

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

(made in accordance with Art. 3 (7) of the Statute of the European Ombudsman¹)

THE COMPLAINT

The complaint was lodged by Statewatch, a private organisation, in July 2000. According to the complainant, the relevant facts may be summarised as follows:

The complainant had obtained copies of agendas and 'outcomes of proceedings' for meetings of the Council of the European Union concerning justice and home affairs. It had noticed that many of the documents listed in the 'outcomes of proceedings' were not listed on the agendas of these meetings. It had also learnt that a number of documents, for example Room documents and SN documents, were generally not listed on the agendas nor on the 'outcomes of proceedings'.

On 27 January 1999, the complainant wrote to the Council in order to ask for "all Room documents, non-papers, meetings documents, SN ["sans numéro", unnumbered] docs etc" that were put before specific meetings in the month of January 1999 and that had not been listed on the agendas for these meetings. In its reply sent on 24 March 1999, the Council took the view that applications for access to documents under Council Decision 93/731/EC of 20 December 1993 on public access to documents² had to contain information enabling the documents requested to be identified. The Council claimed that it was unable to identify the documents concerned, if they existed. In the Council's view, the only means for doing so were the agendas or the 'outcomes of proceedings' that had already been sent to the complainant or could be requested by the latter.

The complainant then lodged a confirmatory application in which it pointed out that there

¹ Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113/15

² OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

was no guarantee that access to the 'outcomes of proceedings' to which the Council had referred would be granted. It also stressed that it might well be the case that documents of the type referred to were not listed in the agendas or the 'outcomes of proceedings' although they constituted part of the decision-making procedure. It thus appeared to the complainant that the Council did not maintain a list or a document that recorded all the documents circulated in advance or put before the meeting. In its decision on this confirmatory application, the Council informed the complainant that on the basis of the 'outcomes of proceedings' it had identified 79 further documents that had been put before the meetings and that access was refused in respect of 15 of them. The listed documents contained only one SN document.

In another application made on 25 January 1999, the complainant asked for access to "all the documents (Restreint, Limite, Non-paper, Meeting document, Room documents, SN document and any other documents etc)" that had been put before a meeting of the Police Cooperation Working Party (Experts' meeting – Interception of telecommunications) on 3-4 September 1998. The Council's reply was virtually identical to the one given to the above application. The complainant lodged a confirmatory application, pointing out that according to the agenda only one document of 4 pages (that the Council had disclosed) had been put before this meeting that had lasted two days and dealt with five substantial issues. In its decision on the confirmatory application, the Council informed the complainant that on the basis of the 'outcome of proceedings' it had identified two further documents that were both accessible.

According to the complainant, the Council issued the following instruction when its public register of documents went online on 1 January 1999:

"Confidential, Restreint, SN and non-paper documents will not be included in the public register. For this reason, from now on these documents will not be mentioned in official Council documents (in particular: on provisional agendas and in outcomes of proceedings)."

The complainant considered that there was no justification for the deliberate exclusion of such documents from agendas, 'outcomes of proceedings' and the public register. It argued that without a full list of the documents considered by the Council the citizen was unable to obtain a full understanding of the proceedings. The complainant took the view that in neither of these two cases had the Council indicated that further inquiries had been made in order to establish which documents had been put before the respective meetings. Neither had the Council provided a list of documents or addressed the issue.

In substance, the complainant made the following allegations:

- 1) The Council failed to provide the documents it had required, that is to say (1) all Room documents, non-papers, meetings documents, SN ["sans numéro", unnumbered] docs etc that had been put before specific meetings in the month of

January that it had asked for on 27 January 1999 and (2) all the documents (Restreint, Limite, Non-paper, Meeting document, Room documents, SN document and any other documents etc) that had been put before a meeting of the Police Cooperation Working Party (Experts' meeting – Interception of Telecommunications) on 3-4 September 1998.

2) The Council failed to provide or failed to maintain a list of all these documents

THE INQUIRY

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

The Council's opinion

In its opinion, the Council made the following comments:

In the present case, 85 documents had been identified of which 68 were released to the complainant. In more general terms, the present complaint raised a question of principle relating to the way in which the Council operated.

The Council's rules on access to documents, unlike those of some Member States, did not distinguish between preparatory documents and final documents: both fell within the scope of Decision 93/731 if they were "held by the Council", including its preparatory bodies (committees and working parties). However, not all preparatory documents were of the same nature.

On the one hand, there were documents which, although being preparatory, nevertheless represented a certain degree of 'finality', in the sense that they could be considered to be the product of a preliminary consultation process and/or to represent an accurate picture of the state of the Council's deliberations on a certain dossier at a certain point in time (like for instance the final version of the 'outcome of proceedings' reflecting delegations' positions on a certain dossier). Those documents generally took the form of official documents which, except for a very small number of documents classified confidential, secret or top secret *and* relating to matters concerning security and defence or military or non-military crisis management, were mentioned in the public register of Council documents at least with their document number.

On the other hand, there were papers which represented the preliminary reflections of a single person or a very small group of persons contributing to the Council's deliberations, which in certain Member States would probably not be considered as 'final' or 'official' documents subject to public access. This was the case, for instance, when the General Secretariat circulated a draft note or report summarising delegations' positions on a certain dossier to the members of the working party or committee concerned: at this stage, such

a draft merely reflected the personal perception of a single official, which could be incomplete or inaccurate. It was this type of papers which were usually circulated as non-papers, SN documents or room documents or in any other informal way. Their common feature was that they were of a purely transitory, preliminary nature: if their content was confirmed or if the ideas presented in them were taken up by the group or committee to which they were addressed, those would ultimately be reflected in a document which could be found on the public register.

The Council agreed that, as a matter of good administration, the register should – except in respect of a very small number of documents the specific nature of which required to treat them in a special way – include references to all documents in the first category. However, the Council was not of the opinion that it was necessary or appropriate to keep a complete, centralised record and register of each paper which was circulated to its members or their representatives, however preliminary or transitory it may be. In fact, this would impose a heavy administrative burden on its General Secretariat. As for the complainant's claim that such papers should be mentioned in the agendas or 'outcomes of proceedings' of the meetings concerned, the Council's rules on access provided for access to documents in their existing form but did not oblige the Council to include them in any particular elements of information.

The crucial problem was of course to determine the point at which a draft or informal paper was to be considered as a document which should be registered and archived. This question was currently being discussed in the context of the Commission proposal for a regulation based on Article 255 (2) of the EC Treaty. At this stage, the Council was therefore not in a position to take a stand as regards the criteria that would be applied to this effect.

The complainant's observations

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

Contrary to what the Council claimed, the "reflections" of a "single person" could be of greater or lesser significance, for example if that person was the Secretary-General of the Council. Similarly a document submitted by a "very small group of persons" could be a document expressing the views of one or more governments or a near final draft of a measure. To argue that documents should not be recorded, archived, registered or accessible to citizens when they were produced by a "single person" or a "very small group of persons" was an extremely dangerous idea in democracy.

The point was not whether documents of a "purely transitory, preliminary nature" were reflected in the final document but rather that the citizen had a right to know what arguments were on the table and which were accepted and which rejected. Citizens had a right to know what influences were brought to bear in determining public policy.

Decision 93/731 made no distinction between "official documents" and documents "of a purely transitory, preliminary nature". It defined the term 'document' as being a document held by the Council. The Council's response thus indicated that it did not abide by that definition.

To suggest, as the Council did, that to keep a complete, centralised record and to register every paper which was circulated to the members and representatives of the Council would impose a heavy administrative burden was not in accord with good administrative practice let alone basic democratic standards.

The complainant enclosed a copy of the 'outcome of proceedings' for the meeting on 3 and 4 September 1998 that he had obtained in the meantime and pointed out that this document listed, in addition to the documents that had been mentioned by the Council in its decision on the complainant's request for access, several other documents that had been put before that meeting. In view of this document, the complainant suggested that the Council's examination of these 'outcomes' had, to say the least, been partial.

The complainant therefore invited the Ombudsman to address a recommendation to the Council.

THE OMBUDSMAN'S DRAFT RECOMMENDATION

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

- "(1)The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies
- (2) The Council should maintain a list or register of all the documents put before the Council and make this list or register available to citizens"

The European Ombudsman gave reasons for the draft recommendation as follows:

1 Failure to provide documents

1.1 The complainant claimed that the Council had failed to provide the documents it had required, that is to say (1) all Room documents, non-papers, meetings documents, SN ["sans numéro", unnumbered] docs etc that had been put before specific meetings in the month of January that it had asked for on 27 January 1999 and (2) all the documents (Restreint, Limite, Non-paper, Meeting document, Room documents, SN document and any other documents etc) that had been put before a meeting of the

Police Cooperation Working Party (Experts' meeting – Interception of Telecommunications) on 3-4 September 1998.

- 1.2 The Council did not make any express comments regarding this aspect of the complaint. From the comments it had made regarding the complainant's second allegation it emerged, however, that the Council appeared to believe that the relevant documents are not covered by Council Decision 93/731/EC of 20 December 1993 on public access to documents³ and that it thus did not have to grant access to these documents. The Council suggested that a distinction should be drawn between documents which, although being preparatory, nevertheless represent a certain degree of 'finality' on the one hand and documents of a purely transitory, preliminary nature on the other hand. It appeared that the Council believed that the rules on access to documents only apply to the first of these two categories.
- 1.3 Article 1 (1) of Decision 93/731 provides: "The public shall have access to Council documents under the conditions laid down in the Decision." The term 'Council document' is defined in Article 1 (2) as meaning "any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2 (2)."
- 1.4 Decision 93/731 has to be seen in the context of the Code of Conduct concerning public access to Council and Commission documents⁴ adopted by the Council and the Commission on 6 December 1993 to which the recitals of Decision 93/731 refer. This Code of Conduct provides, inter alia: "The public will have the widest possible access to documents held by the Commission and the Council." On this basis, the Court of First Instance came to the following conclusion: "The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration."⁵
- 1.5 In the light of these provisions, the Ombudsman considered that there was nothing to support the distinction put forward by the Council. Decision 93/731 covers access to any document held by the Council, irrespective of its nature. This is in conformity with the principle of openness enshrined in Community law. The Ombudsman agreed with the complainant's view that citizens should have the right to know which documents were placed before the Council in order to find out what influences were brought to bear in determining public policy. It appeared useful to add that this did not mean that the Council had to grant access to all these documents, given that Decision 93/731 sets out a number of exceptions where access can legitimately be refused.

³ OJ 1993 L 340, p. 43; amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19).

⁴ OJ 1993 L 340, p. 41.

⁵ Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 66.

1.6 The Ombudsman was aware of the fact that Article 255 (2) of the EC Treaty provides that a regulation regarding public access to European Parliament, Council and Commission documents is to be adopted within two years of the coming into force of the Treaty of Amsterdam. However, no such regulation had yet been adopted. As the Ombudsman had explained in his draft recommendation in complaint 916/2000/GG, he considered that, when examining whether or not there is maladministration, his first and most essential task is to establish whether the administration "has acted unlawfully". The Ombudsman took the view that this examination had by necessity to be based on the law as it stands.

1.7 On the basis of these considerations, the Ombudsman took the view that the Council's approach in the present case gave rise to an instance of maladministration.

2 Failure to provide or maintain a list of all the documents concerned

2.1 The complainant claimed that by failing to provide a list of all the documents concerned or by failing systematically to register and file these documents, the Council had contravened the principles of good administration.

2.2 The Council argued that it is not necessary or appropriate to keep a complete, centralised record and register of each paper which is circulated to its members or their representatives, however preliminary or transitory it may be. In the view of the Council, this would impose a heavy administrative burden on its General Secretariat. The Council also pointed out that its rules on access provide for access to documents in their existing form but do not oblige the Council to include them in any particular elements of information.

2.3 The Ombudsman considered that this allegation of the complainant comprised two aspects which need to be distinguished, namely the question whether access has to be granted to a list of documents and the question as to whether the Council is obliged to maintain such a list.

2.4 Decision 93/731 governs access to documents "held" by the Council. The Ombudsman understood the comments made by the Council in the sense that it did not maintain a complete list of all the documents submitted to meetings of the Council. Since the complainant had not been able to prove the opposite, the Ombudsman considered that its claim according to which the Council committed maladministration by failing to *grant access* to such list must fail.

2.5 However, the Ombudsman took the view that a different conclusion was warranted in so far as the Council's failure to *maintain* such a list was concerned. Community law grants citizens a right to access of documents held by the Council. As explained above, this right extends to all documents held by the Council, irrespective of their nature. It is obvious, however, that the exercise of this right could be seriously

impaired or even thwarted if a citizen does not even know which documents are held by the Council. The present case provided a good example of the difficulties that would arise in such cases. In its original reply to the complainant's request for access to *all* the documents placed before the meeting held on 3 and 4 September 1998, the Council had taken the view that the relevant documents had not been identified precisely enough. In its decision on the complainant's confirmatory application, the Council listed a number of documents and explained that these had been identified on the basis of the 'outcome of proceedings'. However, the text of this 'outcome of proceedings' that had subsequently been submitted by the complainant showed that there were further documents that had been put before the relevant meeting.

- 2.6 In these circumstances, the Ombudsman considered that principles of good administration require that in order to allow citizens to make proper use of their right to access to documents, all the documents that are put before the Council are listed in a document or register that is accessible to citizens. The additional administrative work that this will entail for the Council would have to be accepted in view of the fundamental importance which the right of citizens to have access to documents held by the Council has in order to guarantee openness and transparency in the latter's decision-making.
- 2.7 On the basis of these considerations, the Ombudsman concluded that the Council's failure to maintain a list or register of all the documents put before the Council also constituted maladministration. Since a friendly solution did not appear to be possible, the Ombudsman made a draft recommendation to the Council, in accordance with Article 3 (6) of the Statute of the Ombudsman

The Council's detailed opinion

After receiving the draft recommendation and in accordance with Article 3 (6) of the Statute of the European Ombudsman, the Council sent a detailed opinion on 28 May 2001.

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

“1. As regards the Ombudsman's second draft recommendation, the Council would like to clarify, by way of a preliminary remark, that it fully subscribes to the Ombudsman's conclusion that Decision 93/731/EC covers access to any document held by the Council, irrespective of its nature. It has never been its contention that the rules on access to documents apply only to documents which represent a certain degree of 'finality', but not to texts of a transitory, preliminary nature. The point which the Council wished to make in its comments on the complaint was that this distinction is pertinent for the question of whether it is necessary for a good administration to keep a complete record of all written texts, however ephemeral they may be, which are circulated in a meeting of the Council or one of its preparatory bodies.

2. *The Council recognises that there is clearly a case for maintaining a register of all documents – irrespective of their denomination or form, be it official or unofficial – put before the Council or one of its preparatory bodies which form one of the bases of their deliberations and discussions, or have an influence on the institution's decision-making process or summarize the 'state of play' of a certain dossier.*

3. (...)

4. (...)

5. *In answer to that recommendation, the Council agrees that, contrary to its current practice, also unofficial documents which fulfil the criteria set out above (point 2) should be recorded in the public register. The Council therefore accepts the Ombudsman's second draft recommendation.*

6. *In order to put it into practice, the services of the General Secretariat will be instructed that all documents put before the Council or one of its preparatory bodies which form a basis of the Council's deliberations or discussions in one of its preparatory bodies or have an influence on the institution's decision-making process or summarise the 'state of play' of a certain dossier should as much as possible be circulated in the form of official documents or – where this is not possible due to exceptional circumstances – be transformed into such as soon as possible.*

7. *This does not mean, however, that each and every piece of paper or text – however ephemeral it may be – which is circulated in a meeting of the Council or one of its preparatory bodies is to be recorded in a public register. In practice, apart from the documents which form one of the bases of the discussion in a meeting of a working party, committee or other instance within the Council, it occurs that during the meetings other texts – e.g. drafting suggestions by the Presidency, a delegate of a Member State[,] a representative of the Commission or an official of the General Secretariat – are circulated to delegations. Those papers often simply have the function of replacing or supplementing oral interventions, and the duration of their 'useful life' is usually very limited: either the suggestions are rejected immediately in the meeting in which they were produced – in which case they are not kept -, or their content is included in a subsequent document summarizing the discussions in a meeting. In those cases, on one hand, there is no obvious added value for the cause of transparency if the original piece of paper, typed or manuscript, on which the text was first circulated is recorded in the register, as their content is either subsequently reflected in a document which appears on the public register or has proven to have no use whatsoever during the process. On the other hand, to establish and keep a complete register of all those papers would impose a heavy administrative burden on the Council's General Secretariat and thereby, on balance, go clearly against the principle of good administration [footnote omitted].*

8. *As regards the Ombudsman's first draft recommendation, the Council would like to point out that following the complainant's application it had already identified, on the basis of the outcomes of proceedings, 85 documents of which 68 were released. Upon a new check, the General Secretariat concluded that no further documents as requested by the complainant could be identified. The Council therefore considers that the Ombudsman's first draft recommendation is already fully implemented.*

9. (...)"

The Ombudsman's evaluation of the Council's detailed opinion

By his first draft recommendation, the Ombudsman had invited the Council to reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies. The Council considers that this recommendation has already been fully implemented, relying on the fact that it had already identified 85 documents of which a total of 68 had been released to the complainant. These figures were already mentioned in the Council's opinion on the complaint. However, the complainant subsequently, together with its observations on this opinion, provided the Ombudsman with a copy of the 'outcome of proceedings' for the meeting of the Police Cooperation Working Party on 3-4 September 1998⁶. This document refers to five or six documents that were submitted to the meeting. These documents are not mentioned by the Council in its replies to the complainant's application for access. The Ombudsman therefore considers that the Council has not yet fully implemented his first draft recommendation.

The Ombudsman welcomes the fact that the Council has accepted the second draft recommendation and will take measures to give effect to this acceptance. However, the considerations set out in the text of the Council's opinion and in particular at point 7 thereof raise doubts as to whether the draft recommendations will indeed be implemented. The Council accepts that "*all documents put before the Council or one of its preparatory bodies which form a basis of the Council's deliberations or discussions in one of its preparatory bodies or have an influence on the institution's decision-making process or summarise the 'state of play' of a certain dossier*" should be included in the list or register. However, it then continues by exempting from these documents certain 'ephemeral' documents the 'useful life' of which is considered to be very limited. These documents are nowhere clearly defined. The Ombudsman does not exclude that certain "drafting suggestions" that are made and circulated on the occasion of a meeting might not need to be registered if their only aim is to replace (or supplement) oral interventions. However,

⁶ This is mentioned in point 2.5 of the Ombudsman's letter to the Council of 1 March 2001 setting out the draft recommendations.

these "drafting suggestions" are only mentioned as an example by the Council, and there is no guarantee that these documents are really no more than just an alternative or a supplement to an oral intervention⁷. The main criterion that the Council appears to have in mind for the purpose of defining these documents appears to consist in the very limited duration of their 'useful life'. However, it is hard to see how this criterion could be applied in an objective way.

Furthermore, even if a proposal is subsequently reflected in a document that is recorded on the public register citizens may have an interest in knowing who made it. The same applies if a proposal is not accepted and thus not reflected in such a document.

The Ombudsman acknowledges that including all the documents that are put before the Council in a list or register that is accessible to citizens will entail additional administrative work. He continues to believe, however, that this ought to be accepted in view of the fundamental importance which the right of citizens to have access to documents held by the Council has in order to guarantee openness and transparency in the latter's decision-making.

Regard needs to be had, however, to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁸. Article 11 (1) of this regulation, that was adopted on the basis of Article 255 (2) of the EC Treaty, stipulates that each of these three institutions shall provide public access to a register of documents. Article 11 (2) of the regulation provides that this register shall contain a reference for "each" document . As pointed out in Article 11 (1) , the duty to keep such a register is imposed in order "[t]o make citizens' rights under this Regulation effective". However, Article 1 of the regulation specifies that the purpose of the regulation is to ensure the widest possible access to documents. It should also be noted that according to its Article 2 (3), the regulation shall apply to "all" documents held by the said institutions. The regulation does not appear to distinguish between documents according to the possible limitation of their 'useful life'.

The Ombudsman concludes from the above that Regulation 1049/2001 has created a legal duty to establish and make available a public register of all the documents put before the Council. He further considers that this regulation can be interpreted in the sense that access has to be given to all documents that have been put before the Council in order to be taken into account or dealt with by the latter and which should therefore be available to the citizens. The Ombudsman notes that Article 11 (3) obliges the Council, the

⁷ According to the Council, the documents that in its view do not need to be included in the register "often" have the function of replacing or supplementing oral interventions. It seems to follow that documents that do not have such a function could also be omitted from the list or register in its view.

⁸ OJ 2001 L 145, p. 43.

Commission and the European Parliament immediately to take the measures necessary to ensure that the register is operational by 3 June 2002.

In these circumstances, the Ombudsman considers that it is not necessary or appropriate for him to renew his second draft recommendation as a recommendation to the Council. However, the Ombudsman welcomes the European Parliament's views on this matter.

THE OMBUDSMAN'S RECOMMENDATION

In the Ombudsman's view, the Council's detailed opinion, although accepting his two draft recommendations, fails to provide the necessary assurances that the first of these draft recommendations has indeed been implemented. The Ombudsman therefore re-states the first draft recommendation as a recommendation to the Council:

The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies.

The European Parliament could consider adopting the recommendation as a resolution.

Strasbourg,

Jacob Söderman