



6 June 2012

**To:**

Council Presidency spokesperson COREPER I, Mr. Jakob Alvi  
Permanent representations of Member States

**Cc:**

Mr. Jakob Thomsen, Council Secretariat General  
Marc Maes, Gerard Legris, Jens Nymand Christensen, Commission Secretariat General

Dear Sir, Dear Madam,

We are writing to express our serious concerns about the direction that the current negotiations on the revision of the Regulation 1049/2001 on access to documents are taking and to call on you to ensure that any changes to the text are in line with the European Treaties (Treaty on the Functioning of the EU and the Charter of Fundamental Rights) and with international standards, in particular the Council of Europe Convention on Access to Official Documents and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

With negotiations having reached a stage of three-party dialogues between the Council, Commission and Parliament (the "trialogues") and with the aim of reaching agreement on the text by the end of June, we believe it is imperative that you now take the necessary steps to ensure that the right of public access to documents - protected by the EU Treaties - is fully respected in the future regulation.

While the current proposal made in the name of the Council by the Danish Presidency has a few positive features which would improve the way in which access to documents is regulated, in the main it is likely to severely limit that right in a way which is inconsistent with international standards.

We welcome that the EU's access to documents rules would be extended to apply to all institutions, bodies and agencies; and that relevant legislative documents would be proactively published, both of which are changes required by the Treaty of Lisbon.

We are also encouraged to see that consideration is being given to the introduction of information officers, and we appreciate the clarification that Member States are not considered third parties when their representatives act in their capacity as members of the Council or when their delegates act in the framework of the Council decision-making process.

However, we have great concerns about the following proposals, which would significantly weaken the right of access to EU documents and which should therefore either be removed in their entirety or significantly reworded:

1. The **Definition of a document:** the proposed convoluted definition of a document, which includes new language about databases and the "guidelines" on when a document becomes a document, unduly restricts the categories of document that would be made publicly accessible. We advocate a broad definition of "document" which is in line with international standards, including the Council of Europe Convention on Access to Official Documents and the Aarhus Convention which defines respectively the right as applying to all information held in any format or any material form. The definition proposed by the European Parliament fits most closely with this standard, and importantly requires that future electronic storage of documents be designed with access in mind.
2. The **introduction of block exceptions:** it is proposed that exceptions apply to entire classes of documents, including "documents submitted to Courts by parties other than the institutions", "documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope" and "documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations".

Block exceptions are not permitted by the Council of Europe Convention on Access to Official Documents, and run counter to the principles on which Regulation 1049/2001 is founded by violating the EU Treaties and the Aarhus Convention.

We note that exceptions already exist for the protection of court proceedings and legal advice in Article 4.2, so there is no need for additional exceptions.

3. The proposal to insert Article 4(a) – the **presumption that transparency undermines the protection of legal advice:** this proposal, which directly contradicts the case law of the Court of Justice, puts an undue burden on the applicant to prove that there is an overriding public interest in the as yet unseen information, something which is not normally required for exceptions at the EU or national level.

Furthermore, in a provision which has Kafkaesque overtones, the Council has proposed that the citizen is constrained from referring to the principles underlying this Regulation (good governance, participation, openness of the legislative process) when making arguments in favour of the public interest in access to legal advice.

4. **Referral to national exceptions:** the proposal to allow Member States to refer to their national law to explain why an exception applies creates a risk of legal uncertainty for the European citizens and the possibility of unequal access to similar documents originating from different Member States.
5. **New exceptions for staff selection and awarding of contracts and grants:** these exceptions are unnecessary as such information can already be exempted, if need be, by Article 4(3) on protection of decision-making processes. The new exception would also lead to the unacceptable situation where citizens are unable to hold the institutions to account for the choices made when hiring staff or awarding contracts or grants, and significantly increases the risk of corruption and conflicts of interest.
6. **Failure to strike the balance between transparency and protection of privacy:** the current proposal to defer to the EU's rules on protection of personal data fails to recognise that there are times when it is necessary to strike a balance between access to information and the protection of personal privacy. To achieve this balance the current proposal to take into account the nature of an official's role and responsibilities is narrow and insufficient. We suggest that the exception for personal privacy be covered by an overriding public interest test so that the balance be struck on a case-by-case basis.

7. **Excessive time limits:** the proposal to increase time limits in areas such as third party consultations and the review of appeals is of concern as it could result in requesters having to wait as much as 80 working days, or almost four months, to receive the information requested. Such long time periods would seriously undermine the citizen's right to participate in decision making.
8. **Limiting access to large numbers of documents:** the proposal to provide access to only some documents in cases of requests for large numbers of documents or for long documents gives too much discretionary power to the institution to withhold documents it does not wish to make public and would undermine access for those legitimately investigating complex or voluminous subjects. It is also impracticable as it would be possible for a number of people to request a few of the documents each, thereby gaining access but in such a way as to increase the burden on the administration.

Furthermore, we note that the trialogue process is closed to the public and to non-governmental organisations, which have not been invited to comment on or participate in the future revision of Regulation 1049/2001 on public access to EU documents. We believe that this is inconsistent with the Lisbon Treaty requirements for greater legislative transparency which includes the need for decisions to be taken as closely as possible to the citizen and as openly as possible.

Given the importance of transparency for the legitimacy and accountability of the EU institutions, we call on you to address our concerns and to work within the Council to reach agreement on a new mandate for the Danish Presidency to negotiate with the Parliament and Commission, so that the future text of Regulation 1049/2001 is fully in line with the right of access to documents as enshrined in the EU Treaties and other treaties to which the EU is party.

We look forward to your response and remain available to discuss this pressing issue further with you.

Yours Sincerely,

Helen Darbishire, Access Info Europe  
 Anais Berthier, ClientEarth  
 Jeremy Wates, European Environmental Bureau  
 Natacha Cingotti, Friends of the Earth Europe  
 Jorgo Riss, Director, Greenpeace European Unit

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