



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 13 January 2014

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COVER NOTE

from : General Secretariat of the Council
to : Delegations

Subject : Decision of the European Ombudsman closing her inquiry into complaint
1854/2012/KM against the Council

Delegations will find at Annex a copy of a letter sent by the European Ombudsman to the Council concerning the Ombudsman's decision to close her inquiry into complaint 1854/2012/KM made by Mr Lorand Bartels against the Council.



European Ombudsman

1854/2012/KM
S2014-185861

Emily O'Reilly
European Ombudsman

Mr Uwe Corsepius
Secretary-General
Council of the European Union
1048 BRUSSELS
BELGIQUE

Strasbourg, 09/01/2014

Decision of the European Ombudsman closing her inquiry into complaint
1854/2012/KM against the Council of the European Union

Dear Mr Corsepius,

Please find enclosed a copy of my above decision, which has been sent
to the complainant, Dr Lorand Bartels.

On the basis of my inquiry into this complaint, I have decided to close it
with the following conclusion:

The Council has settled the case to the complainant's satisfaction.

Yours sincerely,

Emily O'Reilly

cc: Mr Hubert Legal, Director-General of the Legal Service

Enclosure:

- Decision on complaint 1854/2012/KM



European Ombudsman

1854/2012/KM

S2014-185860

Emily O'Reilly
European Ombudsman

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Strasbourg, 09/01/2014

Decision of the European Ombudsman closing her inquiry into complaint
1854/2012/KM against the Council of the European Union

Dear Dr Bartels,

On 11 September 2012, you submitted a complaint to the European Ombudsman against the Council of the European Union concerning its rejection of your application for access to certain documents.

After a careful analysis of all the information submitted, I have decided to close my inquiry with the following conclusion:

The Council has settled the case to the complainant's satisfaction.

Please find enclosed my decision on your complaint.

In your observations, you also submitted a question on the content of one of the documents inspected by my services and stated that you would like to obtain another document of which you had only become aware as a result of this inquiry, but were unsure whether this could be arranged in the framework of the present inquiry.

I regret that I am unable to reply to your question on whether the third paragraph on page 3 of document 7008/09, which directly follows the paragraphs to which the Council decided to grant access, might shed some further light on the use human rights clauses. Article 4(1) of the Ombudsman's Statute provides as follows: *"The Ombudsman and [her] staff [...] shall be required not to divulge information or documents which they obtain in the course of their inquiries. They shall, in particular, be required not to divulge any classified information or any document supplied to the Ombudsman, in particular sensitive*



documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, or documents falling within the scope of Community legislation regarding the protection of personal data, as well as any information which could harm the person lodging the complaint or any other person involved [...]."

During the inspection carried out in the present case, which took place in accordance with Article 5(2) of the Ombudsman's Implementing Provisions, the Council identified the entirety of document 7008/09 as being confidential. After my services suggested a re-examination of the matter, the Council decided to grant access to the introductory paragraphs. However, the remainder of the document remains confidential. Therefore, in accordance with Article 13(3) of the Implementing Provisions, which provides that the complainant shall not have access to "*documents or information obtained by virtue of Article 5.1 or 5.2 above which have been identified to the Ombudsman as confidential*", I am unable to reply to your question concerning the content of the inspected document.

As regards the additional document in which you are interested, that is to say, the Council's document 17370/08 on "*Clauses de nature politique dans les accords conclus avec les pays tiers*", I have to inform you that I do not have a copy of this document. I would advise you to make an application, to the Council, for access to that document. Should you not receive a satisfactory reply within the time limits foreseen in Regulation 1049/2001, you could consider submitting a new complaint to the Ombudsman.

Yours sincerely,

Emily O'Reilly

Enclosure:

- Decision on complaint 1854/2012/KM



Decision

of the European Ombudsman closing her inquiry into complaint 1854/2012/KM against the Council of the European Union

The background to the complaint

1. The complainant teaches law at a UK university. On 4 June 2011, he wrote to the Council of the European Union ("the Council") to request access, under Regulation 1049/2001¹, to documents 10491/1/09 REV 1, 7008/09 and 7008/09 COR 1. His request was registered on 6 June 2011.

2. On 24 June 2011, the Council rejected the application. It explained that Document 7008/09 was a note from the European Commission and the Council's General Secretariat to the Member States. It concerned reflections on the so-called political clauses (also sometimes referred to as human rights and democracy clauses) found in agreements signed with third countries, in particular on "*options for their use in the future in order to effectively further the aims of EU policy.*" Document 7008/09 COR 1 is a corrigendum to this document.

3. Document 10491/1/09 REV 1 was a note from the General Secretariat of the Council to COREPER² on the definition of a common approach on the use of such political clauses. It was classified as "RESTREINT UE". That means that it was judged to contain "*information and material the unauthorised disclosure of which could be disadvantageous to the interests of the European Union or of one or more of the Member States.*"

4. The Council explained that the documents fell under the exception of Article 4(1)(a) of Regulation 1049/2001 (which protects the public interest with regard to international relations): releasing them would "*seriously weaken*" the EU's position in relation to "*current and future negotiation partners*". Article 4(3) of Regulation 1049/2001 (on the protection of the decision-making process) also applied. This was because disclosure would make a "*frank and efficient exchange of ideas on this important and politically delicate issue impossible*", which would disrupt the Council's decision-making process. The Council added that it had not identified an overriding public interest in disclosure.

5. In conclusion, the Council stated that it could not give access to the requested documents because the exceptions relied upon applied to all three. However,

¹ 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 documents, OJ 2001 L145 p.43.

² COREPER stands for the Committee of Permanent Representatives, in which the heads or deputy heads of the Member States' missions to the EU prepare the agenda for the meetings of the Council of the European Union.



the complainant could make a confirmatory application for access if he disagreed with this analysis.

6. The complainant did so on 4 July 2011, arguing that the documents had been referred to in publicly available documents and were of public interest.

7. On 24 July 2011, the Council gave partial access to the cover note to Document 10491/1/09 REV 1, to the partially declassified version of this document, and to the introductory paragraph of Document 7008/09. As regards the remainder of the documents, however, it rejected the confirmatory application.

8. The Council explained that document 7008/09 was an internal reference document drafted in preparation of a discussion which aimed at finding a common approach on political clauses, which the EU used to address its key policy objectives in international agreements. It was never intended to be released. The document contained an analysis of the problems encountered when political clauses were used and proposed improvements. Although parts of the document contained facts and information which were indeed in the public domain, the way in which this information was presented was intrinsically linked to the structure and content of the reflection paper. Releasing these parts of the document would therefore undermine the public interest as regards international relations. This was why the Council could only disclose the introductory paragraph of the document.

9. Document 10491/1/09 was closely related to Document 7008/09 and was also internal. Its annex set out the common approach on political clauses agreed by COREPER. The common approach had a "*horizontal importance*" for negotiations with third countries in areas which were "*of particular international sensitivity*". This was the reason why the document had been classified as "*RESTREINT UE*".

10. The two documents mentioned above were intrinsically linked in the sense that if one document was disclosed, the contents of the other could easily be deduced. This would allow undue influence on the political decision-making process as regards the use of political clauses in international agreements. Disclosure would thus risk affecting diplomatic relations and undermining the mutual trust between the EU and third countries, as well as the negotiating position of the EU and its Member States in ongoing and future negotiations.

11. In relation to the complainant's arguments that the documents had been referred to in publicly available documents and that there was a public interest in disclosure, the Council recalled that the exception in Article 4(1)(a) was a "mandatory exception", that is, one which does not have to be balanced against an overriding public interest in disclosure. Therefore, once it was established that disclosure of a document would undermine the public interest as regards international relations, the document could not be released.

12. In conclusion, the Council confirmed the decision not to disclose the documents on the basis of Article 4(1)(a) of Regulation 1049/2001.

13. In his complaint, the complainant alleged that the Council had wrongly failed to disclose the documents and argued that it was in the public interest that they be disclosed.



The subject matter of the inquiry

14. The complainant submitted the following allegation and claim.

Allegation

The Council of the European Union wrongly failed to disclose documents 1049/1/09 REV 1, 7008/09 and 7008/09/COR1.

Claim

The Council of the European Union should disclose the documents.

The inquiry

15. The complaint was submitted on 11 September 2012. On 15 October 2012, the Ombudsman opened an inquiry into the complaint by asking the Council to make the documents available for inspection by her services, in order to allow her to assess whether to ask the Council for an opinion on the matter. On 12 December 2012, the Council agreed to the inspection of the documents.

16. The Ombudsman's services inspected the documents on 28 January 2013. A report on the inspection was sent to the complainant and the Council on 4 March 2013. The complainant submitted his observations on the report on the same day.

17. On 29 April 2013, the Council sent a letter in response to the inspection report. It explained that it had thoroughly re-examined the documents and had decided that it could grant extended partial access to the documents requested by the complainant.

18. On 20 June 2013, the Council's letter was forwarded to the complainant with an invitation to submit observations. The complainant made his observations on 30 June 2013.

The Ombudsman's analysis and conclusions

A. Allegation of failure to disclose the requested documents

Elements considered by the Ombudsman

19. As set out above, the Council initially argued that it could not grant access to the documents requested by the complainant because this would risk undermining the public interest as regards international relations.

20. In his complaint, the complainant explained that he was interested in a "statement about the EU's new policy of linking new EU agreements to an existing human rights clause in a previous framework agreement." He did not think that such a statement could imperil international relations.



21. At the inspection, the Council made available the requested documents, as well as a decision partially to declassify document 10491/1/09 REV 1 and a copy of the Council's reply to the complainant's confirmatory application.

22. In the inspection report, the Ombudsman noted that, after consultation of the documents, it was not *prima facie* clear why certain passages should be considered as being covered by the exception invoked. Thus, the Ombudsman's representatives had queried whether access had to be denied to the first two paragraphs of the not-disclosed part of document 10491/1/09 REV, which gave an introduction to the use of "political clauses", and set out the aims which the EU is seeking to achieve by using such clauses; aims that the Ombudsman's representatives believed to be widely known and to be frequently used in speeches and other relevant publications of the Council and other EU institutions as regards agreements entered into between the EU and third countries.

23. As regards Document 7008/09 and 7008/09 COR 1, the Ombudsman's representatives asked whether the Council had considered granting partial access at least to the more descriptive parts of that document, save for sentences or footnotes whose disclosure might indeed undermine the public interest with regard to international relations. They therefore asked the Council's representatives to consider whether further partial access to both documents was still possible beyond what was already granted.

24. In his observations on the inspection report, the complainant thanked the Ombudsman for the thorough follow-up that was given to his complaint.

25. In its response to the inspection report, the Council underlined that a considerable amount of time had passed since it had replied to the complainant's confirmatory application. Therefore, its decision to grant wider access was largely due to the fact that circumstances had changed. For example, other documents which had similar contents had been disclosed in the meantime.

26. The Council therefore decided that access could be given to the descriptive parts of document 7008/09, as well as to those parts which would not allow conclusions to be drawn as to the protected content of the document. In addition, it decided to grant access to the first two paragraphs of document 10491/1/09 REV 1, which give an introduction to the use of political clauses and the aims which the EU is seeking to achieve by using them.

27. As regards the remainder of the documents, the Council maintained its view that the exception relating to the protection of international relations applied, and referred to the reasons it had put forward in support of this view in its reply to the complainant's confirmatory application. In particular, it underlined that the relevant passage of the documents concerned set out the results of discussions in COREPER and that their disclosure would thus reveal aspects of the EU's strategic interests and its willingness and ability to find a compromise during negotiations. Moreover, even if the documents did contain some information which was already public, these parts were intrinsically linked to those parts that could not be disclosed. Any further disclosure would allow conclusions to be drawn as to the common approach on the future use of political clauses agreed by COREPER.



28. In his observations, the complainant thanked the Ombudsman for her work in "bringing the documents to light". He stated that he was satisfied with the outcome of the investigation.

The Ombudsman's assessment

29. It results from the above that the complainant is satisfied with the outcome of the case. The Ombudsman is pleased to note that, following the inspection carried out by her services and the constructive dialogue that took place on that occasion, the Council followed the suggestion made in the inspection report to re-examine the matter with a view to granting further access.

C. Conclusions

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

The Council has settled the case to the complainant's satisfaction.

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

Emily O'Reilly

Done in Strasbourg on 09/01/2014