THE OMBUDSMAN

26.3.97

Mr Jacob Söderman
European Ombudsman
1, Avenue du Président Robert Schuman .
BP 403
F-67000 STRASBOURG CEDEX
FRANCE

Subject: 1053/25.11.96/Statewatch/UK/IJH
1054/25.11.96/Statewatch/UK/IJH
1055/25.11.96/Statewatch/UK/IJH
1056/25.11.96/Statewatch/UK/IJH
1057/25.11.96/Statewatch/UK/IJH
1087/10.12.96/Statewatch/UK/IJH

Dear Sir,

I write in reply to your letter of 15 January 1997 concerning the above complaints from Mr Tony BUNYAN.

The Council has considered these complaints very carefully.

Pursuant to Article 3(1) of Decision 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, the Council has decided to make the following comments regarding those complaints.

The Council wishes to emphasize, first of all, that it is "committed to the principle that the public will have the widest possible access to documents held by the Council, as an additional measure to improve transparency of the decision-making process and the citizen's confidence in the institution. The Council welcomes this opportunity to inform the Ombudsman of recent steps taken in this regard.

Firstly, applications under Decision 93/731/EC are generating an increasing number of requests for documents. Of documents applied for in 1996, 78% were released to the public. I enclose a statistical report (5271/97) which gives details.

In the context of the 1996 review of the Access Decision, the Council has asked the Secretary-General to take steps, possibly in conjunction with delegations and the other institutions, to alert the public to the possibilities regarding transparency at the Council, particularly in connection with access to documents. Work on this is underway, and will include publicity via the Council's new internet web-site (<http://ue.eu.int>) which was launched in February. This web-site provides information on the Council's activities to a wide audience in all Community languages. Council Press Releases are already available on the internet via the RAPID database on the Europa server (<http://europa.eu.int>) and will shortly be transferred to the Council's server.

The Secretary-General is also looking into the possibility of establishing a register of documents held by the Council. In addition, the Secretariat has created a Register of Legislative and Non-Legislative Council Acts which will be published as an Annex to the report on the activities of the Council. This register includes the result of votes made public and any public explanations of vote, as well as statements in the Council's minutes which have been made public in accordance with the Code of Conduct of 2 October 1995. It should enable members of the public to track the progress of acts through the Council and the other EU institutions and to see at a glance what information is publicly available. I

02:04 97 WED 12:19 FAX

enclose a copy of the Register for 1995. The 1996 version, and an internet version, are in preparation.

In addition, the Council Secretariat is developing a number of other printed publications intended to explain its activities to the public, including in the domain of the Common Foreign and Security Policy and Co-operation on Justice and Home Affairs. These will also be available electronically."

However, in the case in point the Council notes that the complaints in question concern alleged cases of Council maladministration in implementing Council Decision 93/731/EC of 20 December 1993 on public access to Council documents ⁽¹⁾, following requests concerning documents relating to justice and home affairs cooperation, which is covered by Title VI of the Treaty on European Union (TEU).

Thus the question that must first be answered is that of the competence of the Ombudsman to investigate those complaints, as they concern action taken by the Council as an institution of the Union under Title VI of the TEU, and not as a "Community institution or body".

In the Council's opinion, it is quite clear from the Treaties that their authors decided that only activities of the institutions relating to the European Communities should be subject to scrutiny by the Ombudsman, not activities relating to TEU Titles V and VI.

In this connection, it should be borne in mind that pursuant to the TEU, in particular Articles B, C and E thereof, cooperation on justice and home affairs, although subject to a

(1) OJ No L 340, 31.12.1993, p. 43.

single institutional framework, is an activity separate from the activities undertaken in the framework of the EC Treaty, and is governed exclusively by Articles K to K.9 of the TEU. This is, moreover, expressly confirmed by the provisions of the Treaty. Indeed, the EC Treaty does not apply in the area of Title VI unless expressly stated in Article K.8. This is one of the "conditions" implicitly referred to in Article E of the TEU. But Article 138e of the TEC does not appear on the exhaustive list of TEC Articles contained in Article K.8, unlike, for example, Articles 137, 138 and 139 to 142 which appear in the same section (European Parliament) of the TEU's institutional provisions.

This is borne out, if confirmation were needed, by Article 1(2) of the Ombudsman's regulations, which states: *"The Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties"*.

It will be seen from the above that when the Council acts under Title VI, it is acting not as a Community institution, but as an institution of the Union in accordance with the specific conditions laid down in Title VI. In accordance with Article E, it exercises its powers *"under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty"*.

In the light of the foregoing, the Council considers that its actions under Title VI of the TEU cannot be the subject of an inquiry by the Ombudsman.

For information purposes, the Council would point out to the Ombudsman that a comparable, but not identical question is currently pending before the Court of First Instance in case T-174/95 (Tidningen Journalisten v. Council, OJ No C 299, 11.11.1995, p. 18), in which

the issue arises of the Court of Justice's jurisdiction or lack of it in cases concerning the release to the public of documents relating to activities under Title VI of the TEU.

Given that these complaints are inadmissible, their substance cannot be considered. However, in order to enable you better to assess the content of the complaints as well as the Council's policy of openness, I enclose copies of the 72 letters concerning requests to the Council for access to documents made by Mr Bunyan since the entry into force of Decision 93/731/EC and of the Council's 59 replies. So far, a total of 405 documents have been issued to him.

(Complimentary close).

PRESIDENT OF THE COUNCIL

ANNEXE II

Explanation of vote made by the Austria, Belgium, Denmark, Finland, Netherlands and Sweden Delegations

While the Ombudsman is not competent to deal with matters falling under Titles V and VI of the TUE, these Delegations consider that this case concerns an inquiry of alleged maladministration in the application of Council Decision 93/371 on Public Access to Council documents, for which the Ombudsman is competent. These Delegations therefore cast a negative vote and request that this vote and the explanation be made public.



JACOB SÖDERMAN

Strasbourg 09.04.1997 * 000923

Mr Hans van Mierlo
Council of the European Union
rue de la Loi 175
B-1048 Bruxelles

1053/25.11.96/STATEWATCH/UK/IJH; 1054/25.11.96/STATEWATCH/UK/IJH;
1055/25.11.96/STATEWATCH/UK/IJH 1056/25.11.96/STATEWATCH/UK/IJH;
1057/25.11.96/STATEWATCH/UK/IJH; 1087/10.12.96/STATEWATCH/UK/IJH

Dear Sir

By letter dated 15 January 1997, the European Ombudsman informed the Council of the European Union of the above complaints and requested a first opinion on them. As explained in the Annual Report of the Ombudsman for 1995, this is the Ombudsman's normal procedure in relation to complaints which he decides are admissible. It was adopted in order to enable him to respond effectively to citizens of the Union who make use of the possibility, conferred on them by Article 8d of the Treaty establishing the European Community, to complain to the Ombudsman.

According to Article 3 (2) of the Statute of the Ombudsman, Community institutions and bodies are required to supply the Ombudsman with any information he has requested of them.

In its reply to the Ombudsman dated 26 March 1997, the Council has not supplied the information requested by the Ombudsman, but has contested his competence to deal with the complaints.

Under the scheme established by the Treaty and the Statute, the admissibility of complaints is determined by the European Ombudsman in accordance with Community law, on which the highest authority is the Court of Justice. Community institutions and bodies are welcome to bring to the attention of the Ombudsman information relevant to the admissibility of a complaint under Article 138e of the Treaty and the Statute of the Ombudsman.

The Ombudsman has carefully considered the arguments advanced by the Council in relation to the admissibility of the complaints. He has confirmed his original decision that they are admissible, for the following reasons.

The Council's argument that the Ombudsman lacks competence to deal with the complaints appears to be based on two propositions:

- 1 the competence of the Ombudsman does not extend to actions taken by the Council under Titles V and VI of the Treaty on European Union;
- 2 the subject matter of the complaints is action taken by the Council under Title VI of the Treaty on European Union.

The Ombudsman's decision that he has competence to deal with the complaints is based on his view that the second of these propositions is mistaken. It is therefore unnecessary for him to take a position on the first proposition.

The subject matter of the complaints concerns the Council's response to requests for access to documents. The requests were made under the Council Decision on public access to Council documents¹ and were dealt with by the Council in purported application of that Decision. The Decision on public access to documents was made under Article 151 of the Treaty establishing the European Community. The Court of Justice confirmed in its judgement in *Netherlands v Council*,² that the Decision has legal effects vis-à-vis third parties as a matter of Community law.

The Decision was interpreted and applied by the Court of First Instance in *Carvel and Guardian Newspapers v Council*.³ This case involved access to, *inter alia*, documents relating to the actions of the Council under Title V of the Treaty on European Union.

Given the limitations on the jurisdiction of the Court of Justice imposed by Article L of the Treaty on European Union, the Court of First Instance would have had no jurisdiction to deal with this aspect of the *Carvel* case if access to Council documents concerning actions under Title V was itself a Title V matter. In fact, however, the Court did accept jurisdiction in the case.

From the above it appears that the correct interpretation and application of the Council decision on public access to documents is a matter of Community law and not a matter dealt with in Title V of the Treaty on European Union, even if the documents in question concern actions under Title V.

¹ Decision 93/731/EC, OJ 1993 L340/43

² Case C-58/94, judgement of 30 April 1996

³ Case T-194/94, judgement of 19 October 1995

The Ombudsman therefore requests the Council to supply him with the first opinion requested in his letter of 15 January 1997, by no later than 31 May 1997.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jacob Söderman', written in a cursive style.

Jacob Söderman

9

COUNCIL
OF THE
EUROPEAN UNION

The President

Brussels, 20 JUN 1997

Fiche No 0462/mm

Mr Jacob Söderman
European Ombudsman
1, Avenue du Président Robert Schuman
BP 403
F-67000 STRASBOURG CEDEX
FRANCE

6579

Subject: Access to Council documents
Complaints made by Mr Tony Bunyan
1053/25.11.96/Statewatch/UK/LJH
1054/25.11.96/Statewatch/UK/LJH
1055/25.11.96/Statewatch/UK/LJH
1056/25.11.96/Statewatch/UK/LJH
1057/25.11.96/Statewatch/UK/LJH
1087/10.12.96/Statewatch/UK/LJH

Sir,

I refer to your letter of 9 April 1997, in which you set out the reasons why you claim to have the competence to examine the above complaints made by Mr Tony BUNYAN and repeat your request to the Council to send you its comments on the said complaints in accordance with Article 3 of Decision 94/262/ECSC, CE, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties. In reply to your letter, the Council would like to make the comments set out below.

I. The Ombudsman's competence to examine the case in question

The Council paid particular attention to the arguments relating to your competence to examine this case, and would like to make the following points to explain its thinking in the matter.

Although the complaints in question are based on alleged maladministration in the implementation of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents ⁽¹⁾ (hereinafter "Decision 93/731/EC"), this particular case relates to the Council's action under Title VI of the Treaty on European Union (TEU). This raises two questions:

- whether, under TEU arrangements, the Ombudsman's competence covers action taken by the Council under Titles V and VI of the TEU, and
- whether, in this particular case, the complaints made relate to action taken by the Council under Title VI of the TEU.

With regard to the first question, on which you offer no opinion, the Council, for the legal reasons set out in its previous letter, can only confirm its original position. It is obliged to comply with the provisions of the Treaty which define the functions of the Community institutions and bodies.

⁽¹⁾ OJ No L 340, 31.12.1993, p. 43.

Any other interpretation would nullify the significance of Articles J.11 and K.8 of the TEU referring to certain Articles of the Treaty establishing the European Community (TEC), and omitting any reference to others, including Article 138e TEC.

As for the second question, you take the view that the complaints do not relate to action taken by the Council under Title VI of the TEU, but concern the implementation of Decision 93/731/EC . Since that Decision was based on Article 151 of the TEC, in your opinion the Ombudsman would be competent to examine its implementation by the Council, including the treatment of documents covered by Title VI of the TEU.

In the Council's view, following that argument would result in all the decisions taken on that basis being henceforth considered by the Ombudsman as falling within the scope of Community administration. Such an interpretation ignores the fact that, as Article 151 TEC is encompassed by Article K.8 TEU, it covers matters which are not exclusively within the ambit of the TEC, but may also fall within the scope of Title VI of the TEU. This means that Council Decisions taken on the basis of Article 151 TEC in the single institutional framework (Article C of the TEU) can apply both in the area of Community law and to matters covered by Titles V and VI of the TEU. It follows that the implementation and monitoring of such Decisions are covered by different rules according to their subject matter.

The crux of the matter is whether it is possible to examine the manner in which Decision 93/731/EC has been implemented in an area covered by Title VI of the TEU without at the same time subjecting the documents themselves to the kind of close examination which is forbidden, because the documents are covered by Title VI of the TEU.

In order to enable you to consider Mr Bunyan's complaints from the sole point of view of how the Council administered its Decision 93/731/EC, without examining the content of the documents requested nor appraising the substance of documents falling under Titles V and VI of the TEU and their confidential character (Article 4(1) of Decision 93/731/EC), the Council is prepared, in a spirit of sincere cooperation, to supply all useful information concerning the procedure it followed to apply the Decision in this case.

II. Additional information concerning the substance of the complaints

Introductory remark

The Council firstly wishes to repeat, as already stated in its previous letter, that it attaches the utmost importance to effective implementation of Decision 93/731/EC, which is one of the key features of its policy of openness and information. As soon as that Decision was adopted, the Council made considerable efforts to ensure that the increasing number of requests for access to its documents was dealt with effectively. That influx of requests – which the Council considers to be a positive sign of citizens' interest in the Union's policies – obviously necessitates constant adaptation of the administrative structures within the Council General Secretariat to guarantee effective implementation of Decision 93/731/EC and the proper functioning of the Council. The Council referred to this briefly in its previous letter.

With regard to the background of Mr Bunyan's complaints and to demonstrate the considerable efforts made by the Council to deal correctly with Mr Bunyan's requests, the Council points out that up to the beginning of March 1997, Mr Bunyan had sent 72 letters concerning applications for access to Council documents and had received 59 replies and a total of 405 documents. In addition, there were three requests from Mr Bunyan, two of which date from 20 March 1997 and one from 21 March 1997, concerning a total of 124 documents, and three replies to them from the Council forwarding 66 documents to him, as well as a reply dating from 28 April 1997 to a confirmatory application dated 18 March 1997. I attach copies of that correspondence to supplement the documentation already forwarded with the Council's previous letter.

Complaint No 1

This complaint concerns the practical application by the Council and its General Secretariat of Article 3(2) of Decision 93/731/EC.

In this context, the Council wishes to point out that, as he himself states in his complaint, Mr Bunyan uses a systematic technique to obtain access to all the documents concerning action taken by the Council under Title VI of the TEU, without limiting himself to a particular period or to certain subjects. That technique consists of initially requesting the agendas of all the Council bodies dealing with matters falling under Title VI and subsequently requesting all the documents included on those agendas.

The Council considers that Article 3(2) of Decision 93/731/EC provides it with the most appropriate means of dealing with repeated requests such as those in question. That Article enables a fair solution to be applied in two separate cases:

- * to deal with repeat applications *and/or*
- * those which relate to very large documents.

In accordance with the general rules of legal interpretation, that Article must be interpreted in its context and in a way which gives it practical effect.

With regard to the first case mentioned above, application of a fair solution to deal with repeat applications cannot be restricted to applications referring to identical documents, as Mr Bunyan points out in point 2 of his complaint. 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. Following Mr Bunyan's interpretation of Article 3(2) of Decision 93/731/EC with regard to repeat applications would divest that Article of any effectiveness.

In this case, the Council was of the opinion that 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. 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.

Mr Bunyan's argument that, following adoption of the Decision of the Secretary-General of the Council of 27 February 1996 relating to fees in the context of public access to Council documents, the number and size of the documents would have become less relevant for application of Article 3(2) of Decision 93/731/EC, cannot be accepted. The Council points out that the Decision of the Secretary-General of the Council of 27 February 1996 is based on Article 3(1) of Decision 93/731/EC, which provides that an applicant may have access to a document either by consulting it on the spot or "*by having a copy sent at his own expense. The fee shall be set by the Secretary-General.*"

The legislator has therefore merely instructed the Secretary-General to lay down certain practical arrangements for implementing this provision. Those arrangements do not affect the rule of principle provided for in Article 3(2) of Decision 93/731/EC. It is therefore obvious that Article 3(1) applies to all cases in which access to documents is exercised by having copies sent, including cases covered by paragraph 2 of that Article in which the General Secretariat applies a fair solution.

Incidentally, the Council should point out that there is a difference between the French version, which formed the basis for translation into all the other language versions, and the English version of Article 3(2) of Decision 93/731/EC. The French text refers to a "*demande répétitive*", a term which has negative and pejorative connotations, while the English text uses the term "*repeat application*" which does not have that negative meaning.

With regard to the Council's general practice in applying Article 3(2) of Decision 93/731/EC, the Council notes that that provision which, in the Council's view, is aimed at safeguarding efficiency in the Institution's administration in exceptional cases, has been applied only to a limited extent to date. That solution moreover enabled Mr Bunyan to obtain a considerable number of documents, as can be seen from the figures given above.

Complaint No 2

This complaint refers to the conservation and incorporation in the historical archives of telexes sent to delegations concerning the convening of meetings.

Such telexes are retained in the existing computerized system for despatching telexes for approximately one year. After that period, systematic classification of such documents falls within the internal organization of each department of the Council General Secretariat.

A record of each meeting convened is moreover drawn up solely on the basis of the agenda for the meeting, which is adopted at the beginning of the meeting itself on the basis of the draft agenda sent by telex but which may differ from that draft.

However, since the problem arose as a result of the requests made by Mr Bunyan, draft agendas for Justice and Home Affairs (JHA) meetings have been systematically kept by the General Secretariat departments concerned.

Complaint No 3

This complaint refers to the absence of summaries of decisions taken by the Council in the field of cooperation in the JHA area.

As Mr Bunyan rightly observes, the Council is not obliged to produce and regularly update lists of measures adopted by the Council. Article 1 of Decision 93/731/EC provides that "Council document" means *"any written text containing existing data and held by the Council"*. The Council is therefore obliged to take account of requests for access to existing documents but not to produce documents at a citizen's request ⁽¹⁾.

The Council has however made considerable efforts to improve the transparency of its proceedings in this context:

- * A summary of the Council's Decisions taken under Title VI of the TEU is produced once a year and has been published as an Annex to the annual Review of the Council's Work from the 1995 edition onwards.
- * Decisions taken by the Council both under Title VI and in other areas, are announced in press releases issued by the General Secretariat including, in principle, acts adopted by the written procedure. Mr Bunyan is on the mailing list for those press releases and therefore receives that documentation systematically and free of charge.
- * As the Council is a single institution, certain Decisions may formally be taken by compositions of the Council which do not correspond to the subject matter concerned. References to such Decisions therefore appear in a separate heading which can easily be identified in press releases. A computer search of the content of Council press releases can also be made using the "Rapid" base which is accessible via the Internet using the "Europa" server.

⁽¹⁾ See paragraph 20 of the annexed ruling of the Court of First Instance of 22 October 1996 on removal from the Register of Case T-19/96, John Carvel and Guardian Newspapers v. Council, not yet published.

- * Furthermore, the General Secretariat of the Council is working on setting up its own data bases which will also be accessible via the Internet. Among other things, they will present Council Decisions in the areas of JHA and Common Foreign and Security Policy (CFSP).

Complaint No 4

The complaint refers to interpretation of Article 2(2) of Decision 93/731/EC in relation to timetables for meetings of the Steering Groups, Working Parties etc. set up by the Presidency.

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 Bunyan 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 Bunyan'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.

The Council finally also points out that, as a journalist, Mr Bunyan can at any time contact the General Secretariat's Press Office, which is able to inform him on an ad hoc basis of all the meetings organized within the Council as and when they are convened at the Presidency's initiative.

Complaint No 5

This complaint concerns the arguments expounded by the Council for refusing access to certain documents. Mr Bunyan complains in particular that the Council did not give specific reasons justifying the refusal of access to each individual document and that some of the Council's arguments for denying access were not based on Decision 93/731/EC.

The Council's replies of 15 March 1996 and 2 May 1996 to the requests in question comply with the general principles of the statement of reasons on which acts are based as laid down by established case law. In fact it emerges from case law that the reasons for acts must be adapted to the nature of the act concerned. They must show clearly and unambiguously the reasoning of the institution which was the originator of the act, to enable the parties concerned to take cognizance of the arguments justifying the measure taken and the Court of Justice to exercise its scrutiny. Those principles were applied in these cases. It emerges that access 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.

From a practical viewpoint, where the reason for refusal of access is the same for several documents to which reference is made in the same letter, it seems logical to group together the documents in question, particularly where the requests relate to a large number of documents.

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 Bunyan 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 Bunyan's interest in obtaining access to those documents.

It emerges from the foregoing that the Council respected its obligation to give reasons for the refusal in question, in accordance with the principles developed by case law.

In the light of the considerations given under point I above, the Council considers that the Ombudsman's examination must confine itself to the issue of the statement of reasons as he is not competent to judge the well-foundedness of the replies given in this context where documents falling under Title VI of the TEU are concerned.

The Council and its Secretary-General have in fact endeavoured systematically to give reasons for refusal of access to each individual document. Mr Bunyan himself made the following remark in a confirmatory application dated 18 March 1997: *"I note that the General Secretariat in its response to my request is now providing more information on the reasons for refusing access."*

Complaint No 6

This complaint refers inter alia to the global examination of several requests made by Mr Bunyan for access to documents.

Since these requests were all submitted within a short space of time, it seems logical that the General Secretariat and the Council should be able to examine them together and group the replies.

The Council acknowledges that, in exceptional cases and particularly on days when the Secretariat is closed and when staff take annual leave, it is in practice impossible, for internal organizational reasons, to comply with the time limit of one month laid down by Article 7(1) of Decision 93/731/EC. The Council can therefore confirm Mr Bunyan's conclusion that the delay in replying to his requests dated 30 July 1996, 31 July 1996 and 13 August 1996 was due to the August holiday period at the Council.

Meanwhile, the Council has amended Decision 93/731/EC to take account of such difficulties. Pursuant to Article 7(5), added to Decision 93/731/EC by the Decision of 6 December 1996, the Secretary-General may now, exceptionally and provided that the applicant is informed in advance, extend by one month the time limits laid down in the first sentence of Article 7(1) and in Article 7(3) of the Decision.

The Council wishes to emphasize that it endeavours in practice to respect strictly the one month limit imposed by Article 7(1) of Decision 93/731/EC and makes use only exceptionally of the possibility provided for in paragraph 5 of that Article.

The same explanations as those given above in connection with Mr Bunyan's first complaint apply with regard to the Council's interpretation of the concept of repeat applications.

Yours faithfully,

J LEBBINK

Enclosure

THE EUROPEAN OMBUDSMAN



SECRETARIAT

RESS RELEASE 1.7.1997

**COUNCIL EXPLAINS TO EUROPEAN OMBUDSMAN
ITS REFUSAL TO GIVE A JOURNALIST ACCESS TO DOCUMENTS**

European Ombudsman Jacob SÖDERMAN has been successful in obtaining an opinion from the Council of the European Union on six complaints from a British journalist. The complaints are about the Council's response to requests for access to documents relating to justice and home affairs. In its opinion, the Council gives detailed arguments to support its case that it has dealt correctly with the journalist's requests under Decision 93/731/EC on public access to Council documents.

The Ombudsman has invited the journalist to make observations on the Council's opinion before 30 September 1997. After that, the Ombudsman will decide whether he has enough information to resolve the dispute, or if further inquiries are needed.

In November and December 1996, the journalist made six complaints to the Ombudsman against the handling of his requests for certain Council documents concerning justice and home affairs. After determining that the complaints were admissible, the Ombudsman wrote to the Council on 15 January 1997 asking for an opinion on them.

In its reply of 26 March 1997 the Council refused to give the Ombudsman any information on the substance of the complaints. The Council argued that documents relating to justice and home affairs are part of the "third pillar" of the Maastricht Treaty and so outside the mandate of the Ombudsman.

In a further letter to the Council, dated 9 April 1997, the Ombudsman explained that the application of Council Decision 93/731/EC is a matter of Community law. The Decision was applied by the Court in *Carvel and Guardian Newspapers v Council*¹, for example, a case also involving "third pillar" documents. It is therefore within the Ombudsman's competence to inquire whether the Decision has been correctly administered, even if the documents concerned relate to non-Community matters. The Ombudsman therefore renewed his request for the Council's opinion on the complaints, setting a deadline of 31 May 1997. At the beginning of June, the Council informed the Ombudsman that it was preparing its reply.

For further information, please call Mr Ian HARDEN, Principal Officer, tel. + 33 388 17 23 84

¹ Case T-194/94, judgement of 19 October 1995

Statewatch

(11)

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5 July 1997

Dear Mr Söderman,

Thank you for your letter of 30 June.

I will be careful considering the Council's observations to our six complaints and be responding to these before 30 September 1997.

In the meantime, I wonder if it is possible to request more information from the Council regarding Complaints no 4. The Council state:

"In the light of Mr Bunyan'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 request for access to documents of this kind."

It would be helpful, before I respond, to know if "reconsidering" means there has been or will be a change in the Council practice or whether this is still being considered.

Yours sincerely,

Tony Bunyan

Statewatch

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Your references:

1053/25.11.96
1054/25.11.96
1055/25.11.96
1056/25.11.96
1057.25.11.96
1087/10.12.96

23 September 1997

Dear Mr Söderman,

Thank you for your letter of 30 June enclosing the Council's comments on our complaints..

You asked if we wished to make any observations on the comments from the Council and these are enclosed.

Yours sincerely,

Tony Bunyan

23 9. 97
para p. 4.

Response to the Ombudsman on the Council's reply of 20 June 1997 to six complaints lodged by Statewatch:

General comments

The introductory remarks in the Council's response to our six complaints require comment.

1. The Council's contention that it has no requirement to respond to complaints put to it by the European Ombudsman concerning Title VI is strange. Its letters replying to confirmatory applications concerning complaints no 1, 5, and 6 clearly state:

"Your attention is drawn to the provisions of Articles 138e and 173 of the EC Treaty, relating respectively to the conditions for referral to the Ombudsman by natural persons and for review by the Court of Justice of the legality of Council acts."

Indeed this simply follows the right of redress established by Article 7.3 of the Council Decision on public access to Council documents (20.12.93). Article 7.3 does not contain any exceptions.

2. The Council contends that "subjecting the documents themselves to.. close examination" is "forbidden" (page 3 last para). The Council also states that its reply is made providing "the content of the documents requested" are not examined and without "appraising the substance of documents" falling under Title VI in view of "their confidential character (Article 4(1) of the Decision 93/731/EC)" (page 4, para.1).

The claim that all documents falling under Title VI are by their nature "confidential" and therefore fall under the exceptions to access under Article 4.1 has to be challenged. This indicates that the Council is starting from the position that all documents are subject to Article 4.1 except where they decide otherwise. Or put another way the Council, in its practice, does not seem to be starting from the principle that access should in general be granted subject to certain exceptions.

3. Council decisions under Title VI raise a number of issues:

a) the validity of the decision itself particularly under obligations placed on the Council by international and Council of Europe conventions.

This is not at issue here but does raise the question that the Council considers that its decisions are not subject to the rule of law and judicial review (argued by the Council's legal representatives during the hearing in Case T-174/95, Svenska Journalistförbundet, 17.9.97).

It appears that, unlike all of the member states of the European Union, the Council of the European Union considers itself to be above the law for its decisions and actions under Title VI. It would be quite unacceptable in member

states for government policymaking to be undertaken in secret, with major decisions withheld from citizens' access and for them not to be subject to review by the courts.

b) However, the "content" and "substance" of a Council decision are relevant where the Council may have inappropriately claimed that access to a document is refused on the grounds set out in Article 4 (see complaints nos 5 and 6 below).

c) Finally, there is the Council's general application of the Decision of Article 3.2.

RESPONSE TO THE COUNCIL'S REPLY

Our response is divided into two parts.

A.

The first concerns complaints nos 2, 3 and 4. These complaints concern the administrative practices of the General Secretariat of the Council in dealing with requests for access and information.

These complaints have been partly met by the Council response and they have indicated a willingness to change their procedures in order to facilitate access to information.

B.

This is however not the case in the second category of complaints, nos 1, 5 and 6. These concern our three substantive complaints concerning the application of the Decision. The Council simply reiterates its positions and arguments given in response to confirmatory applications.

We had hoped the Council might respond in a more positive fashion and reconsider some of its positions. However this has not been the case so unless the Council changes its response to these three complaints our case for maladministration is, we believe, sustained.

Furthermore, as these three complaints concern the application of the Decision in a way that frustrates genuine applicants, not just ourselves but others too, we hope that the European Ombudsman considers making a series of draft Recommendations (Article 3.6, regulations governing the duties of the Ombudsman) and, if the Council fails to respond make Recommendations in a report to the European Parliament and the Council (Article 3.7 of the same regulation).

Suggested draft Recommendations are set out at the end.

* * * * *

DETAILED RESPONSE TO THE COUNCIL'S REPLY

A.

Response to: The Council's reply to Complaint no 2

1. We are pleased to see that the Council is no longer not "conserving" the agendas of JHA meetings. This complaint is satisfied.

Response to: The Council's reply to Complaint no 3

1. This complaint (no 3) concerns the fact that the Council does not maintain an up-to-date list of decisions taken in the area of Justice and Home Affairs.
2. In our complaint we acknowledged that the Council was not obliged to prepare a list of decisions except at the end of each calendar year. We also acknowledge that the Council is not obliged to produce "documents at a citizen's request".

However, it is surely a sign of inefficiency if the Council itself does not have an up-to-date list of measures adopted by each Council area.

The Council also correctly states that we receive Council press releases and we are aware of the "Rapid" service. However, tracking and applying for the decisions taken, taken by other Councils of Ministers or by written procedure is a laborious task requiring specialist knowledge of the internal workings of the Council's procedures.

For example, during the Irish Presidency (June-December 1996), of the 31 measures adopted in the JHA area only 8 were adopted by the Council of Justice and Home Affairs Ministers itself in November 1996. No less than 23 measures were adopted by eight other Councils of Ministers (General Affairs, Economic and Financial, Culture, Agriculture, Environment, Telecommunications, Internal Market, and Fisheries).

The Council states that is "working on setting up its own databases" which will be accessible on the Internet. This would be a welcome development, but it must be greeted with caution. The list provided to the Ombudsman by the Council of measures agreed in the JHA area in 1995 numbered only 20, a fraction of the decisions taken by the four meetings of the JHA Council in that year (your letter to Statewatch, 16.6.97). For the Council to list the measures that it thinks are relevant is no substitute for genuine access to documents.

3. We believe that despite some efforts by the Council to provide more information it is quite unacceptable that the Council does not maintain, and citizens cannot obtain, an up-to-date list of measures adopted on request.

A basic measure of democratic standards must surely be that an institution, like the Council, makes available the decisions taken (even if they are made in secret). Such a situation would be quite unacceptable in a member state - it

would be like a national parliament meeting and adopting measures in secret and failing to maintain a list of what has been agreed until the end of each year.

We request the Ombudsman to make a **draft Recommendation** to the Council that an up-to-date list of all measures adopted in each of the Council's areas of activity be established, maintained, and made available to citizens on request.

Response to: The Council's reply to Complaint no 4

1. This complaint has two elements.
2. First, the provision of the timetable of meetings held in the JHA area for each Presidency. The Council has now provided us with the timetable for the current Luxembourg Presidency and providing this practice is continued our complaint in this respect is met.
3. Second, we complained that the Council invoked Article 2.2 in response to our original request arguing that the "Presidency" not the "Council" was the author. Our view stated in our original complaint is that "The Presidency" is not "another institution" but rather a function and an office of the Council.

The Council's reply does not deal with this point as such. The Council now acknowledges that it is "reconsidering its practice and its interpretation of Article 2.2.. " Without knowing whether or how the Council has reconsidered its practice it is hard for us to respond.

Our concern remains as in a recent letter from the Council's General Secretariat (11.7.97) we were again refused access to the Agendas of meetings under Article 2.2 on the grounds that the Presidency is "another institution".

4. We would ask the Ombudsman to establish with the Council that the Presidency is not "another institution" within the meaning of Article 2.2 of the Decision - if necessary by making a **draft Recommendation**.

B.

Response to: Council's reply on Complaint no 1

1. Our complaint concerned an application for 14 documents (letter, 25.11.96). The documents concerned were the minutes ("Outcome of Proceedings") of the K4 Committee.

The response from the General Secretariat of the Council enclosed only 5 documents (one of which I had not listed) (3.4.96). The grounds for applying a "fair solution" (Article 3.2) were:

"Your request in this regard is a repeat application which relates as well to a large number of documents."

We lodged a confirmatory application stating that it was not a "repeat application" as none of the documents had been requested before and that the Decision made no reference to a "very large number of documents". The Council's reply was the subject of a vote in the Council of Ministers on 20 May 1996 - 8 voted in favour of the reply and 7 member states voted against to be sent (letter of 23.5.96).

Denmark and Sweden placed their disagreement "with the interpretation of the term "repeat application" contained in Article 3(2)..." on record (see letter of 25.11.97).

2. The Council's response: The Council say (page 5, para 2) that their ground for applying a "fair solution" is based on the uncontested fact that we have "systematically" requested documents concerning Title VI. Moreover our requests have not been limited "to a particular period or to certain topics".

None of the grounds: "systematic", "particular period", or "certain topics" has any basis in the Decision.

The Council argues (page 6, para.1) that a "repeat application" refers to: "cases where 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 ones."

We again reject these arguments. There is either a right to request access to documents or there is not.

The Council's attempt to redefine the obvious meaning of "repeat applications" allows them to frustrate the whole object of access to documents (see WWF judgement, para 56). To allow it apply its own self-defined criteria when deciding at what point an applicant becomes "systematic" etc has no basis in the Decision for this interpretation.

Moreover the "incidental" point made by the Council that the French term "demande répétitive" has "negative and pejorative connotations" cannot outweigh the Council's obligation to consider each document (Carvel case) nor does it justify its practice which frustrates genuine applicants.

The Council also tries to argue that the obvious meaning of "repeat applications" would divest it of any purpose.

On the contrary, it is quite sensible for the Council to include in its Decision a rule that "repeat applications" for the same document can be dealt with quickly to avoid vexatious applications.

It is quite conceivable that an applicant (including ourselves) might properly re-apply for the same document where the grounds for refusal that the document was only "recently adopted" after a reasonable period of time has passed - would this be a "repeat application" or a reasonable request?

The Council states, without any foundation, that "the number of documents

requested is one of the criteria to be taken into consideration." It is not. The "number of documents" is nowhere referred to in the Decision.

It should perhaps be noted that the wording in the joint Code of conduct concerning public access to Council and Commission documents (6.12.93) adopted by the Council and the Commission uses a different form of words. This states:

"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."

The Decision therefore has to be read in conjunction with the Code of conduct. Moreover, the Code says: "In consultation with the applicants" the institution will find a fair solution. We have never been consulted on a "fair solution".

The Council's contention that their "general practice in applying Article 3(2) of Decision 93/731/EC" is only used in "exceptional cases" is untrue. It was been used consistently to frustrate our applications for access, and is being used against other applicants as well.

3. Our response:
 - 3a. We reject the Council's interpretation of "repeat applications" and the wrongful application of a "very large number" of documents. This view is supported by a number of member states.
 - 3b. We ask the European Ombudsman to make a draft **Recommendation** defining the use of the term "repeat applications" and to instruct the Council to abide by the term "very large documents" (Article 3.2) and to only apply a "fair solution" after consultation with the applicant.
 - 3c. We ask the Ombudsman to call on the Council to review all its decisions on applications for documents excluded on the grounds of "repeat applications" and "very large number of documents".

Response to: The Council's reply to Complaint no 5

1. This complaint relates to the refusal to give specific reasons for denying access, using arguments which have no basis in the Decision, and wrongfully applying the Decision.

The Council's contention in the last paragraph concerning complaint no 5 (page 11) that they endeavour "systematically to give reasons for refusal" and that our letter of 18 March recognises constituted a response to a specific reply and not to their policy in general. By 2 May 1997 the General Secretariat sent a response which led us to make a confirmatory application asking if the Council:

"could supply definitions of the following and indicate on what authority these

phrases are used:

1. "undermine" (4 documents)
2. "have negative effects" (12 documents)
3. to be "harmful" (1 document)
4. "detrimental" (3 documents)
5. "related subjects" (20 documents)
6. "in the future" (20 documents) can this be defined or is it indefinite?

Many of these terms were used together, for example, that access could have negative effects on this and related subjects now or in the future.

The Council response of 30 June said:

"the Council is unable to supply you with definitions in the abstract of the terms you mention in your letter, which have to be considered in their specific context, i.e. 60 different times according to your calculation."

2. The Council's response: the Council argues on four points in its reply:
 - a) that some documents were refused on grounds of Article 4.1.
 - b) some on grounds of protecting the confidentiality of the Council proceedings under Article 4.2.
 - c) that "the Council did not refuse access to documents on the grounds that they "had only recently been established"".
 - d) that the European Ombudsman:

"is not competent to judge the well-foundedness of the replies given in this context where documents falling under Title VI of the TEU are concerned."

3. Our response:
 - 3a. Concerning documents refused under Article 4.1:

The Council's response (para 4, page 10) is:

"With regard to documents to which access was refused pursuant to Article 4(1) of the Decision 93/731/EC, the letter of 2 May 1996 adduces sufficient imperative reasons justifying application of the exception on grounds of protection of public interest."

There are no "imperative reasons" concerning the application of Article 4.1. "Imperative" can have two meanings, either obligatory or urgent. The Council is not "obliged" to apply Article 4.1 except according to its discretion which must be open to review. Further given the subject matter of the documents concerned it is hard to believe they were refused on the ground that they were "urgent".

The Council's letter of 2 May says that the 5 documents denied under Article 4.1 are concerned with "the fight against organised crime within and outside the European Union". There is no "imperative" obligation to deny access to all documents concerning "organised crime", for some there may be but for other concerning broad policies there may not be. In either case the decision must be open to review.

One of the documents, SN 1053/94 has nothing to do with organised crime but with the protection of classified information such as that cited below - Decision on measures to protect classified information, 30.1.95. Another 5121/1/95 on Relations with third countries in the context of the Third Pillar, may contain mention of "organised crime" but if it is anything like similar documents any reference will be very general and the document will cover a whole range of topics falling under the "third pillar." The Ombudsman is asked below to review the denial of access to both of these documents (see below).

For example, a document, "Stepping up the fight against organised crime" was sent to us by the Council in May 1997 as was another document "External relations relating to Justice and Home Affairs - Elements for a strategy" in March 1997. Both are similar to those referred to above.

In its first response the General Secretariat refused access to four documents under this Article citing the protection of public interest (public security, ..): 12247/94, SN 1053/94 and 10166/4/94, 9908/2/93 + ADD 1. In their response to our confirmatory application concerning the same documents the Council confirms this decision but adds document 5121/1/95 on the grounds of the protection of the public interest (international relations).

As regards 10166/4/94 and 9908/2/93 + ADD 1 we accept, on this occasion, that as these documents are classified as "Confidential" (defined as "could harm the essential interests of the European Union" in the Decision on measures to protect classified information, 30.1.95) these were properly withheld. We can also accept the denial of access to document 12247/94 although its classification grade may be "restricted" (the lowest level defined as: "unauthorised disclosure of which it would be inappropriate or premature") or "limite" (documents which "will be circulated only to authorised addressees but they will not be subject to any special protection, i.e. they will not be given a security classification.")

[Note: the Council uses three levels of classification: SECRET, CONFIDENTIAL and RESTREINT in this order. LIMITE has no special protection and is not a security classification]

However, we cannot accept under this head refusal of access to **SN 1053/94**. This is described in the 3rd para. on page 3 of the Council letter of 2 May 1996 as not having a "classification code: this is due to the fact that they are working documents which have been produced for internal purposes only." Under the Decision there is no such category as a document "produced for internal purposes" being outside its terms. Indeed the Decision states that it is "applicable to any document held by the Council, whatever its medium..." (para.5 of the Preamble). We ask the Ombudsman to examine whether refusal

of access to this document was valid.

The refusal of access - at the confirmatory stage not the initial one - of document **5121/1/95**.

This document concerns "Relations with third countries in the context of the Third Pillar". In order to assess whether this document has properly been refused under this head it is necessary to know its classification, for example, if it is "Confidential" it might properly be refused, but if it is simply "Limite" it would not be. Equally, we do not think that the simple application of protection of the public interest (international relations) to a document concerning relations with "third countries" is necessarily valid. Many of the documents which could fall under this heading are broad policy decisions, not details of specific operations, and properly belong in the public domain (and would be so at the member state level). We ask the Ombudsman to examine whether refusal of access to this document was valid.

Document **10448/93** is refused under Article 4.2 on the grounds that it "contains 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." Refusal of access here concerns a three-year-old document for which no claim is made that it relates to any specific legal proceedings. Refusal is therefore unacceptable and we ask the Ombudsman to examine whether this refusal was justified.

3b & c.

The Council states that it did not refuse access to 10 documents pursuant to Article 4.2 (protection of the confidentiality of the Council's proceedings) on the grounds that they "had only recently been established." (page 11, para 1). This point relates to page 3 para 7 of the Council's letter of 20 May 1996.

This particular paragraph is open to a number of interpretations:

"the [10] 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."

It is possible to see that the Council did not refuse access under Article 4.2 solely on these grounds.

On re-reading the paragraph it could be said to have a number of meanings:

- did all 10 documents contain "detailed national positions"?
- some documents were refused "with regard to Conventions which have only recently been established"
- some documents were refused because they were "legal instruments still under discussion"

- and some documents were "very recently adopted".

To which documents each of these terms concerns remains unclarified by the Council.

Whatever construction is put on this paragraph the term "only recently been established" is being used to justify refusal.

Moreover, the Council fails to answer the issue of the refusals in relation to the separate term: "very recently adopted."

The 5 documents dated from the JHA Council of 9-10 March 1994 and 5 from the meeting of the K4 Committee on 3-4 February 1994. The Council's response was on 2 May 1996 - certainly leaving open to question what "very recently adopted" means.

Neither of these grounds have any standing in the Decision.

Nor do we consider that "detailed national positions", the views of member states in footnotes to the substance of the documents, should provide grounds for refusing access to documents. In effect this means that where any document contains the views of a member state citizens can be denied access to that decision.

We ask the Ombudsman to make a **Recommendation** that will exclude the inclusion of the views of member states as grounds for denial of access to a document under Article 4.2.

Two of the documents included in this category were: **5354/95** ASIM 70 (Minimum guarantees for asylum procedures) and **5319/95** ASIM 65 (Draft Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis).

Both documents were discussed at the meeting of the JHA Council in Brussels on 9-10 March.

As regards 5354/95 this document was agreed in principle at this meeting, subject to lawyer/linguists' finalisation. It was formally adopted on 20 June 1995. The adopted measure itself contained Statements for the Council minutes from: Austria, Belgium, Ireland, UK, Denmark and Sweden. Indeed it might be thought these contained "detailed national positions". It is hard to see therefore what valid grounds there were for refusing access to this document and we ask the Ombudsman to examine whether this refusal was legitimate within the terms of the Decision.

As regards 5319/95 this was discussed at the same JHA Council in March. It was agreed in principle at the June 1995 JHA Council and formally adopted at the meeting in September 1995. The Council's letter of 2 May 1996 again raises the issue of whether this refusal was legitimate within the terms of the Decision and the Ombudsman is asked to examine this question.

- 3d. We do not accept the Council's argument that the European Ombudsman: "is not competent to judge the well-foundedness of the replies given in this context where documents falling under Title VI of the TEU are concerned."

Were this to be the case the Ombudsman could never consider a complaint concerning the misapplication by the Council of the Decision, and especially in regard to Article 4.1 and 4.2. Equally it would mean that the Council's application of the Decision would in this respect not be open to review or appeal. This would negate Article 3.2 of the regulation governing the Ombudsman's duties (94/262/ECSC, EC, Euratom).

Response to: The Council's reply to Complaint no 6

1. Our complaint concerned the most gross abuse by the Council by failing to treat four, quite separate letters requesting access to documents, individually (30 July 1996, 31 July 1996, and two separate letters dated 13 August 1996 - one of these requested a single document).

This treatment allowed the Council to apply the so-called "fair solution" and not to even consider 3 of the letters.

The response of the Council to our confirmatory application yet again divided the Council of Ministers who voted 8-5 in favour of the reply. The UK and Denmark made public a Declaration opposing the interpretation of "repeat applications" and "very large number of documents".

We argued this constituted unfair treatment and possibly unlawful procedures by failing to consider each of the documents (John Carvel, Guardian case).

2. The Council's reply is woefully inadequate and they make no attempt to respond. Three of the six paragraphs have nothing whatever to do with the complaint and concern the Council's vacational "season" in August (paras 3, 4 and 5).

Their argument that because all the requests were submitted "within a short space of time" it was logical "to examine them together" is absurd - there were four letters, containing four separate requests for different documents.

It seems the General Secretariat, backed by eight members of the Council deliberately took this choice in order to apply a "fair solution" and thus not even consider the requests in three of the letters. A view supported by the intemperate tone of the General Secretariat's response of 26 September 1996.

3. **Our response:**

1. We consider that the grounds of our complaint remain unanswered.
2. In their letter of 26 September 1996 the Council refused access to seven documents solely on the grounds of Article 4(2), "confidentiality of the Council's

proceedings".

In response to our confirmatory application the Council reaffirmed this decision but added other reasons for refusal under Article 4.1. This related to 3 documents refused on the grounds they contained "detailed national positions" and further that they "are still under discussion or have been adopted only very recently".

One of these documents, **6982/2/96**, was a Recommendation on illegal employment of third-country nationals. It was discussed at the Council of Justice and Home Affairs Ministers in June in Luxembourg where the measure was agreed but its formal adoption was blocked by the UK's "beef ban" reservation. It was formally adopted as an "A" Point at the Telecommunications Council on 27.9.96. Thus it had been adopted prior to the Council response on 20 November 1996.

The grounds for refusal access to document 6982/2/96, concerning a Recommendation on illegal employment of third-country nationals, was justified under Article 4.2 on the grounds that it contained "detailed national positions" and was "adopted only very recently". We ask the Ombudsman to examine whether refusal of access to this document was justified.

Documents **7788/96** and **7791/96** which are refused on the grounds that they contain the opinion of the Council Legal Services. We ask the Ombudsman to examine whether these documents were properly withheld.

3. We consider that refusing documents on the grounds of "recent adoption" is invalid and is not within the terms of the Decision. When is a decision not "recently adopted"? Six months, one year? Indeed what more valid reason can a citizen have than to seek access to a measure which has been "recently adopted"? We ask the Ombudsman to consider a **draft Recommendation** to exclude the use of the term "recently adopted" as grounds for refusal.
4. We also consider that refusal of access simply on the grounds that a document including in the footnotes member states' positions is not a valid ground for refusing access to the contents of the measure itself.
5. In reference to a number of issues raised in our response we are mindful of the Court of Instance's judgement in the WWF case (T-105/95), para. 56. This states that:

"it is important to note that where a general principle is established and exceptions to that principle are laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule."

Conclusion

- A. We do not believe that the Council's response to the substantive complaints 1, 5 and 6 satisfies them, and believe that complaints 3 and 4 are only partially satisfied.

- B. We ask the European Ombudsman to examine the validity of the grounds for refusing access to documents: SN 1053/94, 5121/1/95, 10448/93, 5354/95 and 5319//95 (complaint no 5) and 6982/2/96, 7788/96 and 7791/096 (complaint no 6).
- C. The Ombudsman is asked further to consider the following draft Recommendations on the Council's application of the Decision:
1. We ask the European Ombudsman to make a Recommendation to the Council that it should maintain, and make available on request to citizens, an up-to-date lists of all measures adopted in each of the Council's areas of activity.
 2. We ask the European Ombudsman to make a Recommendation that the "Presidency" is not "another institution" separate from the Council within the meaning of Article 2.2.
 3. We ask the European Ombudsman to make a Recommendation limiting the use of the term "repeat applications" in Article 3.2 of the Decision to applications concerning the same document.
 4. We ask the European Ombudsman to make a Recommendation on the application of the term "very large documents" in Article 3.2 of the Decision to exclude its use where a "very large number of documents" are applied for.
 5. We ask the European Ombudsman to make a Recommendation that a "fair solution" under Article 3.2 should only be applied after consultation with the applicant.
 6. We ask the European Ombudsman to make a Recommendation that will exclude the inclusion of the views of member states in a document as being sufficient grounds for refusal of access to a document under Article 4.2.
 7. We ask the European Ombudsman to make a Recommendation to exclude the use of the terms "recently established" or "recently adopted" as grounds for refusal.

We have presumed that we do not have to reiterate all the details set out in our original letter of complaint.

Tony Bunyan, Statewatch, 23 September 1997

COUNCIL
OF THE
EUROPEAN UNION

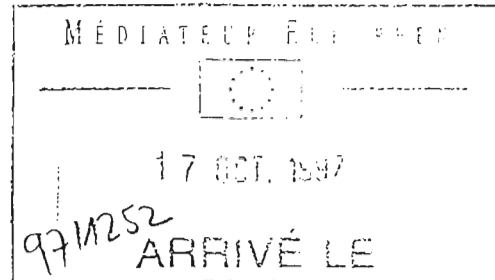
1053 → 1057/96/IJH
1027/96/IJH

13

Brussels, 09. X. 1997

11279

Mr. Jacob Söderman
European Ombudsman
1, Avenue du Président Robert Schuman
BP 403
FRANCE-67000 STRASBOURG CEDEX



Subject: Access to Council documents
Complaints made by Mr Tony Bunyan
1053/25.11.96/Statewatch/UK/IJH
1054/25.11.96/Statewatch/UK/IJH
1055/25.11.96/Statewatch/UK/IJH
1056/25.11.96/Statewatch/UK/IJH
1057/25.11.96/Statewatch/UK/IJH
1087/25.11.96/Statewatch/UK/IJH

Ref: Your letter dated 21.07.1997, No 1612

Sir,

In reply to your abovementioned letter, I can confirm that in cases like the one raised by Mr Bunyan in his complaint No. 4 the Council has already changed its practice.

In a response dated 25 July 1977 (see enclosure) to a request by Mr Bunyan for "*timetables of meetings of the K4 Committee, Steering Groups, Working Parties etc. regarding Justice and Home Affairs held under the Netherlands Presidency and to be held under the Luxembourg Presidency*", the General Secretariat granted access to the calendars circulated by the Luxembourg Presidency. At the same time, it was 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 the meetings is done by means of telexes setting out the dates and agendas.

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1048 BRUSSELS

Tel. (02)285.61.11 - Telegrams: Consilium Bruxelles - Telex: 21711 Consil B

The same approach was followed vis-à-vis Mr Peers in the response dated 18 July 1997 (see enclosure) to a similar request.

The Council intends to follow the same policy in similar cases in the future.

Yours faithfully,

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a series of connected loops and a horizontal line at the end.

J. POOS

Enclosure

EUROPEAN UNION
THE COUNCIL
General Secretariat

25 JUL 1997

Brussels,

Mr. Tony Bunyan
Editor
Statewatch
P.O. Box 1516
London N16 0EW
United Kingdom

8482

Dear Mr. Bunyan,

I refer to your letter dated 5 July 1997 and received by the General Secretariat of the Council the 8 July, requesting copies of the:

"timetables of meetings of the K4 Committee, Steering Groups, Working Parties etc regarding justice and home affairs held under the Netherlands Presidency and to be held under the Luxembourg Presidency."

Public access to such documents is governed by Council Decision 93/731/EC (OJ L 340/43 of 31.12.1993 - hereafter referred to as "the Decision"), in accordance with which your application for access to documents has been considered.

As a result of this consideration:

- You may get access to the calendars circulated by the Luxembourg Presidency containing the provisional dates for meetings under Title VI. However, your attention is drawn to the fact that this calendar has no official and binding character and it is subject to modifications throughout the term of the Presidency. The official convocation of the meetings is done by means of telexes setting out the dates and agendas.

Yours sincerely

For the General Secretariat


E. Gosbel

Enclosures

175, rue de la Loi 1048 Brussels
Tel: 285.65.25 Fax: 285.81.74

Please note that under article 7 (1) of Council Decision of 20 December 1993 on public access to Council documents, when an applicant is informed that the intention is to reject his application he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

I have to inform you that timetables are provisional dates proposed by the Presidency, which are replaced by the agendas and not kept.

EUROPEAN UNION
THE COUNCIL
General Secretariat

Brussels, 18 JUL. 1997

Mr. Steve Peers
93 Princess Drive
High Woods, Colchester
CO4 4YT
United Kingdom

Dear Mr. Peers,

8028

I refer to your letter dated 17 June 1997 (r22/97) and received by the General Secretariat of the Council the 19 June, requesting

- "a) any calendar(s) prepared by the incoming Luxembourg Presidency, setting dates for the meetings of the Steering Groups and Working Groups established under Title VI of the EU Treaty, and/or meetings of the K4 Committee, the Executive Committee established by the Dublin Convention, and any working groups to be established by that Executive Committee;
- b) the agenda for each of the meetings of CIREFI held from 1 January 1997 to 30 June 1997;
- c) the agenda for each of the meetings of CIREA held from 21 February 1997 to 30 June 1997;
- d) document 6736/1/97;
- e) document 6736/97;
- f) the document adopted by the Council on 'Better Use of the Instruments of Title VI of the TEU', mentioned in the European Council's report on the European Union during 1995;
- g) the agenda for each of the meetings of the working party on EURODAC held from 1 January 1997 to 30 June 1997;
- h) the Irish Presidency's work programme for Steering Group III;
- i) the Dutch Presidency's work programme for Steering Group II;
- j) the Dutch Presidency's work programme for Steering Group III."

Public access to such documents is governed by Council Decision 93/731/EC (OJ L 340/43 of 31.12.1993 - hereafter referred to as "the Decision"), in accordance with which your application for access to documents has been considered.

With regard to your request, the General Secretariat has carefully examined your application in the light of the Decision. As a result of this consideration, the General Secretariat has drawn the following conclusions:

- a) You may get access to the calendars circulated by the Luxembourg Presidency containing the provisional dates for meetings under Title VI. However, your attention is drawn to the fact that this calendar has no official and binding character and it is subject to modifications throughout the term of the Presidency. The official convocation of the meetings is done by means of telexes setting out the dates and agendas;

..2..

- b) You may get access to telexes 0051 08.01.97, 1771 28.02.97, 1434 27.03.97, 2065 13.05.97, 2591 11.06.97;
- c) You may get access to telexes 1339 21.03.97, 1951 02.05.97, 2524 06.06.97;
- d) document 6736/1/97 is a note to COREPER on the Draft action concerning travel facilities for school pupils from third countries resident in a Member State. It contains a statement of one Member State, disclosure of which would be harmful for the action still under negotiation. Therefore, it cannot be released to you, by virtue of Article 4 (2) of the Decision;
- e) You may get access to document 6736/97 and 6736/97 cor 1;
- f) You may get access to document 8221/95;
- g) You may get access to telexes 46 08.01.97, 604 11.02.97, 1042 06.03.97, 1355 24.03.97, 1435 03.04.97, 2238 22.05.97;
- h) the Irish Presidency gave an oral presentation of its work programme only: no document was established;
- i) You may get access to document 12729/96;
- j) You may get access to document 12342/96.

According to the Decision of the Secretary-General of the Council (96/C 74/02) relating to fees in the context of public access to Council documents, the number of pages exceeding 30 (56), you are requested to transfer the amount of

ECU 10 + 0,036 x 56 sheets = 12,016 ECU x 0,6816230
 (Infor ECU no 7/97) = 8,19 UKL
UKL 8.19

to our account number 426-4482203-05 (Kredietbank, agence Schuman, rond-point Schuman 4, 1040 Bruxelles), mentioning: Access 62.

Yours sincerely

For the General Secretariat


L. Goebel

Enclosures

175, rue de la Loi, 1048 Brussels
 Tel. 235 65.25 Fax. 235.81.74

Please note that under article 7 (1) of Council Decision of 20 December 1993 on public access to Council documents, when an applicant is informed that the intention is to reject his application he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application



JACOB SÖDERMAN

Mr Tony Bunyan
Statewatch
PO Box 1516
UK - London N16 0EW

Strasbourg,

31.10.1997*002195

1053/25.11.96/STATEWATCH/UK/IJH; 1054/25.11.96/STATEWATCH/UK/IJH;
1055/25.11.96/STATEWATCH/UK/IJH; 1056/25.11.96/STATEWATCH/UK/IJH;
1057/25.11.96/STATEWATCH/UK/IJH; 1087/10.12.96/STATEWATCH/UK/IJH

Dear Mr Bunyan,

On 5 July 1997 you wrote asking me to obtain clarification from the Council of its opinion on your complaint 1056/25.11.96/STATEWATCH/UK/IJH. I forwarded your letter to the Council on 21 July 1997 and a reply from the Council, dated 9 October 1997, was received here on 17 October 1997. A copy of the Council's reply is enclosed.

If you wish to make any observations on the reply from the Council, please send them to me before 30 November 1997.

Your observations on the Council's opinion of 20 June 1997, dated 23 September 1997, were received here on 29 September 1997 and are being carefully considered. I will inform you of the action taken in due course.

Yours sincerely,

Jacob SÖDERMAN

Enclosure

Statewatch

15

PO Box 1516, London N16 0EW
Tel: 0181 802 1882
Fax: 0181 880 1727
e-mail: statewatch-off@geo2.poptel.org.uk

8 November 1997

Dear Mr Söderman,

Thank you for your letter of 31 October.

The Council's response of 9 October clarifies the first element of complaint no 4, namely that the Council is now supplying copies of the timetables of JHA matters held under each Presidency. This element of our complaint is satisfied.

However, the Council has failed to respond to the second element of complaint no 4, both in its response of 20 June and that of 9 October.

This concerns the Council's contention that the "Presidency" of the Council of the European Union is a separate "author" under Article 2.2 of the Decision. We again raised this point in our substantive response to you dated 23 September regarding Complaint no 4 on page 4 of our submission.

Indeed the Council is still using this ploy to avoid giving access to documents. On 24 June I requested copies of the Agendas of the "Senior Level Group" and the "EU-US Task Force". On 11 July the General Secretariat of the Council refused access to these documents under Article 2.2. even though they admit having a copies of the documents and suggested I might apply to "the US authorities". This decision was confirmed by the Council of Ministers in their letter of 13.10.97 (copies of this correspondence is enclosed).

I do not believe this element of the complaint has been satisfied.

Yours sincerely,

Tony Bunyan

Documents

16 - 19

Principal requests on

EU-US agendas

Statewatch

16

PO Box 1516, London N16 0EW
Tel: 0181 802 1882
Fax: 0181 880 1727
e-mail: statewatch-off@geo2.poptel.org.uk

24 June 1997

Dear Mr Goebel,

I would be grateful if you could send me copies of the Agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" both before and after it was signed in December 1995.

Yours sincerely,

Tony Bunyan,
Editor
(member International Federation of Journalists)

EUROPEAN UNION
THE COUNCIL
General Secretariat

Brussels, 11 June 1997

Mr. Tony Bunyan
Editor
Statewatch
P.O. Box 1516
London N16 0EW
United Kingdom

7623

Dear Mr. Bunyan,

I refer to your letter dated 24 June 1997 and received by the General Secretariat of the Council the 27 June, requesting copies of:

"the agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" both before and after it was signed in December 1995."

Public access to such documents is governed by Council Decision 93/731/EC (OJ L 340/43 of 31.12.1993 - hereafter referred to as "the Decision"), in accordance with which your application for access to documents has been considered.

As a result of this consideration, I have to inform you of the following:

- The "Senior Level Group" and the "EU-US Task Force" were created informally for the negotiation of the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" under the Spanish Presidency. The European Union is represented in these groups by the Presidency of the Council and the European Commission. Agendas for meetings are established jointly by the Presidency and the Commission, together with the United States. Whereas the General Secretariat receives those agendas for information, they have never been established as official Council documents. Hence, by virtue of Article 2 (2) of the Decision, you could send a request to the European Commission, the Presidency of the Council (in the second half of 1995: Spain) and/or the US authorities.

Yours sincerely

For the General Secretariat


L. Goebel

Statewatch

PO Box 1516, London N16 0EW
Tel: 0181 802 1882
Fax: 0181 880 1727
e-mail: statewatch-off@geo2.poptel.org.uk

28 July 1997

Dear Mr Goebel,

Thank you for your letter of 11 July received on 18 July.

I would like to make a confirmatory application under article 7(1) of the Council Decision of 20 December 1993 regarding access to the agendas of the "Senior Level Group" and the "EU-US Task Force".

As you may recall Complaint no 4 we have lodged with the European Ombudsman concerns a similar issue. Namely, the General Secretariat's contention that the "Presidency" is a separate "author" from the Council (Article 2.2). The Presidency is not "another Community institution or body", the Presidency is rather a function and an office of the Council.

The Presidency and the Council in regard to requests for access to documents are one and the same. Moreover, as your letter states, the General Secretariat hold copies of these documents and the Decision (20.12.93) refers to "any document held by the Council".

Yours sincerely,

Tony Bunyan,
Editor
(member International Federation of Journalists)

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COUNCIL
OF THE
EUROPEAN UNION

The President

Brussels, 13. X. 1997

Mr Tony BUNYAN
Editor
Statewatch
P.O. Box 1516
UK - LONDON N16 OEW

11503

Sir,

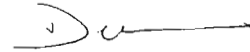
I refer to your letter of 28 July in which you make a confirmatory application, under Article 7(1) of Decision 93/731/EC, for access to documents.

With regard to the agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan", the Council, after careful consideration, confirms the answer given by the General Secretariat.

Contrary to the documents established exclusively by the Presidency for the use of the Council's proceedings, which have previously been disclosed to you and other applicants, the agendas in question, as stated in the letter dated 11 July 1997, are established jointly by the Presidency, the Commission and the US authorities.

Hence, taking into account that the agendas in question were not prepared under the sole responsibility of the Council or its Presidency, the Council is of the opinion that Article 2(2) of the Decision applies in this particular case.

Yours faithfully,



M. DELVAUX-STEHRES

Your attention is drawn to the provisions of Article 138e and 173 of the EC Treaty, relating respectively to the conditions for referral to the Ombudsman by natural persons and for review by the Court of Justice of the legality of Council acts.

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1048 BRUSSELS

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25

JACOB SÖDERMAN

Strasbourg 20 -11- 1997

Mr Jürgen Trumpf
Secretary General
Council of the European Union
175 rue de la Loi
B-1048 Bruxelles

20.11.97 / 2366

1056/25.11.96/STATEWATCH/UK/IJH

Dear Mr Trumpf

I write in order to seek further information in relation to the above complaint by Mr Tony BUNYAN.

Mr BUNYAN has made observations on the Council's opinion on the complaint. A copy of the observations is enclosed (Annex 1), together with a copy of a letter from Mr BUNYAN to the Ombudsman, dated 8 November 1997, which also concerns this complaint (Annex 2).

It appears from these documents that the only aspect of this complaint which remains unresolved is whether the Council considers its Presidency to be "another institution", separate from the Council itself, for the purposes of Article 2.2 of the Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340/43).

I would be therefore be grateful to be informed of the Council's views on this question by no later than 31 January 1998.

If the Council's reply were to make clear that it does not consider its Presidency to be "another institution", separate from the Council, for the purposes of Article 2.2 of the Council Decision on public access to Council documents, it could be possible for the Ombudsman to close the case.

Yours sincerely

Jacob Söderman

cc Mr Boixareu

Enclosures

2750 EN

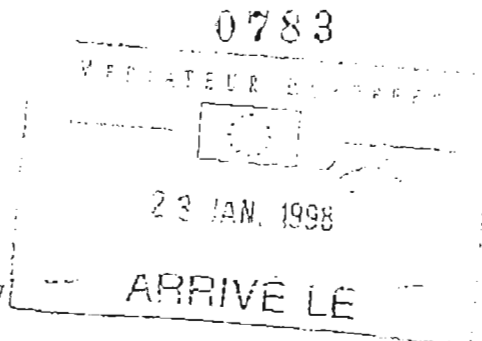
Brussels, 20. 1. 1998

21

The President

Mr. Jacob SÖDERMAN
European Ombudsman
1, Avenue du Président Robert Schuman
BP 403
F-67000 STRASBOURG CEDEX

Subject: Complaint by Mr. Bunyan
1056/25 11.96/Statewatch/UK/IJH
Your letter dated 20 November 1997



Sir,

In response to the question raised in the abovementioned letter, I am pleased to confirm that the Council does not consider its Presidency to be "another institution", separate from the Council, for the purpose of Article 2, paragraph 2 of the Council Decision 93/731/EC on public access to Council documents (hereinafter referred to as "Decision 93/731/EC").

For the purpose of this provision, 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*.

Whereas it is for the Council to decide, under Decision 93/731/EC, whether or not access may be granted to documents falling into the first category, Article 2 paragraph 2 of Decision 93/731/EC is applicable to the second category of documents.

In the recent practice of the Council, documents established exclusively by the Presidency for the use of the Council's proceedings have constantly been considered as Council documents in accordance with Decision 93/731/EC.

The negative response to Mr. BUNYAN's request dated 28 July 1997 concerning the agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" 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.

Yours faithfully,

Gordon M. Brown

G. BROWN



JACOB SÖDERMAN

Mr Tony Bunyan
Statewatch
PO Box 1516
UK - London N16 0EW

Strasbourg,

29.01.1998 + 00 2730

1056/25.11.96/STATEWATCH/UK/IJH

Dear Mr Bunyan,

I have now received from the Council its reply to my letter dated 20 November 1997 concerning the above case. A copy of the Council's reply is enclosed.

If you wish to make any observations on the Council's reply please send them to me by no later than 28 February 1998.

Yours sincerely,

Jacob SÖDERMAN

Enclosure

Statewatch

PO Box 1516, London N16 0EW
Tel: 0181 802 1882
Fax: 0181 880 1727
e-mail: statewatch-off@geo2.poptel.org.uk

24 February 1998

Dear Mr Söderman,

Thank you for your letter of 29 January.

I am pleased to see that the Council no longer considers "its Presidency" to be "another institution", separate from the Council.

However, the Council then sets out a number of qualifications on this position in their letter of 20 January 1998 which have to be contested.

First, their letter states that where documents are written by a Member State "*not relating to its role as Presidency of the Council*" (emphasis in original) then Article 2 paragraph 2 of the Decision of 93/731/EC is applicable. Namely, that an application for access should be sent "direct to the author".

This is unacceptable where a document written by a Member State is on the formal Agendas of the Council of Justice and Home Affairs Ministers, the K4 Committee, the Steering Groups, Working Parties etc. Such a document if agreed forms part of the justice and home affairs *acquis* and should be open to an application for access under the Decision.

Even if the document is not agreed/adopted but forms part of the policy-making process or the implementation of policies in practice of the European Union (under the Treaty on European Union and/or the Treaty establishing the European Community) then it should be open to an application for access under the Decision.

Second, in the final paragraph of the Council's letter they state that the negative response to the request for the agendas of the meeting of the "Senior Level Group" and the "Senior Officials Group EU-US" was not related to Article 2.2 of the Decision.

Instead the Council simply make the following statement: "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." They make no other argument to justify the refusal of these agendas.

We would argue that the three authors of the agendas are jointly and individually responsible for the "establishment of the document(s)" and that an application for access can therefore be made to any one of them, in this case the Presidency.

To argue as the Council does that a request for the agendas of these meetings fall outside of the Decision is wrong. The preamble to the Decision states that application may be made for:

"any document held by the Council, whatever its medium, excluding documents written by a person, body or institution outside the Council".

Application may thus be made for "any document" and the Council in its previous correspondence admits it is holding copies of these agendas. Equally the Presidency of the Council is clearly one of the "authors" of the documents, within the meaning of Article 2.2, and they are not documents written exclusively by bodies or institutions "outside the Council".

The meetings to which the agendas refer do not provide an **alternative code of access** which the citizen can pursue. If the "Transatlantic Agenda" and the "Joint EU-US Action Plan" provided for requests for access to documents concerning their consequential meetings of officials and ministers it would be possible to pursue this avenue. But they do not.

It is surely unacceptable that when the Presidency of the Council draws up agendas with a third-party or third state EU citizens should not have the same rights of access as they do under the Decision. If this were to remain the situation the Presidency representing the Council of Ministers could be party to setting up working parties/regular meetings and conduct business "outside" the norms established within the EU - namely, allowing no right of access to the documents considered.

A parallel situation would mean that when the EU represented by the Presidency meets jointly with third states provision such as those on data protection within the EU would not be binding on the Presidency.

An increasing number of such justice and home affairs meetings are being undertaken with third state(s). For example, with the countries of central and eastern Europe, the Baltic states, Cyprus, Russia, Canada, Ukraine, Turkey, Norway, Iceland, the Magreb countries involved in the Euro-Mediterranean dialogue, Switzerland, Malta, Caribbean and Latin American (Andean Pact, Mercosur) countries, Asia and Japan (ASEM meetings), Council of Europe, Visby, Interpol, UN, the OECD, and the Task Force on Organised Crime in the Baltic Sea Region.

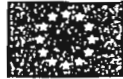
Moreover, refusal to consider requests for access to agendas and documents for meetings such as these not only frustrates a legitimate request it also removes activities carried out in these fora from democratic accountability and from review by the Court of Justice and the Ombudsman.

We therefore request that the Ombudsman establish that Decision 93/731/EC applies to agendas and documents concerning "external relations in the field of justice and home affairs", and that applications can be made to the Council by citizens.

Yours sincerely,

Tony Bunyan,
Editor

THE EUROPEAN OMBUDSMAN



JACOB SÖDERMAN

Strasbourg,

Mr Tony Bunyan
Statewatch
PO Box 1516
UK - London
N16 0EW

30.09.1998*003621

Decision on complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council

Dear Mr Bunyan

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 documents¹ (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 its Decision on public access 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:

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

"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 Bunyan 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 Bunyan'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 Bunyan'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.¹
- 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.²
- 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

¹ Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998, para 66.

² 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 1 above).

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



SECRETARIAT

PRESS RELEASE 6.7.1998

EUROPEAN OMBUDSMAN HOLDS THAT THE COUNCIL MUST RE-EXAMINE AN APPLICATION FOR ACCESS TO DOCUMENTS

European Ombudsman Jacob Söderman has held that the Council of the European Union was wrong not to consider British journalist Tony BUNYAN's application for access to agendas of the "Senior level Group" and the "EU-US Task Force".

The Council rejected the application on the grounds that the Council was a joint author and not the sole author of the documents concerned. The Ombudsman held that the Council must also apply its rules on public access to documents which it has co-authored. The Ombudsman's decision means that the Council will have to reconsider Mr BUNYAN's application and apply the rules correctly.

The Ombudsman's inquiry also led to two other successes for Mr BUNYAN.

First, the Council changed its practice and is now making publicly available the timetable of meetings in the field of Justice and Home Affairs planned under each Presidency.

Second, the Council accepted that the Presidency is not "another institution", for the purposes of its rules on public access to documents. This means that the public can apply to the Council for access to documents which a Member State has written in its capacity as Presidency of the Council.

The complaint is one of six which Mr BUNYAN made to the Ombudsman late in 1996 (1056/25.11.96/STATEWATCH/UK/IJH). One of the cases was closed last year with a friendly solution. The Ombudsman's investigations into the other four cases are continuing.

Notes for editors

The Council's rules on public access to documents are contained in Council Decision 93/731 (*Official Journal* 1993 L 340/43). Decision 93/731, together with the corresponding Commission Decision (Commission Decision 8 February 1994 on public access to Commission documents: *Official Journal* 1994 L 46/58), implement the joint Code of Conduct on public access to documents (*Official Journal* 1993 L 340/ 41) agreed by the Council and Commission after the Maastricht Treaty.

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The Ombudsman's decision follows a recent judgement of the Court of First Instance which stated that 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 (Case T-174/95, *Svenska Journalistförbundet (Tidningen Journalisten) v Council*, judgement of 17 June 1998.)

Tony Bunyan is editor of Statewatch bulletin which "monitors justice and home affairs in the European Union."

*For further information, please contact Mr Ian Harden, Head of the secretariat,
tel. + 33 388 17 23 84*

Statewatch

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e-mail: statewatch-off@poptel.org.uk

9 July 1998

Dear Mr Goebel,

I have received the Decision of the European Ombudsman concerning our complaint, no 1056/25.11.96/STATEWATCH/UK/IJH dated 30 June 1998. A copy of this letter is attached.

The Decision of the European Ombudsman on the issue of "The refusal of access to documents of which the Council is a joint author" is given at point 3 on pages 4/5 and in the Conclusions at points 4.2 & 3.

In para 4.2 the European Ombudsman, in a "critical remark", states that the decision of the Council of the European Union in its letter dated 13 October 1997 "was based on a misapplication of Decision 93/731". The European Ombudsman further states, in para 4.3, that: "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."

I therefore, on the advice of the European Ombudsman, hereby make a confirmatory application under Article 7 (1) of Council Decision of 20 December 1993 asking the Council of Ministers of the European Union to re-consider its decision given in its letter of 13 October 1997.

If access to any of these documents is still refused I would be grateful if the grounds for refusal could be stated for each document. Further, in the case of any refusal to give access to these documents I would be grateful if you could tell me the level of classification applied to them.

Yours sincerely,

Tony Bunyan,
Editor
(Member, International Federation of Journalists)

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Brussels, 29. VII. 1998

10552

Mr. Tony Bunyan
Editor
Statewatch
P.O. Box 1516
UK-LONDON N 16 OEW

Sir,

I refer to your letter dated 9 July 1998, received by the General Secretariat of the Council on 14 July 1998, concerning the Ombudsman's Decision on complaint 1056/25.11.96.

It is obvious that the Ombudsman's decision, annexed to your letter, does not result in the annulment of the Council's reply of 13 October 1997 to your confirmatory application dated 28 July 1997 and does not oblige the Council to reconsider its decision. However, taking into account the lapse of time since your initial application, your request for the relevant agendas of the "Senior level Group" and the "EU-US Task Force" can be considered as a new application, to which the General Secretariat is to reply by virtue of Article 5 of the Council Decision 93/731/EC (hereinafter referred to as "the Decision").

After careful examination, the General Secretariat concluded that since the Council's decision of 13 October 1997 stating that Article 2(2) of the Decision applies in this particular case, there have been no factual developments in the dossier in question which would justify altering this decision. Whatever the correct interpretation of Article 2(2) of the Decision in relation to the objective of the Decision to give effect to the principle of the largest possible access for citizens to information might be - a question which can only be answered by the Court of Justice -, the General Secretariat considers that the Council cannot disclose unilaterally a document which was drawn up jointly with other authors.

Hence, the General Secretariat cannot but align itself with the Council's decision of 13 October 1997, which stated that Article 2(2) of the Decision applies in this particular case, since the agendas in question were not established under the sole responsibility of the Council, but also by another Community institution (in this case the European Commission) and another national or international body (in this case the US authorities). Therefore, the General Secretariat cannot give access to the documents in question.

As for the level of classification applied to them, they have been considered as "limited".

Please note that under Article 7(1) of the Decision, when an applicant is informed that the intention is to reject his application, he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. TrumPF', with a stylized, cursive script.

Jürgen TRUMPF

Statewatch

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27 August 1998

Dear Mr Trumpf,

Thank you for your letter of 29 July received by us on 4 August 1998.

I hereby make a confirmatory application under Article 7 (1) of the Council Decision of 20 December 1993 concerning your letter of 29 July 1998 and in doing so request the Council of Ministers of the European Union to re-consider the decision given in its letter of 13 October 1997.

It is obvious from the Ombudsman's Decision on complaint 1056/25.11.96 that it does not annul the Council's reply of 13 October 1997. However, the Ombudsman's Decision records, in para 4.3 on page 7, that:

"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 letter from the Council of Ministers of the European Union of 13 October 1997 did inform us of this right.

We followed the procedure laid down in the Decision 93/731 and in the Council's letter of 13 October 1997 and lodged a complaint with the Ombudsman. The Ombudsman's Decision on the matter was that the letter of 13 October 1997 "was based on a misapplication of Decision 93/731". The Ombudsman's Decision then states, in para 4.3: "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."

We have to place on record that we had a reasonable expectation that having followed the procedure laid down that the Council would abide by the Ombudsman's Decision.

Instead, we received a reply to our letter of 8 July 1998 suggesting that: "taking into account the lapse of time since your initial application, your request for the relevant agendas of the "Senior Level Group" and the "EU-US Task Force" can be considered as a new application..". Rather than on the grounds that the Ombudsman's Decision called on the Council of Ministers - not the General Secretariat, which clearly has no

option but to "align" itself with the views previously expressed by the Council of Ministers - to reconsider its response to our confirmatory application dated 28 July 1997.

Incidentally we would be grateful if you could confirm the meaning of the phrase "lapse of time since your initial application". Does this mean that if a period of 13 months elapses applicants may reapply for documents to which they have been denied access?

Yours sincerely,

Tony Bunyan,
Editor
(Member, International Federation of Journalists)

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GENERAL SECRETARIAT

DIRECTORATE GENERAL F
CODECISION LEGISLATIVE PROCEDURES
INFORMATION POLICY
PUBLIC RELATIONS

DEPUTY DIRECTOR GENERAL

Mr. Tony Bunyan
Editor
Statewatch
P.O. Box 1516
UK-LONDON N 16 OEW

Sir,

Please find enclosed the decision from the Council to your confirmatory application dated 27 August 1998.

According to Article 7(3) of the Decision on public access to Council documents, I draw your attention to the provisions of Article 138e and 173 of the EC Treaty, relating respectively to the conditions for referral to the Ombudsman by natural persons and for review by the Court of Justice of the legality of Council acts.

Yours sincerely,



Hans BRUNMAYR

Enclosure

**DECISION ON THE CONFIRMATORY APPLICATION BY MR. Tony BUNYAN
(7/98)**

- made to the Council by letter of 27 August 1998, received by the General Secretariat of the Council on 31 August 1998 -, pursuant to Article 7(1) of Council Decision 93/731/EC for access to the agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" both before and after it was signed in December 1995

By letter dated 24 June 1997, the applicant requested to get access to the agendas of the meetings of the "Senior Level Group" and the "Senior Officials Group EU-US" concerned with the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" both before and after it was signed in December 1995.

By letter of 11 July 1998, the General Secretariat informed the applicant that Article 2(2) of Decision 93/731/EC applied in this case.

Following the applicant's confirmatory application of 28 July 1997, the Council, by decision notified on 13 October 1997, confirmed the General Secretariat's response.

Following the European Ombudsman's decision of 30 June 1998 on the complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council, the applicant requested the Council, by letter of 9 July 1998, to reconsider its decision of 13 October 1997 concerning the above documents.

By letter of 29 July 1998, the General Secretariat replied in the same sense as in the Council's decision of 13 October 1997.

By letter of 27 August 1998, the applicant made a confirmatory application and requested the Council again to reconsider its decision of 13 October 1997.

Taking due account of the Ombudsman's critical remarks in its decision of 30 June 1998, the Council has reconsidered its decision of 13 October 1997 and decided as follows.

1. The Council has taken note of the Ombudsman's interpretation of Article 2(2) of Decision 93/731/EC concerning documents of which the Council is a co-author. However, without prejudice to its future approach to this problem, the Council, after careful consideration of the circumstances of the present case, is of the opinion that the documents in question fall outside the scope of application of Decision 93/731/EC as defined in its Article 1(2) in conjunction with Article 2(2).
2. As stated already in the General Secretariat's initial reply of 11 July 1997, the "Senior Level Group" and the "EU-US Task Force" were created informally for the negotiation of the "New Transatlantic Agenda" and the "Joint EU-US Action Plan" under the Spanish Presidency. The European Union is represented in these bilateral groups by the Presidency of the Council and the European Commission.
3. Draft agendas for those meetings are drawn up by the participating parties, i.e. either the Commission, the Council Presidency or the US authorities. They are distributed only to the participants in the meetings. Generally, the agenda is jointly agreed only in the meeting room, so that it is only at this point that the draft - possibly with manuscript annotations - becomes the official agenda.
4. Hence, up to the point when the agenda of the meeting is agreed, the papers in question are draft proposals.

5. It is also important to note that the Council as such is not directly involved in the work of the "Senior Level Group" and the "EU-US Task Force". Whilst the Council - at different levels - is regularly kept informed by the Presidency on the progress of the bilateral contacts with the United States by reports, which are circulated in the form of Council documents (with document number and code), the members of the Council neither receive copies of the draft agendas nor of the agreed, final agendas. In fact, as the agendas as such are never considered by the Council, only the officials in the General Secretariat following the dossier in question keep copies of the (sometimes annotated) draft agendas for the purpose of their work⁽¹⁾; they are neither registered nor filed systematically in the Council's archives; they do not bear any number or code and often not even a date.
6. Hence, the Council is of the opinion that the documents in question are not "*held by the Council*" in the sense of Article 1(2) of Decision 93/731/EC, but only by officials in the General Secretariat and therefore fall outside the scope of application of Decision 93/731/EC. However, this does not preclude the applicant from applying for access to the draft agendas to their author(s) under Article 2(2) of Decision 93/731/EC.
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(1) It should be noted that, in practice, the reports on those meetings for the attention of the Council are drafted by the General Secretariat.