

Initial report on the implementation of Council Decision 93/731/EC on public access to Council documents (July 1996)

Caption: In 1996, the Secretary-General of the Council of the European Union draws up an initial report on the implementation of the Council Decision of 20 December 1993 on public access to its documents, covering the period 1994–95, pursuant to Article 9 of the Decision.

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Report on the implementation of the Council Decision on public access to Council documents

Introduction

Article 9 of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents ⁽¹⁾ stipulates that it will be reviewed after two years of operation. With a view to that re-examination the Secretary General must, in 1996, submit a report on the implementation of the Decision in 1994 and 1995.

The aim of this report, drawn up under the responsibility of the Secretary-General, is to:

- review the policy of public access to Council documents after two years of implementation;
- provide a brief analysis of the main issues, including disputes, to which it has given rise.

1. Transparency measures

The possibility for the public to have access to unpublished Council documents on the basis of Council Decision 93/731/EC constitutes one of the components of the general policy of openness and transparency outlined in the Birmingham Declaration in October 1992 with a view to bringing Europe closer to its citizens.

A first step in that development was taken with Declaration No 17 on the right of access to information annexed to the Final Act of the Treaty on European Union. Later, the principle that citizens must have "the fullest possible access to information" was confirmed by the Copenhagen European Council (June 1993).

On 6 December 1993 the Council and the Commission approved a code of conduct concerning public access to their documents ⁽²⁾ in which it is stated that the public will have "the widest possible access to documents held" by these two institutions.

It is true that before the launch of this new official approach to openness and transparency, the flow of information on Community affairs in general and on the Council's discussions in particular was already characterized by the existence of a multitude of sources that were particularly active in that area: Member States, the Commission, the Press and Information Office of the General Secretariat of the Council, etc.

Rather than substantially increase the effective flow of information, the new approach has thus accentuated recognition of the principle that anyone must have the fullest possible access to information, before the entry into force of Decision 93/731/EC on 1 January 1994, there was no mechanism for providing public access to Council documents.

Additional measures to increase the transparency of the Council's proceedings have come into being in the meantime.

Thus, on 2 October 1995, the Council adopted a code of conduct allowing public access to statements in the minutes and the extracts from minutes where the Council has adopted legislative acts. It should be noted that the outcome of votes and any explanations of votes linked to the Council's legislative activity have been made public on a regular basis since December 1993 by virtue of an amendment to the Council's Rules of Procedure introduced at that time.

On 29 May 1995 the Council further reaffirmed its determination to ensure that the press and the public were regularly and fully briefed prior to each of its meetings. To that end, the General Secretariat of the Council has been authorized to circulate, where necessary in liaison with the Presidency, all the relevant background information relating to the texts under discussion.

Open debates (broadcast by audiovisual means) on the Presidency's six-month programme, on general

matters affecting the interests of the Union or on major new legislative proposals constitute a further significant attempt to increase the transparency of the Council's proceedings. Similarly, increased efforts have been made in the direction of an active information policy on the Council's proceedings ⁽³⁾.

2. Statistical report on the policy of public access to documents

The procedure laid down in Decision 93/731/EC guarantees the applicant for a Council document a maximum time-limit for a reply, a reasoned examination of the application and the right of appeal before the Council (i.e. at the level of the Ministers themselves, after examination at both expert and Ambassadorial level) where the initial reply drawn up by the General Secretariat of the Council is negative. Finally, in the event of a confirmatory application being rejected, the applicant is informed of the content of Articles 138e and 173 of the Treaty establishing the European Community relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.

During the period covered by this report a total of 142 applicants (70 in 1994; 72 in 1995) applied for access pursuant to Decision 93/731/EC. The applications covered a total of 443 documents; some applications did not allow identification of specific documents, as applications were too vaguely expressed or referred to texts that did not exist.

2.1. Origins of applicants

(a) occupation:

Members of the EP	7	5%
Lobbyists	13	9%
Lawyers	36	25%
Journalists	33	23%
Academics	38	27%
Industrial sector	3	2%
Others	12	8%

(b) geographical origin:

Germany	21	15%
Belgium ⁽⁴⁾	44	31%
Denmark	5	4%
Spain	3	2%
France	6	4%
Ireland	1	
Italy	6	4%

Luxembourg	3	2%
Netherlands	10	7%
United Kingdom	35	25%
Switzerland	1	
Norway	2	
Sweden	4	3%
Japan	1	

The geographical and occupational breakdown of applicants demonstrates that the policy of public access to documents is little used or unused in some Member States, nor is it widely used in sectors other than journalism, the law and higher education.

2.2. Subject of applications:

The breakdown of applications according to the areas covered by the Directorates General of the General Secretariat of the Council is as follows: ⁽⁵⁾

Legal matters	5	3%
Agriculture	5	3%
Internal Market	25	17%
Energy, transport	5	3%
External Relations	17	11%
Institutional Affairs and Information Policy	28	19%
Economic and Monetary Affairs	6	4%
Justice and Home Affairs	30	20%
Environment	15	10%
Social Policy	12	8%

Sixteen applicants requested documents concerning policy on transparency and information, in particular on the management of public access to documents.

2.3. Follow-up to applications for access

Of the 443 documents requested or identified as such by the General Secretariat, a total of 65 did not fall within the scope of the Decision as the documents were of a public nature or were not produced by the Council. Of the remaining 378, a favourable reply was given for 222 documents, i.e. 58,7%.

It should be noted that the implementation of the policy of document access has developed in the applicants' favour and the number of positive replies is greater now than it was at the beginning.

Among the 222 documents to which access was granted, 185 documents were supplied by the General Secretariat of the Council in the first instance, while access to the other 37 was decided by the Council in response to 16 confirmatory applications made by the applicants.

The General Secretariat's refusal to grant access was confirmed by the Council in respect of 10 confirmatory applications. The Council gave applicants full or partial satisfaction in 6 other cases.

Regarding the 156 other documents to which access was not granted, the reasons for refusal, pursuant to Article 4 of the Decision, were as follows:

- protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections or investigations) 18%
- protection of the individual and of privacy 3%
- protection of commercial and industrial secrecy 2%
- protection of the Community's financial interests 1%
- protection of the confidentiality of the Council's proceedings 44%
- several reasons simultaneously 25%
- other reasons 7%.

3. Main features of the policy on access to documents

It should be noted that the scope of the policy on access to Council documents is less restrictive than that of the national legislations of most Member States as regards the nature of the documents to which access may be given. Under Decision 93/731/EC, access may be given to all Council documents while most national legislations rule out access to internal administrative documents and reports, such as preparatory documents not leading to a decision being taken. This broad field of application of the Decision is not without creating difficulties.

3.1. Identifying documents

Article 2 of Decision 93/731/EC lays down that applications for access to a Council document must be made in a sufficiently precise manner and must contain information enabling the document or documents requested to be identified.

In practice the Council has been confronted with many very vague or general requests of the kind: "all preparatory discussions on Directive ...", "all texts in connection with the Convention ...", "statistics on qualified majority votes since ...", "all agendas for all Working Parties under Title VI ...", "the amendments to Article ... of a Directive under discussion for many years", etc.

Such requests have sometimes demanded considerable research on the part of the General Secretariat.

While it is true that the Decision provides the option of asking the applicant to make the request more specific, where the applicant does not know what documents are available, this provision did not prove very practical.

In this connection, consideration might be given to the possibility of establishing a register of Council documents.

Also a request for the application to be more specific may not be construed as a refusal within the meaning of Article 7(1) leading to a confirmatory application.

3.2. Applications involving excessive or disproportionate costs

Article 3(2) of Decision 93/731/EC 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.

The Decision makes no provision for any other mechanism to enable the Council to deal with requests that could be considered excessive or that could give rise to disproportionate costs. Moreover, applicants are not required to give reasons for the interest they take in the Council's proceedings. Yet the very nature of certain applications sometimes elicits the thought that steps are being taken to test the system rather than exercise a legitimate option.

For example, during the period in question a single applicant submitted 14 requests involving more than 150 documents, i.e. more than one third of all the documents requested by all the applicants.

It should be noted that the public resources invested to handle applications for access to documents are supplied from the Council's very limited resources in terms of both time and staff.

It might therefore be worth considering whether provision should be made for applications which are manifestly excessive or involve disproportionate costs to be refused, where appropriate, after examination of the reasons for the applicant's interest.

3.3. Application of Article 4 of the Decision

Article 4 of Decision 93/731/EC lays down conditions on the general principle of public access to Council documents.

In practice, application of this article has given rise to two problems in particular involving, on the one hand, documents containing legal positions of the Council Legal Service and, on the other hand, the protection of the Council's proceedings.

(a) It should be noted that, where documents containing legal positions of the Council Legal Service have been requested, the Council has refused to release them to the public on the grounds that their content fell within the scope of Article 4(1), in particular the protection of the public interest (public security, court proceedings), or was part of the Council's proceedings that the Council deemed it necessary to protect for reasons of confidentiality (Article 4(2) of the Decision).

However, it may prove helpful to supplement Article 4(1) of the Decision by adding the words "legal certainty", as in the second paragraph of Article 5(1) of the Council's Rules of Procedure.

Such an addition is justified on several grounds ⁽⁶⁾.

(b) On the matter of the protection of the Council's proceedings, it should be noted that sending the initial reply to the applicant is the sole responsibility of the Secretary General, after examination of the application by the relevant departments of the General Secretariat.

The vast majority of Council documents refer to its proceedings or to the preparatory discussions of its various bodies. For that reason, in doubtful cases where there is a delicate balance of interests, protection of the confidentiality of the proceedings is the reason most often invoked by the General Secretariat for refusing access to a document, leading the applicant to make a confirmatory application so that the Council decides.

This makes the procedure cumbersome since confirmatory applications must be examined by experts ("Working Party on Information"), Ambassadors (Permanent Representatives Committee) and the Council (Ministerial level).

This situation could be improved, in the interests of both the Council and applicants, if the Secretary-General were authorized by the Council to allow public access to certain categories of documents and/or to those relating to dossiers that were no longer current, after a period to be determined, subject to exceptions especially in the case of foreign policy or combating crime. The Council could thus adopt guidelines for the General Secretariat of the Council on implementing the Decision. These guidelines would not replace the detailed examination of each application in turn, but could constitute a reference framework for the Secretariat enabling a much larger number of applications to be settled at the initial stage.

In any event, solutions should be found to ensure that the confirmatory application constitutes an exception to the rule, with a larger number of applications being dealt with appropriately at the initial stage by the General Secretariat. It has already been stated that the "cost" – in terms of both time and human and material resources – as well as in numerous and extended meetings of the experts, Ambassadors and Ministers concerned by these matters has become excessive.

Moreover, it has been suggested that explicit reference to certain members of the Council should be deleted from the documents so that the public may be given access to a greater number of documents without prejudice to negotiations. This approach has been used on only one occasion and is not approved by all the Member States. The procedure may in fact amount to an amendment to the document in question and in those circumstances it might be preferable not to release it.

3.4. Classified information

Article 8 of the Decision stipulates that public access to documents "shall apply with due regard for provisions governing the protection of classified information".

This provision has not prevented the Council from granting public access to certain "classified" documents ⁽⁷⁾ after weighing the interests concerned and declassifying the documents in question. In other cases, the decision was taken not to declassify and the confidential nature of the document was given as the reason for refusal.

It should be noted that the level of classification of a document has never been the only aspect taken into consideration in deciding whether to release it under Decision 93/731/EC, the sole effect of Article 8 being that the Council declassify confidential documents that it decides to release.

Arrangements for the protection of classified information are governed by Decision 24/95 of the Secretary-General of the Council, which entered into force on 1 March 1995. Under these arrangements the criterion for classifying documents is the level of security which must be applied to them in direct relation to their content. Decision 24/95 of the Secretary-General in no way prejudices the rules and procedures laid down by the Council regarding transparency.

3.5. Procedural questions

(a) Time limits

Article 7 of Decision 93/731/EC lays down a maximum period of one month for both the initial reply given by the General Secretariat and that given by the Council in the case of a confirmatory application. Failure to reply within the time limit is equivalent to a refusal of access to the documents.

Experience demonstrates that one month is not long enough at certain times of the year (holiday periods or at the beginning of a Presidency) and/or in the case of particularly delicate applications or those relating to a

large number of documents.

To solve these problems, the Decision could include a provision allowing the time limits for the initial reply and for the reply to a confirmatory application to be extended by one month. The applicant, who would be informed of the extension in writing, would thus be more certain of appropriate examination of the application by the various bodies concerned.

(b) Other practical provisions

- The Decision lays down that an applicant may have access to a Council document either by consulting it on the spot or by having a copy sent at his own expense. A fee was laid down by Decision of the Secretary General of the Council on 27 February 1996 ⁽⁸⁾. The Council charges the same fee as does the Commission.
- Once this report has been published, the present Article 9 will become null and void. The Council may, however, decide to replace it and make provision for a biennial evaluation report.
- Following the move of the Council Secretariat into new premises, the Council's address as set out in a footnote to Article 2(1) should be changed (175 instead of 170 rue de la Loi).

3.6. Recourse to law

In the 1994-1995 reference period, three cases were brought before the Court of Justice or the Court of First Instance under Decision 93/731/EC:

- C-58/94 Netherlands v. Council, which resulted in the judgment of the Court of Justice of 30 April 1996;
- T-194/94 John Carvel and Guardian Newspapers Ltd. v. Council which culminated in the judgment of the Court of First Instance of 19 October 1995;
- T-174/95 Tidningen Journalisten v. Council, pending before the Court of First Instance.

In Case C-58/94, the Kingdom of the Netherlands sought the annulment of three acts: Decision 93/731/EC, Article 22 of Council Decision 93/662/EC adopting the Council's Rules of Procedure and the Code of Conduct concerning public access to Council and Commission documents. The Netherlands Government argued that the Council had committed an abuse of power in that it based the rules on citizens' means of access to documents in its possession in Article 151 of the EC Treaty, which authorizes it to adopt its Rules of Procedure. However, in the applicant's opinion, this question could not be reduced to a mere question of the organization of the Council's internal operation.

The Court of Justice dismissed the application by the Netherlands in a judgment of 30 April 1996 (not yet published). The Court affirmed in this connection that *"so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration."*

The fact that Decision 93/731 has legal effects vis-à-vis third parties cannot call into question its categorization as a measure of internal organization. There is nothing to prevent rules on the internal organization of the work of an institution having such effects.

Consequently, as Community law stands at present, the Council is empowered to adopt measures intended to deal with requests for access to documents in its possession."

As regards Case T-194/94, John Carvel and Guardian Newspapers Ltd. v. Council, the Court of First

Instance delivered a judgment on 27 October 1995 by which it annulled the implied decision of the Council refusing the applicants access to the preparatory report, the minutes, attendance and voting records of the Justice Council on 29 and 30 November 1993 and the decision contained in the letter of the Council of 17 May 1994 refusing access to the minutes of the Agriculture Council of 24 and 25 January 1994.

This judgment was given wide coverage in the media, but the Tribunal's reasoning has not always been reflected correctly. The Tribunal annulled the Council's decisions solely because, when the Council exercised its discretion under Article 4(2) of the Decision, it had an obligation to "genuinely balance the interest of the citizen in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations". In the case in question, however, the Court considered that the Council had not genuinely balanced the interests involved and the decisions had, therefore, to be annulled. This concept of balance of interests between the interest of the citizen in obtaining access to documents and any interest of the Council in maintaining the confidentiality of its deliberations is of major importance. It is, furthermore, closely linked to the degree of consideration given to requests for access to documents. In other words, to ensure the balance of interests, careful consideration must be given to each request for documents.

The results of the last two years have been positive in this respect. It is a fact that the General Secretariat and the Council have acquired more and more experience in an area which was new for the Council before adoption of the Decision. Thus the failure to balance interests which the Tribunal felt obliged to draw attention to in the Guardian case – the facts of which go back to the first half of 1994 – should no longer occur on account of the greater mastery applied in this area by the departments preparing Council decisions and thanks to the steady increase in human and material resources invested in this sector by the Secretariat. Several of the suggestions contained in this report are designed to ensure that the Council's departments are always in a position to give careful consideration to requests for documents.

The third case, T-174/95, *Tidningen Journalisten v. Council*, which is still pending, raises other types of problems concerning the implementation of the Decision. A journalist had asked the Council for 20 Europol documents while the Convention was still being negotiated. After careful consideration of his request by the Council acting in accordance with Decision 93/731/EC, he obtained 4 of the documents. However, the applicant had already obtained 18 of them through the civil service of a Member State.

Attention is drawn to the fact that the purpose of Decision 93/731/EC is that the Council should consider whether to agree to a request for access to Council documents, in accordance with its own pre determined rules.

Decision 93/731/EC itself would be superfluous if the applicant were able to obtain the document through a civil service despite a decision to the contrary by the Council ⁽⁹⁾.

(1) OJ No L 340, 31.12.1993, p. 43.

(2) OJ No L 340, 31.12.1993, p. 41.

(3) An Information Policy, Transparency and Public Relations Division has been set up within the General Secretariat of the Council.

(4) Including organizations based in Belgium.

(5) The fact that some applicants submitted applications for documents relating to different areas explains the difference between the number of applicants and the breakdown by subject matter.

(6) See the conclusions submitted on 9 March 1995 by Advocate-General Jacobs in case C-350/92 (CR 1995, I-1988, point 35), in which an opinion of the Legal Service was used, without its authorization, against the Council in the course of proceedings before the Court of Justice: " *It seems plain in any event that, in the absence of express authorization by the Council, advice given by the Council's Legal Service should not be invoked in proceedings before the Court. That would obviously be prejudicial to the public interest in the provision of independent legal advice* ". Thus, documents containing legal positions of the Council Legal Service should not be released to the public, since, if the Council subsequently departed from the position of its Legal Service, any defence of the Council in a dispute would prove difficult precisely since such defence is provided by its Legal Service. Relations between the Legal Service and the Council are similar to those between lawyers or legal advisers and their clients, those relations being confidential. To ensure the independence of the Legal Service as legal adviser to the Council, documents which contain legal positions should not be released to the public.

(7) See Article 22 of the Council's Rules of Procedure and Decision No 24/95 of the Secretary-General of the Council on measures for the protection of classified information applicable to the General Secretariat of the Council.

(8) OJ No C 74, 14.3.96, p. 3.

(9) From a legal point of view, the judgment of the Court in case C-58/94 stated that Council Decision 93/731/EC was valid and had

legal effects vis-à-vis third parties as regards access to Council documents.