

## Second report on the implementation of Council Decision 93/731/EC on public access to Council documents (19 June 1998)

**Caption:** Second report, drawn up by the Secretary-General of the Council of the European Union in June 1998, pursuant to Article 9 of the Decision, concerning the implementation of the Council Decision of 20 December 1993 on public access to Council documents during the period 1996–1997.

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## Second report drawn up by the Secretary-General of the Council on the implementation of the Council Decision on public access to Council documents (1996-1997)

### Introduction

The conditions governing public access to Council documents are laid down by Decision 93/731/EC <sup>(1)</sup>, as amended by Decision 96/705/EC <sup>(2)</sup>, in accordance with the principles set out in the Code of Conduct of 6 December 1993 concerning public access to Council and Commission documents <sup>(3)</sup>. Decision 93/731/EC stipulates a maximum time for replying to an applicant for a Council document, and provides for a detailed examination of his application together with the possibility of making a confirmatory application should the initial reply from the Secretary-General of the Council be a rejection.

Should a confirmatory application be rejected, the applicant is notified of the content of Articles 138 E and 173 of the Treaty establishing the European Community, relating respectively to the conditions for referral to the Ombudsman by natural persons and to the review by the Court of Justice of the legality of Council acts.

Pursuant to Article 9 of the Decision, the Secretary-General of the Council must, in 1996, and subsequently every two years, submit a report on implementation of the Decision.

The first report by the Secretary-General, submitted in July 1996 <sup>(4)</sup>, reviewed the policy of public access to Council documents for the first two years of its implementation (1994-1995). That report gave rise to the amending Decision referred to above, and to the Council's adoption of a set of conclusions on public access to Council documents on 6 December 1996. <sup>(5)</sup>

Following the pattern of the first report, this report, which has been drawn up on the responsibility of the Secretary-General, contains:

- a review of the policy of public access to Council documents for the period 1996-1997;
- a brief analysis of the main issues arising in implementation of that policy, including disputes to which it has given rise during that period.

### 1. Launching and consolidation of the policy of access to documents

The period covered by this report was one of consolidation of the document access policy and of the various measures recently adopted by the Council to increase the transparency of its work and thereby bolster peoples' confidence in the Council.

Following the first period, 1994-1995, which could be regarded as a "running-in" period for document access, when the different Council structures had to adapt to requirements which had not been experienced to that point, the scheme took off in the period 1996-1997 with an increase in the number of applications dealt with and a degree of standardization in Council practice. This dual phenomenon was accompanied by an increased awareness on the part of all those involved that greater transparency was necessary.

That this policy in fact took off is illustrated by the fact that the number of documents applied for under the Decision increased virtually tenfold over the two two-year periods (see statistical table in the **Annex**), 3 325 documents being compulsorily examined in 1996-1997 as against 378 in 1994-1995.

This substantial increase is reflected in the number of individual cases, or applications made, which generally speaking were for several documents; the number of applications increased from 142 in 1994-1995 to 451 in 1996-1997.

Once they are registered, applications for access to Council documents are examined by the appropriate

departments of the General Secretariat and the applicant notified of the outcome.

Where an application is rejected, the applicant is informed of the grounds for refusal, and then has one month to make a confirmatory application to have the General Secretariat's decision reviewed by the Council.

The confirmatory applications are then examined by the Council's preparatory bodies (Working Party on Information and Permanent Representatives Committee) before the Council adopts its reply.

The statistics for the whole procedure (initial applications and confirmatory applications) reveal that the percentage of documents supplied increased from 58,7% in 1994-1995 to 78,3% for the period covered by this report despite a considerable increase in the number of documents requested.

The explanation for this upward trend to the benefit of applicants is attributable to the increase in the percentage of documents supplied by the General Secretariat on behalf of the Council, i.e. at the first stage of the procedure, from 48,9% for the period 1994-1995 to 72,7% in 1996-1997.

This is largely due to the experience gained by the General Secretariat in interpreting Decision 93/731/EC. The General Secretariat acts on behalf of the Council when it sends applicants preliminary replies.

Although it had to deal during the reference period with three times more confirmatory applications following the General Secretariat's refusal to supply documents, the Council overturned the General Secretariat's initial reply for only 5,6% of documents; that percentage had been close to 10% in the preceding two-year period.

Another noteworthy aspect which provides some evidence that the policy has stabilized, is the growing number of unanimous replies given by the Council to confirmatory applications. In fact half the confirmatory applications made during the reference period were given unanimous replies by the Council, and a large number were voted down by only one or two members of the Council.

## **2. Progress made by the Council towards openness and transparency**

Clearly, with the percentage of documents supplied approaching 80% and a high number of documents being considered, the policy of public access to documents is proving to be a useful and efficient instrument in aid of transparency.

Such a conclusion seems even more appropriate at a time when the largest number of applications concern the Council's activities in the particularly sensitive area of cooperation on Justice and Home Affairs.

It is important here to stress that the opportunity to gain access to Council documents is only one element among many in the Council's general policy of openness and transparency, which has developed considerably in the last few years.

Pride of place must go to the efforts made by successive Council Presidencies and by the General Secretariat's Press Office to achieve greater transparency in the Council's discussions for the benefit of the media, together with the important contribution made by the Member States individually and by the Commission, which participates in the Council's discussions at every level and also helps to give briefings on its discussions.

The practice of public Council debates – accessible both to journalists and the general public – continued (18 in 1996; 16 in 1997). A recent move to make many more people aware that these debates existed drew more than 200 people, other than journalists, to the Council chamber to follow its deliberations. In addition, there is the potentially huge audience for the debates when televised by TV stations via the Commission's "Europe by Satellite" channel and, less often, live by TV stations.

Nonetheless, in view of the still relatively low impact and drawing power of such debates, the Council should consider how best to maximize the potential of such an instrument.

Implementation of the measures on legislative transparency was also continued during the reference period.

The Council thus systematically made public details of the voting when legislative acts were adopted. The Council and its Members also made moderate use of the statements entered in the minutes on the final adoption of such acts. Under the Code of Conduct of 2 October 1995, the Council allowed access to 398 statements in the minutes in 1996 and 361 in 1997 for a total of 229 and 218 legislative acts respectively.

The Council General Secretariat made arrangements for statements in the Council minutes, entered when legislative acts were finally adopted, and extracts from the relevant minutes to be available on the Internet in the course of 1998, using the "Eudor" system (<http://eudor.eu.com>) which is managed by the Office for Official Publications of the European Communities.

Apart from the monthly summaries prepared by the Council General Secretariat, which include any statements in the minutes and details of the voting in respect of legislative acts which have been finally adopted, annual summaries are prepared for each sector and since 1995 have been published as an Annex to the "Review of the Council's work".

As regards positive measures to increase information about the Council's work, the General Secretariat undertook a series of initiatives in the form of conventional publications (leaflets, brochures, reference works and compilations of texts) but more particularly in the area of electronic publishing.

The Council thus has a website (<http://ue.eu.int>) giving access in all the official Community languages to press releases and other news published by the General Secretariat's Press Office, accounts of the aims and working methods of the Council with practical information, plus an easy-to-consult database containing the texts adopted under the Common Foreign and Security Policy (CFSP).

A similar database to the CFSP one, also accessible from the Council's website, will shortly be set up for texts adopted in the area of Justice and Home Affairs (JHA).

The Council's website is visited by an average of 4 000 people a week, who consult an average of ten different pages. In addition, an average 80 requests for information per month are received by e-mail at the address [public.relations@consilium.ue.int](mailto:public.relations@consilium.ue.int) shown on the home page of the website.

This electronic dialogue option is in addition to the numerous requests for information made to the General Secretariat's documentation and information services by more conventional means, as well as requests made directly to other General Secretariat departments, not to mention direct contacts with people on information visits to the Council and at public events such as the annual Open Day.

Following the Council's request to the Secretary-General <sup>(6)</sup> to take steps to alert the public to the possibilities regarding transparency at the Council, particularly in connection with access to documents, the General Secretariat produced a Council Information Guide, which explains how the different instruments operate, thus enabling the general public in particular to keep informed about the work of the Council in practical terms.

Furthermore, in view of the perceived specific needs for transparency in the work stemming from cooperation in the area of Justice and Home Affairs (JHA), the Council agreed on 19 March 1998 on a number of measures ranging from publication of schedules of meetings to an increase in the number of press briefings and publication of periodic reports, explanatory documents and lists of measures taken by the Council in the JHA field.

### **3. Main features in the policy on access to documents**

### 3.1. Identifying documents – establishing a public register

Article 2 of Decision 93/731/EC lays down that applications must be made in a sufficiently precise manner, failing which applicants may be asked for further details before their applications can be considered.

From the outset one of the main problems in the day-to-day operation of the policy on public access to Council documents has precisely been the difficulty that applicants have had in identifying the documents they require.

To alleviate this problem, the first report on the implementation of Decision 93/731/EC put forward the possibility of establishing a register of Council documents.

In view of these difficulties, the Council on 6 December 1996 noted the Secretary-General's intention of examining whether it would be possible to establish such a register. This examination was conducted in 1997, leading to the General Secretariat presenting a draft proposal at the beginning of 1998.

On the basis of that draft proposal, on 19 March 1998 the Council decided to publish as soon as possible, preferably in 1998, a register of Council documents as a counterpart to the existing system of electronic archiving of Council documents.

The register will be available to the public via the Internet. It will be a multilingual tool offering an appropriate range of options which will enable anyone to identify Council documents. It will contain the titles, dates and reference numbers of non-classified documents, but will not allow the content of the document to be posted on screen so as to preserve the right of the Council not to communicate a document for one of the reasons adduced in Decision 93/731/EC.

The availability of the register via the Internet should mean a wider professional and geographical spread of applicants, as these have hardly changed since the establishment of the policy of access to documents (see statistics in the **Annex**).

### 3.2. Application of Article 4 – cases in which access to a document shall not be granted

The first report on implementation of Decision 93/731/EC alerted the Council to the problems of protecting documents containing legal positions of the Council Legal Service and also giving protection to the Council's proceedings.

(a) The question of legal positions of the Legal Service has since been the subject of the Order made by the President of the Court of First Instance on 4 March 1998 in Case T-610/97, *Hanne NORUP CARLSEN v. Council*. In paragraphs 45 and 46 of that Order, in the context of the request for an injunction ordering the Council to release to the Højesteret (the Danish Supreme Court) and the parties in the case pending before that court documents setting out opinions of the Council and Commission Legal Services dating from 1977, the President of the Court comments that were the Opinions on legal matters delivered by the Institutions' Legal Services to be divulged, *"the discussions and exchanges of views within the institutions on the legality and scope of the legal measure to be adopted would be made public and hence, as it stated, the Council might lose all interest in asking the Legal Services for written opinions. In other words, it appears, at least on an initial examination, that disclosure of those documents could give rise to uncertainty with regard to the legality of Community measures and have a negative effect on the functioning of the Community institutions. The stability of the Community legal order and the proper functioning of the institutions, which are matters of public interest for which it is unquestionably necessary to have due regard, would suffer as a result"*.

In addition, the President of the Court comments that *"given the special nature of opinions of the Legal Services, it would not appear that those documents are bound, over the years, to lose their confidential character. Their disclosure could still be detrimental to the public interest in the stability of the Community legal order and the proper functioning of the Community institutions, inasmuch as time is not likely to alter*

*the reasons, mentioned above, justifying such an exception to the right of access" (paragraph 50 of the Order).*

The main proceedings concerning the legality of that decision are still in progress.

(b) With reference to the option given in Article 4(2) of Decision 93/731/EC whereby access to documents may be refused in order to protect the Council's proceedings, the period 1996-1997 saw such justification being used less and less frequently in cases of refusal of access, at least for Council documents where the Council acted as legislator.

A growing number of documents containing delegations' positions, even in great detail, were accordingly released to applicants, particularly when the matters covered were the subject of an act adopted by the Council. In such cases, the balance between the Council's interest in protecting the confidentiality of its proceedings and that of the public in knowing the background to the conception of an Act which might be of direct concern to citizens frequently swung in favour of the latter.

The General Secretariat's practice in the first stage, and that of the Council at the confirmatory stage, reflects the political will of the Member States as expressed in the Amsterdam Treaty signed on 2 October 1997. It would therefore seem a good idea to continue this practice so that in cases of documents concerning the Council acting as legislator, the clause on protecting the Council's proceedings (Article 4(2) of the Decision) would be used with moderation, with Article 4(1) of the Decision being the most frequently invoked provision in cases where access was refused.

There was growing public interest during this period in other Council activities, particularly in the field of cooperation on Justice and Home Affairs (JHA), and this was reflected in a very high number of applications in this area (46% of documents requested in 1996/1997). The fact that, once adopted, a large proportion of the acts adopted by the Council in this area may be of potential significance to citizens and to natural persons who are citizens of third countries, has a considerable influence on the balance of interests when it comes to releasing preparatory documents for such acts. This explains why there is often a large majority – even unanimity – in the Council in favour of granting requests for access to documents containing delegations' positions once the act in question has been adopted, given of course the major consideration that the effectiveness of the Council's decision-making process must be preserved for the future.

### **3.3. Application of Article 2(2) (documents not drafted in the Council)**

Article 2(2) of Decision 93/731/EC states 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."*

Implementation of this clause has in practice given rise in particular to a problem of interpretation concerning Council Presidency documents. On this point, the Council in its reply to a question from the European Ombudsman (see below) explained that for the purposes of Article 2(2) of the Decision a distinction should be made between documents drafted by a member of the Council holding the Presidency in its capacity as the Member State in the Council Presidency, and documents produced by that Member State which did not stem from its capacity as holder of the Council Presidency but contained a national position. Under Decision 93/731/EC it was for the Council to decide whether or not it was possible to grant access to documents of the first type, whereas Article 2(2) of that Decision applied to documents of the second type.

### **3.4. Procedural questions**

Further to the comments made in the first report on implementation of Decision 93/731/EC, the Council decided to include a clause in the text of the Decision allowing, as an exception and after notifying the person concerned, for a one-month extension to the time-limits for reply.

This provision has been in force since 14 December 1996, the date when Decision 96/705/EC amending Decision 93/731/EC entered into force. No objection has been raised to the General Secretariat and the Council exercising this option whenever practical considerations such as holiday periods called upon it to do so.

### 3.5. Manifestly excessive applications

The first report on the implementation of the Decision highlighted the issue of applications which are manifestly excessive or involve disproportionate costs.

It should be noted that the only provision in the Decision to shield the institution from such practices is Article 3(2), which stipulates that the relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents.

In spite of the differing ways in which that provision has been construed, the Council did not see fit, in the first review, to clarify this principle in order to cope with applications clearly designed to put the system to the test.

However, with a sizeable increase in applications in prospect, particularly following the introduction of a public register of documents, this point would seem to call for closer consideration.

In this connection the figures show that, over the period 1996-1997, two applicants alone accounted for 58% of the documents applied for. As a result of their 62 and 55 initial applications and their subsequent 17 and 20 confirmatory applications, those two applicants each obtained over 700 documents from the Council.

There can be no escaping the fact that the administrative cost of scrutinizing the documents in question and handling applications is out of all proportion to the contributions levied by way of fees <sup>(7)</sup>.

It should be pointed out that a confirmatory application involves detailed examination not only by the various departments concerned in the General Secretariat but also at one or more meetings of the Council Working Party on Information, with delegations first being sent copies of the documents applied for, preparation of draft replies in the official languages and consideration of cases by Permanent Representatives (Coreper) and by Ministers at a Council meeting.

In the first review of Decision 93/731/EC, the Council took note that "the Secretary-General, in the context of the fees fixed under the Decision, will examine the question of applications covering a high number of documents and hence involving particularly high administrative costs". No action has to date been taken on that statement.

It should be pointed out here that, even though some applicants might derive commercial gain from the documents obtained, the clause in Article 3(3) of the Decision <sup>(8)</sup> has not been invoked either by any applicant or by the Council where one of the applicants proved in fact to have published a collection of texts.

### 3.6. Legal action and complaints to the Ombudsman

#### (a) Legal action

In early 1996 there was a sequel to Case T-194/94 (*John Carvel and Guardian Newspapers v. Council*), already referred to in the previous report, before the Court of First Instance (Case T-19/96, *John Carvel and Guardian Newspapers v. Council*).

Following the judgment given by the Court of First Instance on 19 October 1995 in Case T-194/94 <sup>(9)</sup>, annulling the Council's decision to reject the applicants' confirmatory application, the Council reconsidered that application and in a letter of 27 November 1995 supplied a number of documents to the applicants. That

reply gave rise to further proceedings by the applicants in the main case, who considered that the Council had failed to supply some documents covered by their application. After the Council supplied further documents, the applicants asked the Court to remove the case from the register and order the Council to pay the costs of the proceedings.

In its order of 22 October 1996 in Case T-19/96 <sup>(10)</sup>, the Court of First Instance removed the case from the register and ordered the applicants to pay the costs of the proceedings, mainly on the grounds that the Council had not been unreasonable in its interpretation of the subject of the applicants' original request. The Court therefore held that in this instance the applicants had not been compelled by the Council's attitude to bring their proceedings unnecessarily.

In the period covered by this report, Decision 93/731/EC has given rise to only one further dispute: Case T-14/98, *Heidi Hautala v. Council*. In an application notified to the Council on 21 January 1998, Ms Hautala, MEP, brought proceedings before the Court of First Instance for annulment of the Council's decision of 4 November 1997 refusing access to a document drawn up under the common foreign and security policy, namely a report to the Political Committee by the Working Party on Conventional Arms Exports. The Council decided that disclosure of the report in question could be harmful to the European Union's relations with non-member countries and it therefore refused access to the document.

Case T-174/95 (*Tidningen Journalisten v. Council*), already referred to in the previous report, is still pending before the Court of First Instance.

Mention should also be made here of two judgments by the Court of First Instance with regard to Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents <sup>(11)</sup>, namely the judgment of 5 March 1997 in Case T-105/95, *WWF UK v. Commission*, ECR II-315, and the judgment of 6 February 1998 in Case T-124/96, *Interporc Im- und Export GmbH v. Commission*, not yet published.

Lastly, although the subject-matter of the dispute was a decision by the Council based not on Decision 93/731/EC but on Article 5(2) of the Council's Rules of Procedure, the question of not allowing public access to opinions given by the Council Legal Service was the subject of the Order made by the President of the Court of First Instance on 4 March 1998 in Case T-610/97 (*Hanne NORUP CARLSEN v. Council*), referred to earlier.

#### (b) Complaints to the Ombudsman

In 1997 the European Ombudsman received two complaints, in January and July 1997 respectively, concerning the Council's implementation of Decision 93/731/EC. The complainants, who are the abovementioned two frequent applicants for large numbers of Council documents, raise the following main points:

- the application by the Council of the fair solution referred to in Article 3(2) of Decision 93/731/EC to deal with repeat applications and/or those which relate to very large documents;
- the keeping and filing away in historic archives of the telexes sent to delegations to give notice of meetings;
- the lack of lists of decisions taken by the Council in the field of JHA cooperation;
- the form in which reasons are given for decisions refusing access to Council documents and the consideration en bloc of a number of applications for access;
- the Council's alleged failure in specific cases under Article 4(2) of Decision 93/731/EC to weigh the applicant's interest in gaining access to a document against the Council's interest in maintaining the confidentiality of its proceedings;

- the Council's interpretation of Article 4(1) of Decision 93/731/EC as regards refusal to grant access to a document from the Working Party on Terrorism;
- the lack of any register of Council documents.

The Ombudsman is currently looking into the merits of those complaints in the light of comments and further information provided by the Council. However, at least two of the points raised by the complainants have already been addressed either by a change in Council practice or by specific measures decided on by the Council.

- A register of Council documents is to be made available to the public on the Internet as soon as possible, if all goes well in 1998 (see 3.1 above).
- The fair solution referred to in Article 3(2) of Decision 93/731/EC, only very rarely used in the past, is even less used now, despite constant applications by the two complainants in question, who are using a systematic approach to obtain almost all documents within a particular area of Council activities (JHA).

### **Annex – Statistics on public access to Council documents**

#### [Statistics on public access to Council documents \(1994-1997\)](#)

- (1) OJ L 340, 31.12.1993, p. 43.
- (2) OJ L 325, 12.12.1996, p. 19.
- (3) OJ L 340, 31.12.1993, p. 41.
- (4) 8330/96.
- (5) 11974/96 + COR 1 REV 1.
- (6) Council conclusions of 6 December 1996 (11974/96 + COR 1 REV 1).
- (7) The Decision of the Secretary-General of the Council of 27 February 1996 (OJ C 74, 14.3.1996, p. 3) sets a fee of ECU 10 plus ECU 0,036 per sheet of paper, only where copies sent exceed 30 pages.
- (8) Article 3(3) of the Decision reads as follows: " Anyone given access to a Council document may not reproduce or circulate the document for commercial purposes through direct sale without prior authorization from the Secretary-General. "
- (9) ECR II-2767.
- (10) ECR II-1520.
- (11) OJ L 46, 18.2.1994, p. 58.