



**RAT DER
EUROPÄISCHEN UNION**

**Brüssel, den 18. Juli 2008 (22.07)
(OR. en)**

9974/08

**OMBUDS 8
INST 69
INF 116
API 29
JUR 218**

I/A-PUNKT-VERMERK

der Gruppe "Information"

für den AStV (2. Teil) / Rat

Nr. Vordokument: 9973/08

Betr.: Beschwerde von Herrn Martin OTTMANN an den Europäischen
Bürgerbeauftragten (944/2008/OV)

Die Delegationen erhalten in der Anlage den von der Gruppe "Information" in ihrer Sitzung vom 17. Juli 2008 geprüften Entwurf einer Antwort des Rates auf das Schreiben, das der Europäische Bürgerbeauftragte im Zusammenhang mit der Beschwerde 944/2008/OV am 22. Mai 2008 an den Rat gerichtet hat.

Der Ausschuss der Ständigen Vertreter wird daher ersucht, dem Rat vorzuschlagen, dass er den in der Anlage enthaltenen Antwortentwurf auf seiner nächsten Tagung als A-Punkt annimmt.

Die Anlage liegt nur in englischer Sprache vor.

DRAFT

Brussels, ... July 2008

Mr Nikiforos Diamandouros
European Ombudsman
1, avenue du Président Robert Schuman
B.P. 403
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Subject: Request for public access to a document relating to a report of the EU-Troika meeting with the US authorities held on 3 May 2006 - Complaint made by Mr Martin OTTMANN (944/2008/OV)
- your letter dated 22 May 2008

Sir,

Thank you for your letter of 22 May 2008 concerning a complaint by Mr Martin OTTMANN in which you ask the Council to submit an opinion on the above matter. I am pleased to inform you of the Council's position on this question.

The complaint

1. In a complaint of 1 April 2008 to the Ombudsman submitted against the Council, Mr Ottmann contests the decision of the Council of 3 March 2008 in reply to a confirmatory application by the applicant, in which the Council denied public access to document COREU CFSP/SEC/1126/06. This document, which is classified RESTREINT UE, contains a report of the EU-Troika meeting with the US authorities held on 3 May 2006.

2. Further to the intervention by the services of the Ombudsman, who sought clarification of the scope of the complaint, the complainant informed the Ombudsman on 5 May 2008 that he wished to obtain access to the document in question as far as it related to the *"legal aspects with regard to the 'rendition' (aka kidnapping) program of the U.S. government"*.

The facts

a) Initial application

3. On 14 January 2008, the complainant requested public access to any Council documents relating to discussions that had taken place between the EU and US representatives on 3 May 2006 in Brussels on the subject of *"rendition"* and *"extraordinary rendition"*.
4. By letter dated 30 January 2008, the General Secretariat of the Council informed the complainant that a report of the EU-US meeting held on 3 May 2006 did exist and that it was contained in document COREU CFSP/SEC/1126/06, which was classified RESTREINT UE. The General Secretariat refused to grant public access to the document, pursuant to Articles 4(1)(a), third indent and 4(3) (protection of the public interest with regard to international relations and protection of the institution's decision-making process) of Regulation (EC) N° 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.¹ It also refused to grant partial access to the document under Article 4(6) of the Regulation, on the basis that the entire document was covered by the referred exceptions.

b) Confirmatory application

5. In his confirmatory application of 12 February 2008, the complainant contested the initial reply of the General Secretariat, claiming that the exceptions under Article 4(1)(a), third indent, and Article 4(3) of the Regulation were not applicable in the present case.

¹ OJ L 145 of 31.05.2001, p. 43.

6. Following reconsideration of the complainant's arguments and after new internal consultations, the Council took a decision on the confirmatory application, whereby it denied public access to the document in question, pursuant to the third indent of Article 4(1)(a) of the Regulation.
7. In its decision, the Council, first of all, established that the requested document fell within the scope of the exception regarding the protection of international relations, since it contained a 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 and which reported in detail on the positions taken by both sides.
8. The Council then justified the need for protection of the invoked public interest by specifying that disclosure of the document would be prejudicial to the good functioning of the relations between the EU and the US. In particular, it pointed out that, if the US had reason to believe that the positions it had taken in the meetings not open to the public might be made unilaterally public by the EU side, it would be difficult, if not impossible, to address in future controversial issues between the two sides in this format.
9. The Council refused to grant partial access to the requested document, since the *"information contained in the document forms an inseparable whole"*.

c) *Complaint to the Ombudsman*

10. In his complaint 944/2008/OV, the complainant deems that the Council's decision refusing access to the requested document is unfounded for the following reasons:
 - i) The exception under the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) *"becomes void"*, because of the illegality of the acts the document makes reference to and the alleged involvement or complicity of the EU governments in the various illegal kidnappings, detentions and transportations of detainees by the US authorities;

- ii) As to the exception under Article 4(3) of the Regulation (protection of the institution's internal decision-making), there exists an overriding public interest in disclosure, which clearly outweighs the possible prejudice caused to the institution's decision-making.

In his letter of 22 May 2008 informing the Council of the opening of an inquiry in the above complaint, the Ombudsman requests the Council to elaborate on the following issue:

- iii) Given the “extremely brief” reasoning relied upon by the Council in refusing partial access to the document, it is uncertain how those reasons can also justify the denial of access to those parts of the document which do not set out the position of the US but that of the EU.

Observations

The above three questions are discussed separately.

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

11. The applicant claims that, given the grave illegalities surrounding the incidents invoked in the requested document and the EU Member States' involvement in these activities, the exception relating to the protection of international relations under Article 4(1)(a), third indent, is inapplicable to the present case. By this argument, the complainant essentially contends that, having regard to the specific facts of the case, the need for transparency is so pressing that it overrides the need to protect the document in question from disclosure.

12. First of all, the Council would recall 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. In consequence, once it is established that the requested document falls within the sphere of international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed, the institution must refuse public access. There is neither a need nor even a possibility to balance the protected interest against other interests.¹
13. In the light of the foregoing, after having determined that the conditions were met for the application of the international relations exception pursuant to Article 4(1)(a), third indent of the Regulation, the Council was bound to refuse access to the requested document, without the possibility of weighing the interest in the good functioning of the transatlantic relations against the public interest in the disclosure of the document, evoked by the applicant.

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

14. The complainant contends that when evoking the exception under Article 4(3) of the Regulation (internal decision-making of the institution) for refusing public access, the Council did not take into account the existence of an immense public interest which, in the complainant's view, outweighed the possible damage resulting from disclosure.
15. In this regard, the Council would point out that, in its decision of 3 March 2008 on the applicant's confirmatory application — which is subject of the present complaint — it did not invoke Article 4(3) of the Regulation to refuse access to the document and therefore it cannot be accused of having failed to appreciate the pressing public interest, in accordance with Article 4(3) of the Regulation.

¹ See case C-266/05 P Sison v. Council, [2007] ECR I-1233, pt. 46.

16. In this respect, your attention is drawn to the fact that the initial decision in the two-step administrative procedure is not, as such, open to review. As it has been consistently held by the Court of Justice, *"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"* (case T-70/04 Franchet and Byk v. Commission [2006] ECR II-2023 para. 46).

c) *Reasons for refusing partial access*

17. The Council would emphasise that it did consider the possibility of granting partial access under Article 4(6) of the Regulation. However, as it is clear from paragraph 7 of the decision on the confirmatory application, the Council found that partial access could not be granted, *"as the information contained in the document forms an inseparable whole"*.

18. The statement of reasons underlying the decision refusing public access fully enabled the applicant to understand the reasons for the refusal. In particular, it was possible to understand, firstly, that the entire document falls within the sphere of international relations and secondly, that, due to its sensitive content, disclosure in full or in part of the document would be detrimental to the good functioning of the relations between the EU and the US.

19. The Council would point out that it was not possible to provide all information as to why the document cannot be disclosed without revealing its contents and without thereby depriving the exception of its very purpose. In this respect, it would recall that the Court has consistently held the brevity of the institution's statement of reasons for the rejection of a request for public access when relying on one of the mandatory exceptions in Article 4(1)(a) does not constitute a failure to state reasons as long as it enables the applicant to understand or ascertain the reasoning followed, to enable him to challenge that refusal effectively before the Court and to enable that court to review the legality of the contested decision.¹

¹ See T-264/04 WWF-EPO v Council [2007] ECR II-911, pt. 37.

20. As to the possibility of releasing only those parts of the document which set out the position of the EU, the Council would reiterate that the information contained in the document forms an inseparable whole, in the sense that it would be impossible to disclose the comments by one of the parties without also uncovering the position of the other party to the discussions.
21. Finally, as regards the complainant's request to receive public access to those parts of the document setting out the legal position of the negotiating partners, the Council reiterates that the exception relating to the protection of international relations covers all information contained in the document.
22. For the reasons set out above, the Council believes the complaint to be unfounded.

(Complimentary clause)

Pierre de Boissieu