

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 10 July 2001¹

1. This appeal was brought by the Council of the European Union against the judgment of the Court of First Instance of the European Communities of 19 July 1999 in Case T-14/98, which annulled the Council Decision of 4 November 1997 refusing Heidi Hautala, a Member of the European Parliament, access to the report of the Working Group on Conventional Arms Exports.²

2. This case originated with a written question which Mrs Hautala put to the Council on 14 November 1996,³ in which she stated that she was concerned by the violations of human rights which were being assisted by arms exports from Member States of the European Union. Mrs Hautala asked the Council what the reasons were for the secrecy surrounding the guidelines which the Working Group on Conventional Arms Exports had proposed to the Council's Political Committee with a view to clarifying the criteria governing arms exports.

3. The Council replied on 10 March 1997 stating that one of the eight criteria taken into account in arms exports decisions concerned respect for human rights in the country of final destination. It added that at its meeting on 14-15 November 1996 the Council's Political Committee approved a report from the Working Group on Conventional Arms Exports, with a view to further enhancing the consistent implementation of the common criteria.

4. By letter of 17 June 1997, addressed to the Secretary-General of the Council, the applicant asked to be sent the report mentioned in the Council's answer.⁴

5. The report was approved by the Political Committee but not by the Council itself. It was drawn up under the COREU special European correspondence system⁵ and was therefore not distributed through the normal channels for distributing Council documents. In the Council's practice, the COREU network is reserved for questions

1 — Original language: French.

2 — *Hautala v Council* [1999] ECR II-2489, 'the contested judgment'.

3 — Written question P-3219/96 (OJ 1997 C 186, p. 48).

4 — Hereinafter 'the report'.

5 — The system adopted by the Member States and the Commission in 1995 within the framework of the common foreign and security policy (CFSP) in application of Title V of the Treaty on European Union.

falling within the abovementioned Title V. Distribution of documents transmitted via the COREU network is restricted to a limited number of authorised recipients in the Member States, the Commission of the European Communities and the General Secretariat of the Council.

6. By letter of 25 July 1997, the General Secretariat of the Council refused access to the report under Article 4(1) of Decision 93/731/EC,⁶ stating that it contained 'highly sensitive information, disclosure of which would undermine the public interest as regards public security'.

7. By letter of 1 September 1997 the applicant made a confirmatory application, in accordance with Article 7(1) of Decision 93/731.

8. The confirmatory application was considered by the Information Working Party of the Committee of Permanent Representatives and by the members of the Council, which considered by a simple majority that a negative reply should be given. Four delegations were in favour of releasing the document.

9. By letter of 4 November 1997,⁷ the Council rejected the confirmatory application on the grounds that disclosure of the report could be harmful for the European Union's relations with third countries. It stated that access to the document was refused in order to protect the public interest with regard to international relations.

10. On 13 January 1998 Mrs Hautala brought an action before the Court of First Instance for annulment of the Council's decision refusing access to the report.

11. The terms of the contested judgment are set out below, following the description of the legal background to the present case.

I — Legal background

12. The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 contains a Declaration

⁶ — Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

⁷ — Hereinafter 'the contested decision'.

(No 17) on the right of access to information,⁸ which states:

‘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.’

13. At the close of the European Council in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled ‘A Community close to its citizens’,⁹ in which they stressed the need to make the Community more open. That commitment was reaffirmed by the European Council in Edinburgh on 12 December 1992.¹⁰

14. On 5 May 1993 the Commission addressed to the Council, the Parliament and the Economic and Social Committee Communication 93/C 156/05 on public access to the institutions’ documents.¹¹ It contained the results of a comparative survey on public access to documents in

the Member States and some non-member countries, and concluded that there was a case for developing further the access to documents at Community level.

15. On 2 June 1993 the Commission adopted Communication 93/C 166/04 to the Council, the European Parliament and the Economic and Social Committee on openness in the Community,¹² setting out the basic principles governing access to documents.

16. At the European Council in Copenhagen on 22 June 1993, the Council and the Commission were invited to ‘continue their work based on the principle of citizens’ having the fullest possible access to information’.¹³

17. Within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved on 6 December 1993 a Code of Conduct concerning public access to Council and Commission documents,¹⁴ aimed at establishing the principles to govern access to documents held by them.

8 — OJ 1992 C 191, p. 95, 101, ‘Declaration No 17’.

9 — Bull. EC 10-1992, p. 9.

10 — Bull. EC 12-1992, p. 7.

11 — OJ 1993 C 156, p. 5.

12 — OJ 1993 C 166, p. 4.

13 — Bull. EC 6-1993, p. 16, point I.22.

14 — OJ 1993 L 340, p. 41, hereinafter ‘the Code of Conduct’.

18. The Code of Conduct sets out the following general principle:

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.'

'The public will have the widest possible access to documents held by the Commission and the Council.'

21. The Code of Conduct further provides:

19. 'Document' is defined as 'any written text, whatever its medium, which contains existing data and is held by the Council or the Commission'.

'The Commission and the Council will severally take steps to implement these principles before 1 January 1994.'

20. The circumstances which may be relied on by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following terms:

22. In order to put that undertaking into effect, the Council adopted Decision 93/731/EC on public access to Council documents.

'The institutions will refuse access to any document whose disclosure could undermine:

23. Article 4(1) of Decision 93/731 provides:

— the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

'Access to a Council document shall not be granted where its disclosure could undermine:

— ...

— the protection of the public interest (public security, international relations,

monetary stability, court proceedings, inspections and investigations),

...’.

II — The contested judgment

24. The Court of First Instance sets out the pleas in law put forward by Mrs Hautala as follows:

‘The applicant puts forward three pleas in law to support her application: first, infringement of Article 4(1) of Decision 93/731; second, infringement of Article 190 of the EC Treaty (now Article 253 EC); third, breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to documents of the Community institutions, and of the principle of protection of legitimate expectations’.¹⁵

25. Since the decision to refuse access was annulled on the basis of the first plea the Court did not consider the other two pleas.

26. The Court considered in turn the three arguments put forward by the applicant in support of her first plea. It sought to determine ‘first, whether the confirmatory application was given adequate consideration by the Council; second, whether access to the report could be refused by reference to the public interest concerning international relations; and third, whether the Council was obliged to consider whether it could grant partial access, authorising disclosure of the parts of the document not covered by the exception on grounds of protection of the public interest’.¹⁶

27. The Court rejected the first two arguments put forward by Mrs Hautala. It accepted the third argument, in favour of granting the applicant partial access to the report, and ordered the annulment of the Council’s refusal on the following grounds:

‘75 As regards the third argument, which is supported by the Swedish Government, namely that the Council infringed Article 4(1) of Decision 93/731 by refusing to grant access to the passages in the report which are not covered by the exception based on protection of the public interest, it should be observed that the Council considers that the principle of access to documents

¹⁵ — Paragraph 43.

¹⁶ — Paragraph 65.

- applies only to documents as such, not to the information contained in them.
- 76 It is thus for the Court to verify whether the Council was obliged to consider whether partial access could be granted. Since this is a question of law, review by the Court is not limited.
- 77 Decision 93/731 is a measure of internal organisation adopted by the Council on the basis of Article 151(3) of the EC Treaty. In the absence of specific Community legislation, the Council determines the conditions for dealing with requests for access to its documents (see, to that effect, Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, paragraphs 37 and 38). Consequently, if the Council so wished, it could decide to grant partial access to its documents, under a new policy.
- 78 Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted. Nor, as the Council accepted at the hearing, does it expressly prohibit such a possibility.
- 79 In view of the above, the basis on which the Council adopted Decision 93/731 must be borne in mind for the purpose of interpreting Article 4 of that decision.
- 80 Declaration No 17 recommended that the Commission should submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. That commitment was restated at the European Council in Copenhagen on 22 June 1993, which invited the Council and the Commission to “continue their work based on the principle of citizens’ having the fullest possible access to information”.
- 81 In the preamble to the Code of Conduct, the Council and the Commission refer expressly to Declaration No 17 and the conclusions of the European Council in Copenhagen as the basis for their initiative. The Code of Conduct states the general principle that the public will have the widest possible access to documents.
- 82 Furthermore, the Court of Justice stressed in *Netherlands v Council*, paragraph 35, the importance of the public’s right of access to documents held by public authorities. The Court of Justice noted that Declaration No 17 links that right with “the demo-

cratic nature of the institutions". In his Opinion in that case ([1996] ECR I-2171, point 19), the Advocate General stated, with reference to the individual right to information, as follows:

"Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [of the Treaty on European Union, now, after amendment, Article 6 EU] of the Common Provisions."

83 The Court of First Instance recently held in *Svenska Journalistförbundet, paragraph 66*, referring to *Netherlands v Council*, that:

"The objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration."

84 Next, it should be noted that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (see, to

that effect, *WWF UK v Commission*, paragraph 56, and *Interporc v Commission*, paragraph 49). In the present case, the provisions to be construed are those of Article 4(1) of Decision 93/731, which lists the exceptions to the above general principle.

85 Furthermore, the principle of proportionality requires that "derogations remain within the limits of what is appropriate and necessary for achieving the aim in view" (Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38). In the present case, the aim pursued by the Council in refusing access to the report was, according to the reasons stated in the contested decision, to "protect the public interest with regard to international relations". Such an aim may be achieved even if the Council does no more than remove, after examination, the passages in the report which might harm international relations.

86 In that connection, the principle of proportionality would allow the Council, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the interest in

public access to those fragmentary parts against the burden of work so caused. The Council could thus, in those particular cases, safeguard the interests of good administration.

interpreting Article 4(1) of Decision 93/731 as requiring the Council to consider whether it should grant partial access to information not covered by the exceptions to public access to its documents.

87 Accordingly, Article 4(1) of Decision 93/731 must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions.

29. The Council and the Kingdom of Spain claim that the Court has misconstrued Decision 93/731, as regards both its *wording* and its *objective*, and has wrongly applied the *principle of proportionality*.

88 As appears from paragraph 75 above, the Council did not make such an examination, since it considers that the principle of access to documents applies only to documents as such and not to the information contained in them. Consequently, the contested decision is vitiated by an error of law and must therefore be annulled.'

30. The Council considers that the Court has categorised as being a right to information what is merely a right of access to public documents. The text of Decision 93/731 refers only to Council documents in their existing form and not to the items of information which they contain. The Council is therefore required merely to consider whether the document requested, in its existing form and without any alteration, can be released or whether it falls under one of the exceptions laid down in Article 4 of Decision 93/731. The decision does not, however, require it to consider whether partial access may be granted to documents. It does not oblige it to create a new document comprising only items of information which may be disclosed, as the contested judgment appears, wrongly, to require. The Council observes that the approach taken by the Court is likely to create a considerable administrative burden and significant practical difficulties since it would be necessary to determine which parts of each document could be released.

III — Pleas in law and arguments of the parties

28. The Council is seeking to have the judgment of the Court of First Instance set aside and is supported by the Kingdom of Spain, intervener in the appeal. It claims that the Court made an error of law by

31. In the view of the Council, the objective of Decision 93/731 is not to enshrine a right to information. The judgments of the Court of First Instance relating to the right to information fail to recognise that the Court of Justice in its judgment in *Netherlands v Council*, cited above, refers to access to documents and that Declaration No 17 on the right of access to information is a political statement and has no binding effect.

32. As regards the principle of proportionality, to which the Court of First Instance refers in the contested judgment, the Council considers that it cannot be applied in order to determine the validity of a restriction on a right protected under Community law. The decision aims not to confer an absolute right of access to Council documents on members of the public, but to arrange for access to be granted on certain conditions. In the absence of a general principle of Community law conferring an absolute right of access to Council documents on members of the public, and in view of the adoption of Article 255 EC as a result of the Treaty of Amsterdam, which confirms the absence of a pre-existing principle in this matter, the principle of proportionality cannot be interpreted as a restriction on a right protected under Community law. In addition, by ensuring by means of the exceptions laid down in Article 4 that disclosure of documents will not harm certain interests in need of protection, Decision 93/731 already applies the principle of proportionality. That principle is thus fully taken into consideration.

33. The Kingdom of Spain shares that view. It contends that it cannot be inferred either from the legislation in force or from the case-law of the Court of Justice and the Court of First Instance that there is a principle of a right to information such as is embodied in the contested judgment. It also contends that the principle of proportionality, when applied to measures adopted by the Council in relation to Article 4(1) of Decision 93/731, can only mean that that institution must act within the confines of what is appropriate and necessary in order to fulfil the requirements of that provision. That involves denying access to its documents if one of the interests listed in that provision would otherwise be undermined.

34. Mrs Hautala claims that the appeal should be dismissed. The United Kingdom of Great Britain and Northern Ireland and the Kingdom of Denmark, interveners in the appeal, and the Kingdom of Sweden and the Republic of Finland, interveners at first instance and present at the appeal stage, support that claim.

35. In the view of Mrs Hautala and the Member States associated with her defence, the right of partial access is required by both the wording and the context of Decision 93/731. They add that the latter should be interpreted and applied in accordance with the general principles of Community law, which include the right to information. Entitlement to partial access

to documents follows directly from the fundamental principle of Community law that European Union citizens should be granted the widest and fullest possible access to documents of the European institutions.

which the Council is to adopt its own rules of procedure. It lays down the principle of public access to Council documents. It does, however, make exercise of that right subject to a number of conditions, which it lists and which include the exceptions contained in Article 4(1) of the decision.

36. Mrs Hautala contends that, like other principles of Community law, the right of access to information was incorporated into the Treaty by Article 255 EC. The principle of proportionality therefore serves in this case to limit that right in order to safeguard other objectives deserving of protection. It requires, however, that exceptions should not exceed the limits of what is appropriate and necessary for achieving the aim in view.

37. Before giving my opinion on the above-mentioned pleas and arguments I think it is appropriate to recall the rules of Community law governing the interpretation of Decision 93/731.

39. In *Netherlands v Council* the Kingdom of the Netherlands sought annulment of Decision 93/731 on the ground that the Council wrongly relied as its legal basis on Article 151(3) of the Treaty and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council's internal organisation. The Kingdom of the Netherlands argued that Decision 93/731 went far beyond the ambit of the rules on the internal organisation and management of the Council and constituted an act expressly designed to have legal effects *vis-à-vis* citizens. The Netherlands Government contended that the Council had categorised as a matter of internal organisation something which in fact constituted a fundamental right, namely the public's right of access to information, the rules governing which must be accompanied by the necessary safeguards.

IV — The rules of Community law governing the interpretation of Decision 93/731

38. Decision 93/731 is based on Article 151(3) of the EC Treaty (now, after amendment, Article 207(3) EC), under

40. The Court of Justice acknowledged that so long as the Community legislature had not adopted general rules on the right of public access to documents held by the

Community institutions, the institutions must take measures regarding the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.¹⁷

41. It thus acknowledged the Council's right to use its power of internal organisation to introduce a measure of transparency into its operation. The absence of Community rules of a general nature governing access to documents undoubtedly justified an institution such as the Council improving its methods of operating, in an effort to achieve transparency, by laying down rules more favourable than those which had so far governed its own practice.

42. Despite its aim, which by reason of the links it has with the very foundations of the European Community, clearly goes beyond the mere internal organisation of one of the Community institutions, Decision 93/731 was held to be based on the appropriate Treaty provision. The Court of Justice was able to regard the Treaty provision enabling the Council to adopt its rules of procedure as constituting an adequate legal basis for improving the transparency of its operation.

43. It would be an exaggeration, however, to claim that even as regards the Council's field of operation the content of that judgment dealt fully with the question of access to documents.

The judgment in *Netherlands v Council*, which confirms the formal validity of Decision 93/731, does not appear to contribute anything substantive to the interpretation of the provisions of Decision 93/731 at issue. In that case the Court of Justice was clearly bound by the subject-matter of the action, which was confined to the question of the appropriate legal basis of Decision 93/731.

44. The present appeal, however, calls for an interpretation of the contested provisions. That can only be done if all the rules of Community law governing the right of access to documents are taken into consideration. In *Netherlands v Council* the Court of Justice noted that the trend followed by the Community 'discloses a progressive affirmation of individuals' right of access to documents held by public authorities'.¹⁸

45. It is clear that the provisions of Decision 93/731 at issue cannot be applied

17 — *Netherlands v Council*, paragraph 37.

18 — Paragraph 36.

unless their content is interpreted in accordance with that trend and with the foundations of the right of public access to documents which that decision by its very title seeks to achieve.

the European Council in Copenhagen on 22 June 1993 the Council and the Commission were called upon to continue their work on the basis of the principle that citizens must have the fullest possible access to information.

46. The rules it contains are intended to put into effect, in the limited context of the Council's power of internal organisation, the guidelines laid down since Declaration No 17 in respect of the right of individuals to have access to documents held by the public authorities.

49. Those various political impetuses were translated into action in particular through the adoption by the Council and the Commission of a code of conduct and subsequently the amendment by the Council of its rules of procedure. Decision 93/731, which reiterates and supplements the provisions of the Code of Conduct, was adopted following that amendment.

47. Declaration No 17 is the first tangible act in which the Community acknowledged the importance of a general right of access to information within the Community institutions. The Intergovernmental Conference thereby demonstrated its intention to increase the effectiveness of that right. In noting that transparency of the decision-making process enhances the democratic nature of the institutions and the confidence of the public in the administration, it emphasised the importance of a right which is derived from the most essential political foundations of the Member States of the Community.

50. The process of acknowledging the right of access did not end with the adoption of rules of procedure which the institutions laid down for themselves. A new article, Article 191a (now Article 255 EC), was introduced into the EC Treaty by the Treaty of Amsterdam. Article 255(1) EC provides that '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3'. In pursuance of those paragraphs, a proposal was submitted for a regulation of the European Parliament and of the Council regarding public access to

48. The European Councils held in 1992 in Birmingham and Edinburgh reaffirmed that will to make the Community more open. At

European Parliament, Council and Commission documents.¹⁹

also the surest method of involving them in the management of public affairs.²²

51. Article 42 of the Charter of Fundamental Rights of the European Union²⁰ provides a right of access to European Parliament, Council and Commission documents.

53. Advocate General Tesauro described perfectly the place of the right of access to documents in Community law as follows:

52. It is important to take into account that consistency in the political will of the Member States and in the evolution of the scope of Community legislation in that regard. They demonstrate the emergence of a right closely related to the foundations of the Community. As Advocate General Tesauro observed in his Opinion in *Netherlands v Council*, the openness of the public authorities' action is closely linked with the democratic nature of the institutions.²¹ The fact that citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system. At the highest level of that system, providing the public with information is

'Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice... . In the light of the changes which have taken place in the legislation of the Member States, the right of access to official documents now constitutes part of that principle... . Hence it is the democratic principle and the content which it has progressively assumed in the various national systems which requires access to documents no more to be allowed only to the addressee of a measure of the public authority'.²³

19 — Proposal 2000/C 177 E/10 (OJ 2000 C 177 E, p. 70). With regard to the Amsterdam reform in this field, see in particular, Öberg, U., 'Public Access to Documents after the entry into force of the Amsterdam Treaty: Much Ado About Nothing?' in *European Integration online Papers (EIoP)*, Vol. 2, 1998, No 8 (<http://eiop.or.at/eiop/texte/1998-008a.htm>).

20 — OJ 2000 C 364, p. 1.

21 — Point 14.

22 — See among many works devoted to this question, Blancher, T., 'Transparence et qualité de la législation', in *RTD eur.*, 33 (4), Oct.-Dec. 1997, p. 915 et seq.; Bradley, K. St. C., 'La transparence de l'Union européenne: une évidence ou un trompe-oeil?' in *Cahiers de droit européen*, 1999, p. 283 et seq.; Curtin, D., and Meijers, H., 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' in *CML Rev.*, 1995, p. 391 et seq.; Öberg, U., cited above, O'Neill, M., 'The Right of Access to Community-Held Documentation as a General Principle of EC Law', in *European Public Law*, Vol. 4, Issue 3, p. 403 et seq.; Ragnemalm, H., 'Démocratie et transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires', in *Scritti in onore di G. F. Mancini*, p. 809 et seq.; Timmermans, C., 'Subsidiarity and transparency', in *Fordham International Law Journal*, Vol. 22, 1999, p. S106 et seq.; Vesterdorf, B., 'Transparency — Not Just a Vogue Word', in *Fordham International Law Journal*, 1999, p. 902 et seq. See also as an example of the opposite view, Davis, R.W., 'Public access to Community documents: a fundamental human right?', in *European Integration online Papers (EIoP)*, Vol 3, 1999, No 8 (<http://eiop.or.at/eiop/texte/1999-008a.htm>).

23 — Point 19 of the Opinion in *Netherlands v Council*.

54. The finding by the Court of Justice in *Netherlands v Council* that the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle reflects the strength and relevance of that right.²⁴ A large number of Member States, moreover, have amended their domestic legislation concerning access to documents since 1996 without there appearing to be any retreat except in a few minor cases. Ireland and the United Kingdom in particular have adopted legislation which goes notably far as regards protection for citizens in this respect.²⁵

55. It is important to emphasise this convergence of national laws since to my mind it constitutes a decisive reason for recognising the existence of a fundamental principle of a right of access to information held by Community institutions.

56. According to consistent case-law now enshrined in the Treaties,²⁶ fundamental rights form an integral part of the general principles of law with which the Court of Justice ensures compliance. To that end it draws on the constitutional traditions common to the Member States and on evidence provided by international instruments concerning protection of human rights in which Member States have cooperated or to which they have acceded.²⁷

57. Thirteen of the fifteen Member States have a general rule that the public has a right of access to documents held by the administration. In nine of those thirteen States the right of access is a fundamental right, a 'principle' of a constitutional nature²⁸ or a right founded in the constitution but of a legislative nature.²⁹ In the four other Member States the right derives from one or more laws.³⁰

58. Those national rules, although the content of their corresponding legal systems are not necessarily the same, demon-

24 — Paragraph 34. See as regards current legislation of the Member States on access to documents of the institutions the annex to the Commission communication of 5 May 1993, 'Public access to the institutions' documents' [COM(93) 191 final, OJ 1993 C 156, p. 5]. For an updated version of the text, see Commission documents dated 10 August 2000 entitled 'Comparative analysis of the Member States' legislation concerning the access to documents' and 'Overview of Member States' national legislation concerning access to documents' (http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/en/index.htm).

25 — In Ireland a general right for the public to obtain the widest possible access to documents held by the administration has replaced the former principle under which citizens were entitled to have access only to certain limited categories of documents or to documents in the possession of the administration dating back more than 30 years (1997 Freedom of Information Act). In the United Kingdom, the 2000 Freedom of Information Act recently extended the right of access, which had previously been reserved for certain limited categories of information.

26 — Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU), and Article 46(d) EU.

27 — See for a recent example of such case-law Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37. See in particular Puissochet, J.-P., 'La Cour de justice et les principes généraux du droit', in *Les annonces de la Seine*, 1996, No 69, p. 3 et seq.

28 — Kingdom of Belgium, Kingdom of Spain, Italian Republic, Kingdom of the Netherlands, Portuguese Republic, Republic of Finland and Kingdom of Sweden.

29 — Hellenic Republic and Republic of Austria.

30 — Kingdom of Denmark, French Republic, Ireland and the United Kingdom of Great Britain and Northern Ireland.

strate a common conception in most of the Member States, which Advocate General Tesauro has described as follows: 'it is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse'.³¹

59. In the light of that conception of relations between those who govern and those who are governed, on which there is almost unanimous consensus within the European Union, it appears natural to me to accept that there exists a principle of access to information held by the national public authorities and that that principle is such that it would engender an equivalent principle at Community level.

If there is to be any discussion, it would appear to be more about the content of the exceptions to the principle which must be laid down, since the need to define certain limits does not raise any significant objections either. It cannot be ruled out that certain restrictions on access to information should be allowed for reasons of a public or a private nature.

60. If one considers the international instruments concerning protection of human rights which Member States have cooperated in or adhered to, their contribution with regard to access to documents varies.

61. The right to freedom of expression provided for in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms has not so far been interpreted by the European Court of Human Rights as covering the right of access to information. Article 10(1) provides that the right to freedom of expression 'shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....'. It is a matter for regret that freedom of expression is not regarded as having a natural link to the right of access to information unlawfully kept secret. However, the letter of the text has always been interpreted strictly.³²

62. Various resolutions, recommendations and declarations of the Parliamentary Assembly of the Council of Ministers of the Council of Europe have affirmed the importance for citizens to have adequate information about the operation of the public authorities.³³ A draft recommenda-

32 — For a different interpretation of the case-law of the European Court of Human Rights, see O'Neill, M., cited above.

33 — See in particular Recommendation No 854 (1979) of the Parliamentary Assembly of the Council of Europe of 1 February 1979 relating to access by the public to government records: Freedom of Information (Council of Europe Parliamentary Assembly, texts adopted, 30th ordinary session, 3rd part, from 29 January to 2 February 1979) and recommendations of the Committee of Ministers of the Council of Europe No R (81) 19 on the access to information held by public authorities (Council of Europe, Collection of Recommendations, Resolutions and Declarations of the Committee of Ministers on Human Rights, 1949-1987, Strasbourg, 1989, p. 96) and No R (91) 10 on the communication to third parties of personal data held by public bodies (Council of Europe, Committee of Ministers, Recommendation to Member States, 1991, Strasbourg, 1995).

31 — Opinion in *Netherlands v Council*, point 15.

tion on public access to official information is in the course of preparation by the Council of Europe.³⁴ In its current version that draft lays down a general principle providing to anyone who makes an application the right to have access to documents held by the public authorities. Exceptions to the general principle are provided for where other legitimate interests prevail. They must be applied restrictively. It should be noted that the draft provides for partial access to information. However, partial access may be refused if the expurgated version of the document is misleading or incomprehensible.³⁵ The final draft of the recommendation should be adopted before 31 December 2001.

63. These various measures show that even if no 'legislative' step has yet been taken by the Council of Europe numerous unambiguous declarations have been made as a preliminary.

64. Article 19 of the 1966 United Nations Covenant on Civil and Political Rights provides expressly that freedom of expres-

sion includes the right to seek information and ideas.³⁶ The 1966 Covenant is in force in all the Member States. That freedom conferred on citizens to have access to the information required in order for them to exercise their freedom of expression confirms the principle that each Member State has enshrined in its national law.

65. It should not be overlooked, however, that the broad interpretation which may be made of Article 19 of the 1966 Covenant is far from being unanimously accepted. Some authors do not consider that the freedom to seek information provided for in the 1966 Covenant includes the obligation on Member States to supply that information.³⁷

66. In any event, the approach traditionally taken by the Court of Justice to the protection of fundamental rights has never

34 — Draft prepared by the Group of Specialists on Access to Official Information at its 6th meeting (from 27 to 29 September 2000).

35 — See draft recommendation contained in Annex III to the report of the meeting of September 2000, Strasbourg, 26 January 2001, DH-S-AC (2000)7.

36 — Hereinafter 'the 1966 Covenant'. Treaty Series, Vol. 999, p. 171. Article 19(2) provides: '[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. This text is very close, as regards freedom to seek information, to Article 19 of the 1948 Universal Declaration on Human Rights. However, unlike the 1966 Covenant, the 1948 Universal Declaration is regarded as having no binding effect on States or direct applicability with regard to individuals. It is primarily a programme (De Vries Reilingh, J., 'L'application des pactes des Nations unies relatifs aux droits de l'homme de 1966', Helbing & Lichtenhahn, Bruylant, 1998, paragraphs 25 and 32).

37 — See, for example, Blumenwitz, D., 'Die Meinungs- und Informationsfreiheit nach Art. 19 des IPBPR', in M. Nowak, D. Steurer and H. Tretrer, *Fortschritt im Bewußtsein der Grund- und Menschenrechte, Festschrift für Felix Ermacora*, Kehl-Strasbourg-Arlington, Engel Verlag, 1988, p. 71.

led it to take guidance from a provision if it was not certain that that provision laid down the rule corresponding to the principle at issue.

have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States.

67. The Court of Justice ensures compliance with fundamental rights. It contributes to their recognition and participates in the definition of their content. The general principles of Community law, of which fundamental rights are an integral part, are often derived from international instruments such as the European Human Rights Convention or the 1966 Covenant.

68. Examination of the case-law reveals, however, that the convergence of the constitutional traditions of the Member States may suffice in order to establish the existence of one of those principles without the need to obtain confirmation of its existence or content by referring to international rules.³⁸

69. Moreover, a general principle of Community law may be recognised without first establishing the existence of either constitutional rules common to the Member States or rules laid down in international instruments in which the Member States have cooperated or to which they have acceded. It may suffice that Member States

As regards the powers of investigation available to the administration in respect of legal persons, for example, the Court of Justice has held that 'there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities'³⁹ and the European Convention on Human Rights did not allow for recognition of a fundamental right to the inviolability of the 'home' of a business.⁴⁰ This lacuna in the principal rights under consideration was not enough to deter the Court of Justice from recognising the existence of a general principle that individuals must be protected against harmful intervention by the public authorities. The Court held that 'in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must [therefore] be recognised

38 — Case 44/79 *Hauer* [1979] ECR 3727, paragraphs 19 to 22.

39 — Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, paragraph 17.

40 — *Ibid.*, paragraph 18.

as a general principle of Community law'.⁴¹

70. It is quite clear from the foregoing that the principal sources which traditionally support the enshrinement of general principles of Community law are not essential if other elements are sufficient to define the content of those principles.⁴²

71. I consider that that is precisely the case here.

72. As we have seen, as a principle and regardless of the exceptions that may apply to it and the procedure for exercising it, access to documents for citizens is a right widely shared among the Member States. It would be paradoxical to say the least to extend the situation in which the Community institutions, which have legislative powers similar to those of the Member States, are sheltered in the exercise of those powers by a right of access to documents which is ill-defined and restrictive, when almost all the Member States have elevated that right to the level of a principle. Finally, is it reasonable to accept that the transfer by Member States of their sovereign rights

to the Community legal order in certain specified fields should not be accompanied by a similar transfer of the safeguards which they accord their citizens, which embrace the right to have knowledge of information in the possession of the administration?

73. At Community level, the principle of access to documents was confirmed, and its status and content defined, following the entry into force of the Treaty of Amsterdam and the adoption of the Charter of Fundamental Rights.

74. It should be remembered that that principle was 'constitutionally' enshrined by the adoption of Article 255 EC. Its content is to be defined in the regulation to be adopted under Article 255(2) EC, which is currently being negotiated,⁴³ and by the future decisions of the Court of Justice.

75. The fact remains that that right, which 'existed before the Council's new Rules of Procedure and Decision 93/731/EC were adopted',⁴⁴ has now been expressly integrated at the highest level of Community law.

41 — *Ibid.*, paragraph 19.

42 — On this aspect of the Court's case-law see Monet, H., 'La Communauté européenne et la convention européenne des droits de l'homme' in *Revue trimestrielle des droits de l'homme*, 1994, p. 501 et seq.

43 — Proposal for a regulation 2000/C 177 E/10, cited above.

44 — Opinion of Advocate General Tesauro in *Netherlands v Council*, point 20.

76. That the principle existed before it was introduced into the Treaty was evident from the case-law of the Court of First Instance, which considers that Declaration No 17 and the Code of Conduct enshrine the general principle of giving the public the widest possible access to documents held by the Commission and the Council.⁴⁵ It had clearly stated that the objective of Decision 93/731 was to give effect to the principle of the widest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration.⁴⁶ One must concur with that.

77. The strength of the principle of access to documents derives from the fact that it is a fundamental right.

78. Advocate General Tesauro termed it 'a fundamental civil right'.⁴⁷ Article 42 of the Charter of Fundamental Rights of the European Union provides '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents'.

79. Classification of the right of access to documents as a fundamental right consti-

tutes a further stage in the process of recognising that principle and establishing its ranking within the Community legal order.

80. Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked.⁴⁸ However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection.⁴⁹ The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States.

81. It is known that the political and moral values of a society are not all to be found in positive law. However, where rights, freedoms and principles are described, as in the Charter, as needing to occupy the highest level of reference values within all the Member States, it would be inexplicable

45 — Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, paragraph 38.

46 — Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 66.

47 — Opinion in *Netherlands v Council*, point 16.

48 — See, in particular, Wathelet, M., 'La charte des droits fondamentaux: un bon pas dans une course qui reste longue', in *Cahiers de droit européen*, 2000, Nos 5 and 6, p. 585 et seq.

49 — Fourth recital in the preamble.

not to take from it the elements which make it possible to distinguish fundamental rights from other rights.

82. The sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the Member States and the European Union.⁵⁰ It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values.

83. As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.

84. In this case, the link between Article 42 of the Charter and Article 255 EC is

50 — The fifth recital in the preamble states that '[t]his Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights'.

evidenced by the explanatory note to Article 42, which states that '[t]he right guaranteed in this Article is the right guaranteed by Article 255 of the EC Treaty'. It cannot be made more plain that the right contained in Article 255 EC is now clearly described as corresponding to a fundamental right within the meaning of the Charter.

85. It is true that, according to the same explanatory note, '[i]n accordance with Article 52(2) [of that Charter, that right] applies under the conditions defined by the Treaty'.⁵¹ The content of the right of access to documents, as set out in the Charter, is thus delimited by the provisions of Article 255 EC. That delimitation is the logical consequence of the difference in legislative value between the Charter and the binding provisions of the Treaty.

86. That should not, however, cause us to overlook the fundamental nature of that right, as affirmed by the Member States of the Union at the time it was introduced into the Charter. Although not enshrining a positive right itself, Article 42 of the Charter confers on that right a quality which should provide guidance for its interpretation. I consider that where it is decided that a right should be classified as a fundamental right the authorities responsible for applying it are under a strict requirement to give it the wide interpretation demanded by its true nature.

51 — Text of the explanations relating to the complete text of the Charter as set out in *Charte 4487/00* Convent 30, of 19 October 2000 (<http://ue.eu.int/df/default.asp?lang=en>).

87. This should be the case as regards the right of access to documents as enshrined in Article 255 EC.

ment the principle of access to information refer to access to documents.⁵²

88. The Court of Justice will doubtless be required again to interpret the principle of access to documents, Article 255 EC, which introduces it into the Treaty, and the regulation which is to lay down the detailed provisions concerning that principle.

91. Use of the term 'documents' is not enough in my view to justify the interpretation proposed by the Council.

89. It is not required, in the context of this appeal, to give an exhaustive definition of the principle. However, it is necessary in order to be able to give a ruling on it to deal with one aspect of that definition by clarifying the meaning ascribed to the term 'documents' both by Article 42 of the Charter and by Article 255 EC.

92. The distinction between documents and information seems to me to be purely formal.⁵³ The right of access to a document concerns the content of the document and not its physical form. No one can claim that when making a request for access to documents he is seeking the document itself and not the information it contains. When applying for the disclosure of a document, the applicant implies that he is seeking all of the information contained in the document, which leaves him free to ascertain the information which is of particular interest to him.

90. The other Community texts on this subject do not all use the same terms. Declaration No 17 refers to 'public access to information'. At the European Council in Copenhagen, the Council and the Commission were directed to pursue their work of implementing the principle that citizens should have 'the fullest possible access to information'. However, the measures adopted following those requests to imple-

93. The nuance introduced by the Council imposes a somewhat artificial distinction between the container and the content or

52 — See, for example, Communication 93/C 156/05, cited above, the Code of Conduct, Decision 93/731, Article 255 EC and Article 42 of the Charter.

53 — This view is shared by the governments which intervened in the proceedings before the Court of Justice apart from the Spanish Government.

between the medium and the information. So far as the applicant is concerned, it is only the substance of the document which is relevant. We request access to a document solely because it contains data which is likely to be of interest to us. It is therefore always ultimately a case of a request for information.

94. This understanding of the right of access to documents is, moreover, in accordance with the broad interpretation which should be used in such matters. It is necessary, therefore, to interpret the concept of the right of access to 'documents' as meaning a right of access to the 'information' contained in the documents.

95. It is in the light of that right thus interpreted that I can now give my opinion regarding the present appeal.

V — The appeal

96. The Council challenges the existence of the obligation imposed on it by the Court of First Instance to consider whether it should grant partial access to the information contained in the document at issue.

97. It relies, first, on the wording of Decision 93/731, which uses exclusively the term 'documents' and not 'information'.

98. I have just given the reasons why the right of access to documents should not be interpreted in this way. The Council's concept of 'access to documents' should therefore be understood to mean access to the information contained in that institution's documents.

99. Since what counts is the information itself and not the document, the argument put forward by the Council that partial access would oblige it to create a new document containing solely information which may be released is unfounded.

100. If interpreted in this way, the right of access to Council documents provided for in Article 1(1) of Decision 93/731 authorises partial access to documents. It should therefore be accepted that access is permitted to certain information contained in a document although the document cannot be made public in its entirety for

reasons relating to the need to protect one or more of the interests listed in Article 4(1) of Decision 93/731.

prevent rules on the internal organisation of the work of an institution having legal effects *vis-à-vis* third parties.⁵⁶ It would not therefore be permissible for the Council, by means of an internal measure, to avoid a fundamental rule with which the other Community rules are required to comply.

101. Second, the Council contends that the objective of Decision 93/731 is not to establish a right of access to information. In its view, that decision has its own specific and limited objective.

104. As Advocate General Tesauro stated, 'a Council decision, albeit adopted in full compliance with its self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information.'⁵⁷ In other words, the purpose assigned to Decision 93/731 cannot be relied on in support of a reading of its provisions which is contrary to fundamental principles.

102. Decision 93/731 is, in fact, intended to ensure the internal operation of the institution in conformity with the interests of good administration.⁵⁴ It is a measure of internal organisation by means of which the Council may deal with requests for access to documents in its possession.⁵⁵

105. It is appropriate to consider the Council's third complaint, alleging that the principle of proportionality is not relevant in this case in the absence of an absolute right of access to its documents. In the Council's view, Article 4 of Decision 93/731 already applies that principle.

103. Even within the limited scope of its power of internal administration, however, the Council is bound by the general principles of Community law and, even more, by fundamental rights. The purpose assigned to Decision 93/731 cannot therefore be relied on in breach of the fundamental right of access to documents. This applies even more where, as the Court of Justice has observed, there is nothing to

106. As I said, the right of access to documents must be regarded as one of the

⁵⁴ — *Netherlands v Council*, paragraph 37.

⁵⁵ — *Ibid.*, paragraphs 38 and 39.

⁵⁶ — *Ibid.*, paragraph 38.

⁵⁷ — Opinion in *Netherlands v Council*, point 21.

fundamental rights protected by the Community legal system. It is accepted that those rights are not framed as absolute rights. Exercise of such rights may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed.⁵⁸

107. By prohibiting the Council from authorising access to a document where its disclosure could undermine the protection of the public interest, Article 4(1) of Decision 93/731 is capable of restricting the right of access to Council documents.

108. It is not denied in the present case, however, that the exception contained in Article 4 of Decision 93/731 with regard to protection of the public interest in the field of international relations meets Member States' requirements regarding defence of

their prerogatives in international affairs.⁵⁹ Among those prerogatives is the right for Member States to consult each other in order to adopt a common position with regard to non-member countries on questions which may be as sensitive from a political viewpoint as arms exports to countries suspected of using such arms for purposes incompatible with human rights.

109. The Council interprets the principle of proportionality as having already been incorporated into the content of Article 4(1) of Decision 93/731.

110. According to that view, merely listing the circumstances which justify restrictions on the right of access to documents is sufficient to ensure that that right is observed, provided the restrictions meet the objectives of the Community.

111. I do not share that view.

58 — For this consistent case-law, see in particular Case 4/73 *Nold v Commission* [1974] ECR 491; *Hauer*, cited above, paragraphs 23 and 32; Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23; Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraphs 17 and 18; Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 21, and Case C-293/97 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others* [1999] ECR I-2603, paragraphs 54 to 58.

59 — Mrs Hautala claimed before the Court of First Instance, however, that access to the report at issue did not harm the public interest concerning international relations. Noting in particular that the report contained exchanges of views between the Member States on respect for human rights by the country of final destination and contained formulations and expressions which might have caused tension with certain non-member countries, the Court of First Instance did not uphold the application on that basis (paragraphs 71 to 74 of the contested judgment).

112. In order to assess whether or not the principle of proportionality has been infringed, it is not enough to ensure that exceptions like those contained in Article 4(1) of Decision 93/731 are in accordance with the public interest objectives pursued by the Community. It is necessary also to ascertain whether they have been applied in a manner proportionate to those objectives.

113. The Council's refusal to consider whether partial access should be granted to information not covered by the exceptions clearly conflicts with the principle of proportionality.

114. Since it is not covered by the exceptions, the information to which access is refused is presumed not to be confidential. It is hard to see therefore why the objective of protecting the public interest pursued by Decision 93/731 requires that information which has been shown to be harmless should not be accessible to the public although it appears in a document containing other information which could be harmful to the public interest.

115. The 'all or nothing' approach taken by the Council may mean that it classifies an entire document as being confidential, however large it is, solely because it contains a single piece of information justifying refusal of access. The major part of that document would be kept from the

public without any justification. By depriving all applicants of the right to have access just to information not covered by the public interest exception, the Council is not merely applying the principle of proportionality improperly, it is also undermining the very substance of the right of access to documents.

116. Refusing partial access, moreover, conflicts with the principle that exceptions to the general principles of Community law must be interpreted and applied strictly.⁶⁰

117. Since the right of access to documents, being a fundamental principle, should be understood in the broad sense, Article 4(1) should be interpreted as requiring the Council to consider granting partial access to information not covered by the exceptions.⁶¹

118. As to whether the Council can be dispensed from granting partial access

60 — See, as a recent example of settled case-law, Joined Cases C-174/98 P et C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 27.

61 — Moreover, as the Court of First Instance noted in the contested judgment, 'Decision 93/731 does not expressly require the Council to consider whether partial access to documents may be granted. Nor, as the Council accepted at the hearing, does it expressly prohibit such a possibility' (paragraph 78).

where the administrative burden involved in blanking out information which cannot be released would be too great, there is a need for caution.

119. First, it is not in accordance with the nature of the right of access to documents as a fundamental right to accept purely administrative reasons as grounds for restricting partial exercise of that right, regardless of the extent of such constraints. Second, it does not appear that the work involved in marking the confidential part of a document is in general substantially increased by the work of separating the confidential parts from the others or of removing them.

Moreover, partial access is enshrined, in law or in case-law, in nine of the fifteen Member States of the Community.⁶² In three other Member States that right is neither expressly provided for nor expressly prohibited.⁶³ In my view, this significant convergence between national laws should be taken as a sign that the widespread practice of the right of partial access does not generally pose insurmountable administrative problems.

62 — Kingdom of Belgium, Kingdom of Denmark, French Republic, Ireland, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Finland and Kingdom of Sweden.

63 — Hellenic Republic, Kingdom of Spain and Italian Republic.

120. It remains possible, however, that, where there would be a particularly heavy administrative burden for the institution concerned, refusal may be justified on a wholly exceptional basis.

121. It seems legitimate, therefore, to allow a derogation to the right of partial access exclusively where the administrative burden would exceed the limits of what can reasonably be required.⁶⁴ Exercise of that right of refusal should even so be open to review by the courts, in accordance with the right to effective judicial review, and the institution concerned should be required to provide evidence of the extent of the workload in question.

122. With reference solely to the complaints raised by the Council concerning the contested judgment, it is necessary to consider that Decision 93/731 as interpreted in the light of the fundamental principle of the right of access to documents does not prohibit the right of partial access. The conclusion must therefore be that the Court of First Instance did not err in law in ruling that the Council was required to consider whether partial access should be granted to information not covered by the exceptions provided for in Article 4(1) of Decision 93/731.

64 — See, in a different field, Case 104/75 *De Peijper* [1976] ECR 613, paragraph 18.

Conclusion

123. In the light of the foregoing I propose that the Court should:

- (1) dismiss the appeal;
- (2) order the Council to pay the costs, under Article 69(2) of the Rules of Procedure.