

Decision of the European Ombudsman closing his inquiry into complaint 944/2008/OV against the Council of the European Union

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- Summary: [Alleged refusal to grant access to terrorism related document](#)

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THE BACKGROUND TO THE COMPLAINT △

1. The present complaint concerns a request for access to a document produced by the Council of the European Union (the 'Council'). The complainant is concerned about various infringements of national law in EU Member States which, in his view, were committed by the US authorities and certain EU Member State governments. According to the complainant, these infringements date back to 2001 and involve kidnappings, illegal detentions and the illegal transportation of detainees by the CIA. The complainant considers that the Council should be forced to disclose the content of all its negotiations, consultations and discussions with the US authorities regarding these alleged infringements^[1].

2. On 14 January 2008, the complainant applied, in accordance with Regulation 1049/2001/EC^[2] ('the Regulation'), for public access to any Council documents relating to discussions which took place between EU and US representatives on 3 May 2006 in Brussels on the subject of "*rendition*" and "*extraordinary rendition*".

3. By letter dated 30 January 2008, the General Secretariat of the Council informed the complainant that a report of the EU-Troika^[3] meeting with the US authorities, held on 3 May 2006, was contained in document "*COREU CFSP/SEC/1126/06*", and that this document was classified as "RESTREINT EU". The General Secretariat refused to grant access to the document, applying the exceptions set out in the Regulation under Article 4(1)(a), third indent, (protection of the public interest as regards international relations), and Article 4(3) (protection of the institution's decision-making process).

4. On 12 February 2008, the complainant made a confirmatory application for access, referring to Article 42 of the Charter of Fundamental Rights (right of access to documents) and to Article 6 of the Treaty on European Union, as amended by the Lisbon Treaty, according to which the Charter has the same legal value as the Treaties. In his confirmatory application, in reply to the Council's reference to Article 4(1)(a) of the Regulation, the complainant referred to Article 19(2) of the Charter of Fundamental Rights which provides that no one may be removed, expelled or extradited to a State where there is a serious risk of being subjected to the death penalty, torture or inhuman treatment. The complainant argued that this fundamental right had been repeatedly infringed by the US government and certain EU Member State governments, and that the EU had infringed Article 19(2) of the Charter of Fundamental Rights by allegedly participating in these criminal activities. The complainant argued that the EU was not serving the public interest of EU citizens, but the interests of the US government.

5. As regards the Council's reference to Article 4(3) of the Regulation, the complainant submitted that there was an immense public interest in disclosure which by far outweighed any possible negative effects which might result from the disclosure of the EU/US discussions. The complainant stated that thousands of media reports had been written on the subject of the alleged illegal kidnappings and detentions, and that criminal investigations had been initiated in Italy and Germany.

6. By letter dated 3 March 2008, the General Secretariat of the Council rejected the confirmatory application and refused to grant access to the requested document on the basis of Article 4(1)(a), third indent, of the

Regulation. In its reply, the Council stated that the document in question "contains the report of the EU-US meeting held in the framework of the transatlantic dialogue, during which sensitive issues in the field of the fight against terrorism were discussed. It reports in detail on the positions taken by both sides. It contains an analysis and comments on this area of co-operation and an assessment on how the issues have so far been addressed by the two parties.

Given the sensitive content of the document, the Council considers that its disclosure would be detrimental to the good functioning of the relations between the EU and the US. It would hinder the diplomatic efforts being made to find constructive solutions to the outstanding issues in sensitive political areas. If the United States had reason to believe that the positions taken by it in meetings not open to the public may be made public unilaterally by the EU side, it would be difficult, if not impossible, to address controversial issues between the two sides in this format. This would not only breach the mutual confidence in the future negotiations but also, in turn, make it considerably more difficult to reach agreement between the two sides. ..."

The Council stated that it had also looked into the possibility of disclosing parts of the document pursuant to Article 4(6) of the Regulation, but that partial access could not be granted since the information contained in the document formed an inseparable whole.

THE SUBJECT MATTER OF THE INQUIRY △

7. In his complaint to the Ombudsman, the complainant claimed that the Council should grant full access to the document.

8. On 5 May 2008, however, during a telephone conversation with the Ombudsman's Office, the complainant indicated that he would also be happy if partial access could be granted to those parts of the document which were of interest to him. In an e-mail sent the same day, the complainant confirmed that such partial access to the relevant document would be satisfactory. The complainant further pointed out that he was only interested in information on legal aspects with regard to the "rendition" (kidnapping) programme of the US government which were covered in the document.

9. On 22 May 2008, the Ombudsman wrote to the Council, asking it to give its opinion on the complaint, and to address the following two issues:

1. First, in its decision of 3 March 2008 rejecting the confirmatory application, the Council argued that Article 4(1)(a), third indent, of the Regulation was applicable, since it would be difficult to address certain issues with the US if the latter had reason to believe that "*the positions taken by it in meetings not open to the public may be made public unilaterally by the EU side*". The Ombudsman pointed out that it was not clear how this reasoning could entitle the Council to refuse to grant access to those parts of the document which do not set out the position of the US, but that of the EU.
2. Secondly, the Ombudsman noted that the reasoning used by the Council to refuse partial access was extremely brief and limited, stating that "*the information contained in the document forms an inseparable whole*".

THE INQUIRY △

10. On 22 May 2008, the Ombudsman sent the complaint to the Council with a request for an opinion, which it sent on 28 July 2008. It was forwarded to the complainant, who sent his observations on 31 October 2008.

11. By letter dated 26 February 2009, the Ombudsman informed the Council that he considered it necessary to inspect the document which formed the subject of the complaint. On 10 March 2009, the complainant sent further comments to the Ombudsman. He also provided a copy of a United Nations Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

12. On 8 April, 19 May, 12 June, 14 and 21 September, and 18 and 25 November 2009, the Council and the Ombudsman exchanged letters on the procedure to be followed for the inspection in connection with the present complaint, and two other complaints.

13. On 8 December 2009, the inspection was carried out. On 17 December 2009, the Ombudsman sent a copy of the inspection report to the Council. On 18 December 2009, he sent a copy of the inspection report to the complainant with an invitation for him to submit observations before 31 January 2010. On 19 January 2010, the complainant asked the Ombudsman for a copy of the Council's letter dated 18 November 2009, and a copy of the Ombudsman's reply of 25 November 2009. On 29 January 2010, the Ombudsman forwarded the requested copies of the said letters to the complainant. The complainant did not submit any observations.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS



A. As regards the claim that full or partial access to document "COREU CFSP/SEC/1126/06" should be granted



Arguments presented to the Ombudsman

14. The complainant claims that the Council should grant full or partial access to the document entitled "COREU CFSP/SEC/1126/06" (classified as "RESTREINT EU"). In an e-mail sent on 5 May 2008, the complainant indicated that he was only interested in information on the legal aspects of the "rendition" (kidnapping) programme of the US government which were covered in the document.

15. In its opinion, the Council made the following comments:

i) Applicability of the exception of Article 4(1)(a), third indent, of the Regulation

16. The Council first dealt with the complainant's argument that the exception relating to the protection of international relations under Article 4(1)(a), third indent, of the Regulation was inapplicable in the present case since, in the complainant's view, the incidents covered by the relevant document, and the EU Member States' alleged involvement in those incidents, involved grave illegalities. It pointed out that the complainant was essentially arguing that the need for transparency was so great in the present case that it overruled the need to protect the document in question from disclosure. The Council recalled that the exceptions provided for in Article 4(1)(a) of the Regulation, including the protection of public interest as regards international relations, are *mandatory*. Therefore, once it is established that the requested document falls within the sphere of international relations, and that the protection of the interest would be impaired if the document were to be disclosed, the institution *must refuse* public access. There is therefore neither a need, nor even a possibility, of balancing the protected interest against other interests^[4]. On that basis, once it was determined that the conditions for the application of the said exception were met as regards the document in question, the Council was bound to refuse access to it. As a result, there was, therefore, no need to weigh the interest in the good functioning of transatlantic relations against the public interest in the disclosure of the said document.

ii) Applicability of the exception under Article 4(3) of the Regulation

17. The Council pointed out that, in its decision of 3 March 2008 on the complainant's confirmatory application, which is the subject of the present complaint, it no longer relied on Article 4(3) of the Regulation in order to refuse access to the document. It argued that the initial decision in the two-step administrative procedure is not open to review. The Council recalled that the General Court had consistently held that "*in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle open to review only if it is a measure definitely laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for the final decision.*"^[5]

iii) Reasons for refusing partial access

18. The Council emphasised that it had considered the possibility of granting partial access under Article 4(6) of the Regulation. However, and as indicated in paragraph 8 of its decision on the confirmatory application, the Council decided that partial access could not be granted "*as the information contained in the document form[ed] an inseparable whole*". The Council argued that this explanation fully enabled the complainant to understand the reasons for the refusal. In particular, it was possible to understand, first, that the entire document fell within the sphere of international relations. Second, due to its sensitive content, disclosure of the document, in full or in part, would be detrimental to the good functioning of EU-US relations.

19. The Council also pointed out that it was not possible to provide further information as to why the document could not be disclosed without revealing its contents, and that to do so would defeat the very purpose of the exception. In this respect, the Council recalled that the General Court has consistently held that if an institution relies on one of the mandatory exceptions in Article 4(1)(a) of the Regulation to reject a request for public access, the brevity of its statement of reasons does not constitute a failure to state reasons if first, it enables the applicant to understand or ascertain the reasoning followed, second, it enables an applicant to challenge a refusal effectively before the Court, and third, it enables the court to review the legality of the contested decision^[6].

20. As regards releasing only those parts of the document which set out the EU's position, the Council reiterated that the information contained in the document formed an inseparable whole, in the sense that it would be impossible to disclose one party's comments without also revealing the position of the other party to the discussions.

21. Finally, as regards the complainant's request to be given access to those parts of the document setting out the legal position of the negotiating partners, the Council reiterated that all the information contained in the relevant document was covered by the exception relating to the protection of international relations.

22. In his observations, the complainant argued that the Council had not offered any explanation or information on how partial or full disclosure of the document could be detrimental to public security in so far as international relations are concerned. The complainant reiterated his view that numerous crimes and infringements of national laws of EU Member States had been committed by the US government and by certain EU Member State government agencies, such as those of Poland, Italy and Romania. He stated that some other EU Member State governments, such those of Ireland, the United Kingdom and Germany, had chosen to turn a blind eye to the criminal acts which had occurred. Despite the fact that there was great public interest in this matter, which it indirectly acknowledged in its opinion, the Council had decided in favour of secrecy, and to shield the illegal activities from disclosure. The complainant submitted that the wording of the Regulation was vague and ambiguous and that this gave the Council the option of relying on secrecy, without having to answer to public scrutiny, or an outside review of the administrative process. He also argued that the Council's decision not to disclose the document, nor even a part of it, was based on political considerations and that the purpose of its decision was to serve the interests of the US government and certain EU government agencies that had either condoned or participated in illegal activities.

23. On 10 March 2009, the complainant enclosed with his further observations a copy of a United Nations Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The complainant submitted that this report examined the infringement of basic civil rights by European and US intelligence agencies. He expressed the hope that the Ombudsman would take the findings and recommendations of the report into consideration when making his final decision on the complaint.

The inspection of the document

24. On 8 December 2009, the Ombudsman's representatives carried out an inspection of the document which forms the subject of the complaint.

The Ombudsman's assessment

25. The Ombudsman would first like to point out that it is the Council's decision of 3 March 2008 on the complainant's confirmatory application which needs to be examined in the present case, and not its decision of 30 January 2007 on the initial application^[7]. The only issue he therefore needs to examine is whether the Council was entitled to apply the exception foreseen in Article 4(1)(a), third indent, of the Regulation in order to refuse access to the document concerned. Given that the Council no longer relied on Article 4(3) of the Regulation in its decision of 3 March 2008, there is no need for the Ombudsman to examine whether access could have been refused by applying that exception.

26. In his observations, the complainant expressed the view that the wording of Article 4(1)(a), third indent, of the Regulation is vague and ambiguous. Insofar as the complainant wishes to criticise the drafting of the Regulation, it is useful to recall that the Ombudsman can deal only with complaints about maladministration. He has no mandate to deal with complaints about the substance of EU legislation. As regards the present case, the relevant issue for the Ombudsman is whether the Council properly applied Article 4(1)(a), third indent, of the Regulation.

27. The Court of Justice of the EU has held that "*it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests*"^[8].

28. The Ombudsman verified by inspecting the document whether the conditions had been satisfied for the exception based on the protection of the public interest as regards international relations to be applied to the document requested by the complainant. The inspection showed that the relevant document contains a detailed report of an EU Troika-US meeting which took place on 3 May 2006 concerning anti-terrorism activities and policy, in the framework of the transatlantic dialogue. The document deals with several highly sensitive issues concerning the fight against terrorism, and it sets out the positions of both parties to the discussions. It contains a detailed analysis of the various issues that were discussed. On the basis of his inspection, the Ombudsman considers that the Council was justified in taking the view that the exception based on the protection of the public interest as regards international relations applies, and that releasing the document in question would be detrimental to EU-US relations.

29. In light of the case-law mentioned above, and the fact that the exception was found to be applicable, it is neither possible nor necessary to balance the interest protected by Article 4(1)(a), third indent, of the Regulation against other interests.

30. The Ombudsman examined whether the Council should have granted partial access. In its decision of 3 March 2008, the General Secretariat of the Council stated that it had looked into the possibility of disclosing parts of the document pursuant to Article 4(6) of the Regulation. It concluded, however, that partial access could not be granted since "*the information contained in the document forms an inseparable whole*". This statement of reasons is extremely brief. However, the Ombudsman's inspection showed that the comments in the document setting out the EU and US positions on the matters discussed were indeed intertwined, making it impossible to release parts of the document, for instance those setting out the EU's position, without infringing the protection of the interest covered by Article 4(1)(a), third indent, of the Regulation.

31. In light of the above, the Ombudsman concludes that the Council was entitled to apply the exception foreseen in Article 4(1)(a), third indent, of the Regulation in order to refuse access to the document.

C. Conclusion △

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

There was no maladministration by the Council.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 29 June 2010

[1] The complainant runs a website (<http://www.expose-the-war-profiteers.org/>) on which he publishes a detailed "document archive" of all his correspondence with the Council and the Ombudsman in the framework of the present complaint (944/2008/OV), and another complaint which he submitted to the Ombudsman (523/2009/TS).

[2] Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[3] The Ombudsman understands that, at the relevant time the term "EU-Troika" referred to the Foreign Affairs Minister of the Member State holding the Presidency of the Council of the European Union, the Secretary-General/High Representative for the common foreign and security policy, and the European Commissioner in charge of external relations and European neighbourhood policy.

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

[5] Case T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, par. 46.

[6] Case T-264/04 *WWF v Council* [2007] ECR II-911, par. 37.

[7] Case T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, par. 46.

[8] Case C-266/05 *P Sison v Council* [2007] ECR I-1233, par. 46; see also Case T-264/04 *WWF v Council* [2007] ECR II-911, par. 44.