ACCESS TO EUROPEAN COMMUNITY OFFICIAL INFORMATION

John Carvel & Guardian Newspapers v. *EU Council*

AMID rather less fanfare than one might perhaps have expected, the press, and, by extension, the public, of the European Union scored a modest victory for freer access to official information following the judgment of the Court of First Instance in the case of *John Carvel & Guardian Newspapers Ltd (Denmark, The Netherlands and the European Parliament intervening)* v. *EU Council.*[1] This case is the latest stage in an evolving policy of access to official information generally, a policy which has gained impetus with official concern about the so-called "democratic deficit" and a heightened awareness of the perceived remoteness of the European institutions from the daily lives of the citizens of the Union.

A. *Development of the Law before* Carvel

There is no Treaty provision about access to information, or any prior case law. The starting point is the declaration in the Maastricht Final Act.

> The Conference considers that transparency of the decision making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

In its response entitled "Public access to the Institutions' documents"[2] the Commission addressed this request. The then recent introduction of the annual work programme for the Community institutions and the wider use of consultation exercises before making legislative proposals are both noted in approving terms:[3]

> The Commission views this declaration as an important element of the Community's policy on transparency of the institutions. Improved access to information will be a means of bringing the public closer to the Community institutions and stimulating a more informed debate on Community policy matters. It will also be a means of increasing the public's confidence in the Community.

Thereafter, the communication turns to consider "further steps", in particular in relation to access to official documents. Declaring itself in favour of "a framework for granting general access to documents", the Commission invites the other institutions to co-operate in developing a set of "fundamental principles and a minimum set of requirements" governing such access. Outline proposals for such guidelines are set out, in terms very similar to those eventually adopted at the December 1993 Council, but omitting that portion of text which gave rise to trouble in *Carvel.* Annexed to the communication is a most interesting comparative survey of the laws governing access to information in a number of countries including, but not restricted to, the member States.

1. Case T194/94. Judgment of the Court of First Instance: 19 Oct. 1995, reported [1995] 3 C.M.L.R. 359.
2. (1993) O.J. C156/05.
3. *Idem*, p.5.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

This was followed later in 1993 by another Commission paper "Openness in the Community".[4] Going somewhat beyond simple access to documentation, this study extends into the realm of rather wider issues relating to access to government more generally and to the decision-making processes in the Community. Much of that discussion is at the level of aspiration.

However, in relation to the matter of access to documents, there are a number of issues flagged up for discussion with the various institutions;[5] Annex II sets out a number of "basic principles" for discussion; these are more in the nature of headings to be addressed in legislation, and are as follows:

(1) The definition of a document (the proposed definition implied material media only, rather than including electronic media, which may seem rather archaic today—but see too point 10 below).
(2) The need for a precise (i.e. specific and focused) request from the public.
(3) Time limits.
(4) A general presumption in favour of access. Exceptions are proposed for (i) public interest; (ii) commercial, industrial and financial confidentiality, including intellectual property rights; (iii) protection of individual and personal privacy; (iv) records of financial institutions; (v) the financial interests of the Community. Also to be excluded are internal working documents containing opinions of EC staff, etc.
(5) A regime for documents containing information from a secondary source—e.g. from a member State—these requests to be referred to the original source before disclosure.
(6) Languages—the reply to be in the language of the request.
(7) Costs.
(8) How to make documents available—i.e. manner of disclosure.
(9) Committees—access to their papers would require to be considered separately.
(10) Databases—information stored on a database to be available so long as a special retrieval program was not required in order to make the information requested comprehensible (i.e. to avoid unnecessary additional effort and expense).
(11) Internal organisational matters requiring to be addressed by the Community institutions.

B. The Council Rules of Procedure and the Code of Practice

All this activity culminated in the promulgation of new Rules of Procedure for Council meetings[6] and the adoption of a Code of Practice concerning access to Council documents. The former relate to a wide range of matters concerning the formalities of Council meetings, but also include a number of particular provisions about public access to the workings of the Council, including official documents.

4. COM(93)258 Final (1993) O.J. C166/4.
5. See s.3 and Annex II.
6. Council Decision 93/662/EC of 6 Dec. 93, adopting new Council Rules of Procedure (hereafter "Council Rules"); (1993) O.J. L304/1.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

Except in relation to the policy debates to be held on the recently mandated annual work programme, which are to be broadcast,[7] or those other debates which the Council may decide unanimously to allow to be broadcast because "they concern an important issue affecting the interests of the Union or an important new legislative proposal",[8] Council meetings are not to be held in public,[9] so that it follows by necessary implication that the proceedings of such meetings are, in the first instance at least, confidential.

Thus far, the legislation is relatively uncontroversial. It was the combined effect of certain provisions in relation to voting that followed which caused the dispute in *Carvel*: namely, Article 5(1), which provides that, without prejudice to Article 7(5) (which deals with the record of voting),[10] the deliberations of the Council shall be covered by obligations of professional secrecy—which term is not defined—except in so far as the Council decides to the contrary. It is not immediately clear whose professional secrecy is here being invoked and on what basis. Presumably it encompasses at least that of the Council Secretariat; in which case the rule simply extends the general duty of confidence owed by an employee to his or her employer. How much further such a concept may be stretched is open to question; professional persons such as lawyers and bankers owe *ex lege* certain particular obligations to their client, but such obligations are strictly between client and adviser. Member State delegations can scarcely be said to owe any obligation of a *professional* sort in the context of the Council, which leaves the media. The journalist, of course, owes no duty in law (at least in the legal systems of the United Kingdom) to anyone other than the outlet employing him or her.

Where the record of the vote in Council is made public in accordance with Article 7(5), the explanations of votes made when the vote was taken are also to be made public at the request of Council members concerned "with due regard to these rules, legal certainty and *the interests of the Council*" (emphasis added). Although it is not so stated, the presumed intention of the highlighted phrase is to preserve the widest possible discretion for the Council. As became clear during the argument in the Court, the Council took a political rather than legal view of how its interests were to be measured and protected. There was a marked reluctance to allow much daylight into the mythologised "smoke-filled rooms" which the media delight in portraying as being the decision-making forum at Council meetings, with great emphasis being placed on the need felt by member States to keep details of their positions in Council off the publicly accessible record so as not unduly to limit the negotiation process. It may be argued that this position is a sensible reaction to the political reality in which the Council operates; however, the Council is more than simply a political discussion group, forming as it does an important part of the Community legislation machinery.

7. Council Rules, Art.6.
8. *Idem*, Art.6(2).
9. *Idem*, Art.4.
10. *Idem*, Art.7(5) provides that the voting records shall be made public (a) where the Council acts as legislator unless the Council decides otherwise; (b) where the Council is operating under the provisions of Art.189b of the Treaty; (c) where the Council acts in terms of Titles V and VI of the Union Treaty by unanimous decision; (d) in other cases on a decision taken at the request of one member. The latter is a potentially powerful bargaining tool, as will be noted below.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

It is then provided that detailed arrangements for public access to Council documents disclosure of which is "without serious or prejudicial consequences" are to be adopted by the Council.[11] Thereafter the Council and Commission jointly agreed a Code of Conduct concerning public access to Council and Commission documents.[12] This is printed in the *Official Journal* back-to-back with a Council Decision dealing with access to its own documents,[13] which essentially repeats the formulae of the Code, with a number of small, but highly significant, alterations. While the Code speaks of the public having the "widest possible access", the Council Decision speaks of access "under the conditions laid down" in the decision. In addition to the provisions of Articles 4 and 7, which are quoted by the Court in *Carvel*,[14] those conditions are set out in Article 6[15] and Article 8, which provides: "This Decision shall apply with due regard for provisions governing the protection of classified information." It is not clear whose secrecy is here being protected—that of the particular member State, or of the Community, or both. What is clear, however, is that the whole tenor of the approach required by these provisions is to raise a presumption against disclosure, a position which sits ill with the Commission approach set out in its original proposals.

It is also noteworthy—in this information age—that reproduction or circulation of the document for commercial purposes (which term is not defined) through direct sale is prohibited without prior authorisation.[16] Given that newspapers are generally produced for the commercial purpose of generating revenue, it would appear that reproduction of legitimately obtained information and documents is caught by this provision. It might be argued that the authorisation provision is akin to a copyright licence. That analogy is less exact than may at first appear, given that copyright licensing is, of course, a matter of the protection and exploitation of property rights, whereas this provision has no such obvious origin in recognised private law categories of that kind (particularly as intellectual property rights were considered separately by the Commission). Both the Code and the Council Decision have effect for an initial period of two years, with a review by the Commission of their operation in practice at the end of that period, with interim reports to be presented in 1994 and 1995.

C. Carvel—*the Factual Background*

Against this rather subtle legislative background the case of *Carvel* arises. The plaintiff Carvel was the European affairs editor of the *Guardian* newspaper (which supported his application as second plaintiff), and he wrote to the Council Secretariat seeking access to Coreper preparatory reports, minutes, attendance and voting records and decisions in relation to certain Council meetings on social affairs, justice and agriculture. Information was provided in relation to the social affairs meeting, the request relating to agriculture was, in terms of the Council

11. *Idem*, Art.22—which provides the authority for the adoption of the Code of Practice.
12. Decision 93/730/EC (1993) O.J. L340/41 (hereafter "the Code").
13. 93/731/EC (20 Dec. 1993), (1993) O.J. L340/43 (hereafter "the Council Decision").
14. Judgment, *supra* n.1, at paras.11–13.
15. Which provides for examination of applications by the relevant department of the Secretariat, "which shall suggest what action is to be taken on it".
16. Art.3(2).

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

Decision, timeously rejected, and the justice application was rejected a month later than required by the Council Decision. Interestingly, the Council Secretariat subsequently issued a further letter stating that the social affairs documentation had been released in error, and that the request ought to have been refused. Access was refused on the ground that the documents sought "directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed".[17] Access to the preparatory papers was denied on the grounds that such were "preliminary texts preceding the decision of the Council",[18] although the final texts were copied to Carvel. When the plaintiffs—unsuccessfully—exercised their right to administrative review of the refusal in terms of the Code of Practice and Council Rules, the reasons for refusal were spelled out even more starkly:[19]

> the Council takes the view that access to these documents cannot be allowed since they refer directly to the deliberations of the Council and its preparatory instances. If it did allow access, the Council would fail to protect the confidentiality of its proceedings. The documents in question contain confidential information relating to the position taken by members of the Council during its deliberations.

In this way the full effects of the subtle difference in wording adopted by the Council over the draft originally proposed by the Commission became apparent. Shortly put, the Council was operating a presumption of secrecy in relation to its deliberations and all documents associated with that process. Such a stance, of course, was at marked variance with the philosophy for access proposed by the Commission.

Interventions in support of the plaintiffs' application for annulment under Article 173 came from the pro-disclosure governments of Denmark and the Netherlands and also from the European Parliament.

D. Carvel—*the Arguments Advanced*

A number of propositions were advanced for the plaintiffs, starting with the broad assertion of a fundamental principle affording access to the documents of the Community institutions, and focusing on infringement of Article 4(2) of the Council Decision because of the blanket terms in which the refusals were cast. Failure to give reasons and breach of the doctrine of legitimate expectations were also prayed in aid; however, it was the blanket terms of the refusal to release the documents which formed the focus of the Court's reasoning. It was argued that the Council had not carried out a proper balancing exercise in relation to the various interests involved before coming to a decision on whether the documents would be released. That position, disputed by the Council, was supported by a statement issued by the governments of Denmark and the Netherlands after the Council meeting on 16 and 17 May 1994 at which the administrative review of the first refusals was considered, and at which those refusals were affirmed by the Council.[20] Interestingly, particularly in the light of the eventual press coverage of the decision, it was not argued that there was an automatic right of access to all documents. It was noted, for instance, that the Council minutes were a formal record of

17. Quoted in the judgment, *supra* n.1, at para.16.
18. *Ibid.*
19. Letter from Council Secretariat 17 May 1994, quoted in *idem*, para.22.
20. See *idem*, para.43.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

the statements read by member States and requested to be minuted; the detailed negotiating position would not appear there, and was not being sought.[21]

Disputing the argument about balancing of interests on an evidential basis, the Council asserted that the documents sought properly fell within the class of confidential material. It was further argued for the Council that the decision did not amount to a blanket refusal since it was always open to make use of the derogation powers in Article 4(2) of the Council Decision to allow disclosure in a particular case.[22] In essence, the Council's position came to be that, because of its political nature and the process of negotiation and compromise by which it arrived at its collective decisions, there was another vital interest to be protected, namely, its own. It was essential that member States could:[23]

> freely express their national preoccupations and positions. It is essential that those positions remain confidential, particularly if members are forced to move away from them in order that agreement may be reached, sometimes to the extent of abandoning their national instructions on a particular point. This process of compromise and negotiation is vital to the adoption of Community legislation and would be jeopardised if delegations were constantly mindful of the fact that the positions they were taking as recorded in the Council minutes, could at any time be made public through the granting of access to those documents whether or not the Council had authorised such access.

This fascinating insight into the decision-making process simply confirms the long-held view of outside observers about the manner in which the Council—which is, after all, part of the Community legislature, and notionally accountable to the citizen—operates.

As noted above, there were interventions from two member governments. Their positions were far from identical. Denmark, noting the discretion conferred by Article 4(2) as to whether to allow access, proposed a "subjective" test: that is, a case-by-case and document-by-document approach.[24] By contrast, the approach of the Netherlands (although not so described) was more in the nature of an "objective" test, focusing on the balancing of the citizen's interest in the exercise of the right of access and the interest of the Council in protecting the confidentiality of its decision-making.[25] It may perhaps be that the Netherlands approach is inherently more flexible, at least at the level of generality stated by the Court. In practice, however, the effect of both approaches may come to the same thing, because some weighing-up exercise seems inherent in the discretion conferred by Article 4(2). In their operation, the difference may come to be a question of degree; because, although the Netherlands approach is a general weighing up of factors, this has to be applied to a concrete request for particular documents which will themselves be factors in the decision.

E. The Judgment of the Court

In its analysis the Court began by considering the source of the right of access to documentation. Concluding that the Council Decision was the only instrument

21. See further *idem*, para.45.
22. *Idem*, para.48.
23. *Idem*, para.52.
24. *Idem*, para.57.
25. *Idem*, para.58.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press

governing such rights, and was therefore the measure of those rights,[26] the Court went on to analyse the terms of Article 4. Drawing a contrast between the mandatory terms of Article 4(1)—whereunder access "shall" not be granted where disclosure "could undermine" one of the specified interests—and the discretion conferred by Article 4(2), which specifies that access "may" be refused to protect confidentiality, the Court found it readily established that a balancing exercise was required to be carried out in cases falling under Article 4(2).[27] Such an exercise required that the Council "genuinely balance the interests of the citizen in gaining access to its documents against any interests of its own in maintaining the confidentiality of its deliberations". Further, the Council could not defeat the citizen's rights by exercise of discretion under Article 5(1) of its Rules of Procedure (which provision seeks to raise a presumption of secrecy about Council proceedings).[28]

On that analysis the Court held[29] that the refusals in the present case demonstrated no such weighing up—a view in which the Court was fortified by the Danish/Dutch statement following the Council of 16 and 17 May 1994.[30] It followed that the refusals would be annulled. In reaching that result, the Court addressed only this argument; the other lines of attack were not dealt with in the judgment at all, and it is not therefore possible to establish what weight the Court might be prepared to give to them. Given that this was the first case to come before the Court on this matter, it is perhaps unfortunate that the opportunity was not taken to address the whole range of arguments advanced.

F. Conclusions

Carvel received his documentation and wrote a series of articles in the *Guardian* newspaper immediately after the judgment was announced.[31] Perhaps professional chivalry caused his journalistic colleagues to forbear from writing the case up at such length—or at all—for the coverage elsewhere was muted. Perhaps, too, there was a realisation that the case, although important, does not in fact afford unfettered freedom of access to official documentation. That is the real message from the Court in this case, namely, access is to be allowed as of right subject to a balancing exercise being carried out to weigh up the respective interests of the citizen and the Council. Further cases on the operation of that balancing exercise in practice can be expected. It remains to be seen which of the approaches to that balancing exercise proposed respectively by Denmark and the Netherlands is adopted, or whether the Court chooses to characterise the test in yet a different way.

There are, of course, other cases already before the Court in relation to access to official information and on the wider question of secrecy in the carrying out of the Community's business. It is likely, therefore, that *Carvel* is the pioneering case rather than the last word in the Court's jurisprudence on this topic.

KENNETH CAMPBELL*

26. *Idem*, para.62.
27. *Idem*, para.65. However, the Court did not take the opportunity to consider the linguistic tension—in the English text at least—between the mandatory "shall" and the rather looser "could undermine", which seems to imply a margin of appreciation.
28. *Idem*, para.68.
29. *Idem*, paras.78–80.
30. *Idem*, paras.71–74.
31. "Guardian court victory piercing EU wall of secrecy hailed as breakthrough for citizens"; "Court lifts mantle of secrecy"; "Now read all about it": *Guardian*, 20 Oct. 1995.

* Advocate, Edinburgh.

https://doi.org/10.1017/S0020589300060164 Published online by Cambridge University Press