

Statewatch

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6 January 2002

Dear Mr Visscher,

Thank you for your letter of 18 December. I would like to make a confirmatory application under Article 7.2 of 1049/2001.

1.

The Council refusal to give access to the agendas says that "Each request will be studied on a case by case basis" yet your response suggests that where a third party (in this case the US) is opposed to the release of documents that the Council has no choice but to refuse access (see point 5 below).

2.

The Council argues that "New Transatlantic Agendas are documents drawn up jointly by the EU and the US side and are therefore - at least partly - third party documents in the sense of Article 3.b of Regulation 1049/2001". I accept that these documents are "at least partly - third party documents (in the sense of Article 3.b), but partial third party documents cannot form a new category of documents to be excluded. Moreover, the Ombudsman, in his ruling in 1056/25.11.96/Statewatch/UK/IJH, established that each of the parties concerned are independent entities and that in particular the Council cannot use the argument of document prepared "jointly" to evade its independent status and obligations. The same applies to the "co-authors" question the Council raises.

3.

The US authorities state that the documents, agendas, in question are "government-to-government documents". I have no idea what this means and this concept is certainly not mentioned in 1049/2001 as a category of documents which are excluded from access. In other words government-to-government documents are not an excepted category, specific documents would have to individually fall within the scope of the permitted exceptions, as restrictively interpreted.

4.

It appears that the "consultations" with the US authorities also resulted in the US taking a view that they were opposed to "even partial" access (under Article 4.6). This seems a quite unreasonable position to take in the light of evidence from Agendas providing to us in the period "prior to February 1998". These include information such as:

22 November 1997

- TABD (Transatlantic Business Dialogue)
- WTO meeting

28 January 1997

- WTO work plan
- dialogue on biotechnology issues
- TABD
- TALD (Transatlantic Labour Dialogue)
- Joint Action on Central Europe
- Third Pillar Initiative

It is quite clear that no sensitive information whatsoever is contained in the agendas as such. Moreover to argue that such non-sensitive information from the agendas of meetings could "significantly disturb the good functioning of the cooperation between the European Union and the United States in this field" is simply preposterous from the point of view of the European Union which purports to grant its citizens the greatest possible access to documents .

5.

While it is clear that as one of the authors (under Article 4.4) the US should be consulted, and perhaps also consulted under Article 4.6 (partial access), it is quite unacceptable that the Council should conclude that:

"In those circumstances, the General Secretariat cannot but conclude that release of these agendas would significantly disturb the good functioning of the cooperation between the European Union and the United States in this field. For this reason, access to these agendas must be denied pursuant to Article 4(1)a of Regulation 1049/2001 (international relations)".

This presumes that if a "third party", who is a co-author, opposes the release of a document that the Council "cannot but conclude..." that a document should not be released. On the contrary I would argue that while the Council clearly has an obligation to "consult" a third party it has NO overriding obligation to accept the views of the third party. Rather, the Council is required under its Treaty obligations to perform its own independent assessment after it has consulted with the US (or other third parties) and to do so in the light of the legal obligations placed on it within the framework of EU law. These obligations also quite clearly include considering specifically the question whether a citizen should in any event be granted access to part of the documents requested (ie. those which contain information which on a strict reading does not fall within the scope of any of the permitted categories of exception to the access rules).

6.

The Council's refusal to grant access to the documents in question constitutes a violation of the terms of Regulation 1049/2001 as well as the principle of granting the widest possible access to documents and the principle of proportionality as applied and interpreted by the Court of Justice. Moreover, it is clear from the timing of the Council response to my request of 23 July that the Council has deliberately waited until after 3 December to reply to my request (and even then only at my prompting).

The request was lodged on 23 July and by letters of 23 August (vacation period) and 20 September the Council extended the deadline to enable "consultations" by a further month, that is until 20 October, but it failed to reply within this time. Indeed it would appear that I only received a reply on 18 December in response to my further e-mail of 15 December. This unnecessary delay and casual attitude is in itself contrary to the Council's own rules and the provisions of the newly entered into force Regulation.

Yours sincerely,

Tony Bunyan
Editor Statewatch