Access to documents. European Ombudsman Special report following complaint 917/2000/GG

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PURPOSE : to present a special report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 917/2000/GG.
CONTENT : the European Ombudsman, Jacob Söderman, has launched a special report on the failure of the Council of the European Union to grant access to certain documents from its meetings on justice and home affairs. The documents were requested by Statewatch, a UK body fighting for openness and transparency. The complainant had obtained copies of agendas and 'outcomes of proceedings' for meetings of the Council of the European Union concerning justice and home affairs. It had noticed that many of the documents listed in the 'outcomes of proceedings' were not listed on the agendas of these meetings. It had also learnt that a number of documents, for example Room documents and SN documents, were generally not listed on the agendas nor on the 'outcomes of proceedings'. In his draft recommendation in March this year, the Ombudsman asked the Council to release all the relevant documents. According to the evidence in the Ombudsman's possession, the Council has so far failed to do this. In its complaint, Statewatch also targeted the Council's failure to maintain a list of all the documents that were put before its meetings. The Ombudsman is of the view that the Council should establish such a list and make it available to citizens. This is vital so that citizens can use their right of access to documents properly. According to the Council, on the one hand, there were documents which, although being preparatory, nevertheless represented a certain degree of 'finality', in the sense that they could be considered to be the product of a preliminary consultation process and/or to represent an accurate picture of the state of the Council's deliberations on a certain dossier at a certain point in time (like for instance the final version of the 'outcome of proceedings' reflecting delegations' positions on a certain dossier). Those documents generally took the form of official documents which, except for a very small number of documents classified confidential, secret or top secret and relating to matters concerning security and defence or military or non-military crisis management, were mentioned in the public register of Council documents at least with their document number. On the other hand, there were papers which represented the preliminary reflections of a single person or a very small group of persons contributing to the Council's deliberations, which in certain Member States would probably not be considered as 'final' or 'official' documents subject to public access. This was the case, for instance, when the General Secretariat circulated a draft note or report summarising delegations' positions on a certain dossier to the members of the working party or committee concerned: at this stage, such a draft merely reflected the personal perception of a single official, which could be incomplete or inaccurate. It was this type of papers which were usually circulated as non-papers, SN documents or room documents or in any other informal way. Their common feature was that they were of a purely transitory, preliminary nature: if their content was confirmed or if the ideas presented in them were taken up by the group or committee to which they were addressed, those wouldultimately be reflected in a document which could be found on the public register. In its observations, the complainant maintained its complaint and made the comment that the point was not whether documents of a "purely transitory, preliminary nature" were reflected in the final document but rather that the citizen had a right to know what arguments were on the table and which were accepted and which rejected. Citizens had a right to know what influences were brought to bear in determining public policy. In the light of these provisions, the Ombudsman considers that there is nothing to support the distinction put forward by the Council. Decision 93/731 covers access to any document held by the Council, irrespective of its nature. The Ombudsman agrees with the complainant's view that citizens should have the right to know which documents were placed before the Council in order to find out what influences were brought to bear in determining public policy. It appears useful to add that this does not mean that the Council has to grant access to all these documents, given that Decision 93/731 sets out a number of exceptions where access can legitimately be refused. The Ombudsman therefore considers that the Council's approach in the present case gave rise to two instances of maladministration. He thus makes the following draft

recommendations to the Council, in accordance with Article 3 (6) of the Statute of the Ombudsman: The Council of the European Union should reconsider the complainant's application and give access to the documents requested, unless one or more of the exceptions contained in Article 4 of Decision 93/731 applies and that the Council should maintain a list or register of all the documents put before the Council and make this list or register available to citizens. In his special report to the European Parliament, the Ombudsman restates his recommendation and calls on the Parliament to intervene. The new Regulation 1049/2001 on access to documents obliges the Council to keep such a register. Mr. Söderman therefore considers that there is no need to pursue this aspect of the case.