Analysis

Constructing the secret EU state: "Restricted" and "Limite" documents hidden from view by the Council

Tony Bunyan

- **Over 117,000 "RESTRICTED" documents produced or handled by the Council since 2001 but only 13,184 are listed in its public register of documents**
- **103,839 "RESTRICTED" documents not listed in the Council's public register due to the "originators" right of veto?**
- **The Council seeks to stop the publication of unreleased "LIMITE" documents, which are defined as "sensitive unclassified documents"**
- **The Commission has failed to implement the Lisbon Treaty to ensure that all legislative documents are made public as they are produced - this means that 60% of Council documents relating to legislative decision-making are made public after "the final adoption" of measures**
- **The Council uses Article 4.3, the "space to think", to refuse access to 50% of requests for access to legislative documents under discussion**

The Regulation on public access to EU documents (1049/2001) [1] was meant to "enshrine" openness in the EU. At the time many in civil society argued that while the Regulation was a step forward, far too much discretion had been given to the EU institutions to interpret the law to suit their interests and historically-embedded practices. This is famously embodied in the Council and Commission's call for "the space to think" – for law-makers to meet, discuss and decide in secret and to only inform the public once a measure had been agreed. And so it turned out.

[1] Regulation 1049/2001: **http://www.statewatch.org/news/2001/jul/newregoj.pdf**

For example, it had been argued by European Parliament negotiators during the passage of the Regulation that there were checks and balances to ensure compliance by the institutions, such as three crucial references to enforce an "overriding public interest in disclosure". Over the past 12 years applicants for documents who assert that disclosure is "in the public interest" are routinely turned down.

Challenges in the European Court of Justice (ECJ) and complaints to the European Ombudsman by civil society, academics, journalists and MEPs sought to keep the practice in tune with the law, sometimes succeeding and sometimes not. [2] In the successful *Access Info* case, where the Council of the European Union (made up of Member State government representatives) sought to hide the identity of national government interventions, the ECJ Grand Chamber had to remind EU governments of their democratic duties:

> *"the possibility for citizens to find out the considerations underpinning legislative action is a precondition of the effective exercise of their democratic rights. And if citizens are to find these out, they must necessarily be able to scrutinise all the information which has formed the basis of a legislative act."* [3]

Since 1994, *Statewatch* has successfully lodged nine complaints with the European Ombudsman against Council of the European Union over access to documents. But when *Statewatch* complained to the European Ombudsman that the European Commission's public register of documents was manifestly incomplete the Ombudsman agreed and called on the Commission to comply with Regulation 1049/2001 and to list all documents it produced and handled - the Commission simply refused to comply. [4]

Since 2008 there has been an "institutional impasse" between the Council and the European Parliament on the changes needed to improve Regulation 1049/2001. [5] The Parliament wants significant improvements to ensure openness. Most Member States in the Council are happy with the present setup which gives them the discretion to decide what is released and when (if at all). Some Member State governments would back the Commission by making the Regulation even more restrictive. The Council's position is based on the creation of a regime in which the

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[2] See Turco judgment: **http://www.statewatch.org/news/2008/jul/ecj-turco-case-judgment.pdf** and Sophie in 't Veld: **http://www.statewatch.org/news/2013/mar/acta-ecj-veld-judgment.pdf**
[3] Access-Info judgment: **http://www.statewatch.org/news/2013/oct/ecj-access-info-judgment.pdf**
[4] Statewatch wins European Ombudsman complaint against the European Commission over its public register of documents – but it refuses to comply: **http://www.statewatch.org/analyses/no-82-eu-commission-register.pdf**
[5] The State of Play: Amending the Regulation on public access to EU documents - an "institutional impasse": Nothing has changed since 2009: **http://www.statewatch.org/news/2011/mar/06eu-access-regulation-state-of-play.htm**

release of documents is controlled and which tries to ensure total secrecy where necessary.

Two regimes have been created by the Council to ensure secrecy and deny democratic debate

The EU, led by the Council of the European Union, has constructed two complimentary regimes for controlling and limiting access to the documents it produces and holds (including documents originating from other institutions, Member States or agencies). The first regime is known as EUCI (EU Classified Information) and follows NATO standards. [6] The policy for classifying documents is as follows (emphasis added):

- TOP SECRET where unauthorised disclosure could cause "**exceptionally grave prejudice**" to the **essential** interests of the EU or its Member States;
- SECRET where disclosure "**could seriously harm**" the **essential** interests of the EU or its Member States;
- CONFIDENTIAL where disclosure "**could harm the essential interests**" of the EU and its Member States; and
- RESTREINT UE/EU RESTRICTED: information and material the unauthorised disclosure of which **could be disadvantageous to the interests** of the European Union or one or more of the Member States. [7]

The first three definitions rely on the concepts of "essential" interests and "grave prejudice/harm". "RESTRICTED" relies simply on the notion of "disadvantageous", y, disclosures which if made public could be embarrassing to the EU or its Member States and could lead to open comment and debate.

How many RESTRICTED documents are held by the Council and how many are listed in its public register?

In 2012 it was reported by *EUobserver* journalist Andrew Rettman that the Council "*sees between 600 to 1,000 new RESTREINT documents each year.*" [8] This number came from discussions with contacts in the Council.

Figures supplied by the Council to *Statewatch* in August 2012 gave the number of classified documents produced or handled in the 11 years between 2001 and 2011, and show a far higher figure. [9] (See ANNEX)

A total of **110,156 RESTRICTED documents were produced or handled by the Council in this period**. Recently a source confirmed that in 2012 the Council

[6] **http://statewatch.org/news/2006/sep/nato-sec-classifications.pdf**
[7] **http://www.statewatch.org/news/2014/jan/eu-council-classified-information-reasoning-10872-11.pdf**
[8] 'What is 'SECRET UE' anyway?: **http://euobserver.com/institutional/31296**
[9] EU classified information handled by the Council between 2001-2011: **http://www.statewatch.org/news/2014/jan/eu-council-euci-handled-2001-2011.pdf**

produced or handled 7,500 RESTRICTED documents. This would mean that in the 12 year period 2001-2012 the Council produced or handled **117,656 RESTRICTED documents**.

The explanation provided with the figures suggests that:

> *"Most classified documents relate to CSFP, and a significant number are received by the Council from the Commission and the EEAS (European External Action Service)."*

However, according to the Council's Annual Report on public access to documents for 2012, only 13,817 RESTRICTED documents are recorded (listed) in its public register of documents out of a total of 117,656 RESTRICTED documents produced or handled since 2001. [10] This means 103,839 RESTRICTED documents produced or handled by the Council were not listed in the public register over the 12 year period. Similarly for CONFIDENTIAL documents 5,619 documents were produced or handled by the Council but only 1,390 are listed in the register (See ANNEX).

The discrepancy between the number of documents (RESTRICTED an CONFIDENTIAL) produced or handled (received) by the Council and the large number of document not listed on the public register may well illustrate the extensive use of the "originator principle" (or rather veto) under Article 9.3 of Regulation 1049/2001 which states:

*"Sensitive documents shall be recorded in the register or released only with the **consent of the originator**"* [emphasis added]

The so-called "originator principle" is exercised by officials in the General Secretariat of the Council (the staff that prepared the documents in their own right or on behalf of the Council Presidency), EU governments and "third parties" such as the USA or EU agencies (eg: Frontex).

There is thus no means for citizens and civil society to find out that this vast number of documents even exist, let alone their subject matter.

Under Article 17.1 of Regulation 1049/2001 on public access to EU documents the Council, Commission, EU bodies and agencies are required to state the number of sensitive documents not listed in the public register. Neither the Council nor the Commission give this figure in their Annual Reports on public access to documents.

Another source confirmed to *Statewatch* that 1,284 RESTRICTED documents were produced by the Justice and Home Affairs (DG D) Secretariat of the Council in 2012, out of 7,500 produced or handled by the General Secretariat of the Council as a

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[10] Council's Annual Report on public access to documents for 2012: **http://www.statewatch.org/news/2014/feb/eu-council-access-report-2012.pdf**

whole. Based on the figure for 2012 it can be estimated that some 15,000 concerned Justice and Home Affairs over the 12 year period.

On the available evidence it can only be concluded that this discretionary power has been, and continues to be widely used to hide the existence of thousands of documents.

Are "LIMITE" documents pushed up to "RESTRICTED" in order to keep them secret?

In 2012 Andrew Rettman (euobserver) sought to find out how documents were classified and how many of them were being created. He cites two sources with different views:

> *"One EU source said: 'It may have happened that a document was classified because it made us look bad, but this is not something regular.' Another EU contact said face-saving secrecy is normal… 'If something is embarrassing, then its secret. This is what they call raison d'etat.'"*

Another official said: "*At the end of the day, it's a subjective decision*". [11]

In 2011 the Council adopted a policy on creating EU classified information (EUCI). [12] The guidance on RESTRICTED documents is interesting. As regards "*downgrading and declassification*" it says:

"Classification is to be maintained only as long as the information requires protection," and

"in particular for information classified as RESTREINT UE/EU RESTRICTED," the originator should indicate *"whether the document can be downgraded on a given date or following a specific event."*

It would be interesting to know how many Council officials dealing with JHA issues follow this guidance and how many "RESTRICTED" documents have a specified secrecy time limit.

The policy on creating EU classified information sets out a 'practical classification guide' which, when applied to the "disadvantageous" disclosure caveat for RESTRICTED documents, shows the latitude for subjective decision-making. It asks officials to consider whether disclosure would:

- Adversely affect diplomatic relations;
- Facilitate crime;
- Be disadvantageous to policy negotiations with others;
- Impede the development of EU policies; or

[11] What is 'SECRET UE' anyway? **http://euobserver.com/secret-ue/117634**
[12] Policy on creating EU classified information: **http://www.statewatch.org/news/2014/jan/eu-council-classified-information-reasoning-10872-11.pdf**

- Undermine the proper management of the EU.

It is not hard to see how a LIMITE document becomes a RESTRICTED one.

LIMITE documents: "sensitive unclassified documents"

In the second secrecy regime there are four categories:

- Public documents placed in the public domain by the institutions, e.g. the Council, and listed in public register.
- LIMITE documents (not part of the EUCI system), intended for "internal" circulation to the Council, Member States and their authorised authorities.
- "DS" ('document de séance') drawn up by and for Council Working Parties developing new legislation or new operational plans (e.g. for joint operations). [13] These are not listed in the public register.
- There are also "Room documents" circulated at meetings (usually from Member States) which are also not listed in the public register.

LIMITE documents are listed in the public register but direct access may or may not be given. The Council's logic is that some LIMITE documents are immediately accessible and people can "apply" for access to those which are not – which brings into play Article 4.3 of the Regulation where access can be refused if disclosure would seriously undermine the decision-making process. This veto on access is widely used in particular for some of the most interesting documents which concern ongoing decision-making on legislative measures (see below).

Alternatively, "partial access" may be granted following an application to the Council. "Partially accessible" documents frequently have much of the content censored. Similarly, "partial access" may be given to a RESTRICTED document.

The Council Legal Service has the following to say about LIMITE documents:

> *"Council documents marked "LIMITE" may be distributed to any official of a national administration of Member States, the European Council, the European Commission and the EEAS. "LIMITE" documents may also be distributed to nationals of a Member State who are duly authorised to access such documents by virtue of their functions"*

The Council thus maintains that "LIMITE" documents are for internal distribution within EU institutions and Member States. [14] Such a position is hard to enforce because LIMITE documents are widely circulated not just in governments but in parliaments and by lobby groups and civil society, a fact more recently recognised by the Council itself in a note on "disclosure of confidential documents":

[13] Many documents drawn up by JHA Counsellors (drawn from the "PermReps", the permanent Member State representations in Brussels) fall into this category.
[14] **http://www.statewatch.org/news/2014/feb/eu-council-limite-handling-11336-11.pdf**

"There have been a number of recent instances where Council documents marked LIMITE have been passed to and published in the press." [15]

The note goes on to make a familiar argument, rejected by the ECJ in the *Access Info* case, that disclosure: *"undermines the ability of the Council and its members to carry out their responsibilities on the basis of frankness and mutual confidence."*

The official policy on 'Handling of documents internal to the Council' was discussed in the Council Security Committee (CSC) and a subsequent report produced by the Antici Group was sent to the Council and COREPER (the Committee of Member States' Permanent Representatives in the Council). [16] This says that "*documents internal to the Council which are not automatically made public (marked 'LIMITE')*" are **"*sensitive unclassified documents*"**. The "*untimely public disclosure of such documents could adversely affect the Council's decision-making processes*" and may not be distributed "*to any other entity or person, the media or general public without prior authorisation*".

The report also states that these "*sensitive unclassified documents*" are "*deemed covered by the obligation of professional secrecy in accordance with Article 339 of the TFEU (Treaty on the Functioning of the European Union)*" – that is, the Lisbon Treaty

The Antici Group report followed on from a contribution from the Legal Service of the Council on 'Handling of documents internal to the Council'. [17] This also emphasised the "*obligation of professional secrecy*" under Article 339 TFEU:

> *"All servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy…"*

This invocation seems to introduce a kind of UK-style Official Secrets Act. [18]

A classic case of excessive secrecy came in November 2013. The General Secretariat of the Council sent a Note to COREPER entitled 'Public access to documents' concerning its response to the Access Info case (in which the ECJ ruled that the positions of Member States' governments should be made public when discussing legislative issues). Ironically, the case centred on a document on possible changes to the Regulation on public access to EU documents that contained Member States' positions. [19]

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[15] **http://www.statewatch.org/news/2014/jan/council-limite-documents-14920-13.pdf**
[16] **http://www.statewatch.org/news/2014/feb/eu-council-limite-handling-11336-11.pdf**
[17] Document 10384/13.
[18] **http://www.legislation.gov.uk/ukpga/1989/6/contents**
[19] *Statewatch* published the document soon after it was produced:
http://www.statewatch.org/news/2011/mar/eu-council-acess-regulation-ms-16338-08.pdf

The General Secretariat's 'Public access to documents' note was put on the public register stamped as a 'Public' document was in fact a 'document partially accessible to the public'. [20] In other words it had been heavily censored with the removal of the five key paragraphs. The uncensored version invites COREPER to decide whether to:

a) give public access to the "*identities of individual Member States*" concerning ongoing legislative procedures; or
b) *"In view of the impact on Member States' negotiating flexibility, to cease recording the identities of individual Member States in such documents."* [21]

The issue was discussed in COREPER on 11 December 2013 and the Outcomes/Minutes were produced on 6 March 2014 in a "LIMITE" document, which is not accessible on the Council public register [22]. The document shows that the Council Presidency is adamant that LIMITE documents, like this one, should remain secret. The Presidency made:

"a strong intervention on the practice relating to the dissemination of LIMITE documents; such documents cannot and should not be made public without proper authorisation by the Council. The attention of national administrations should be drawn to the relevant provisions."

On the substantive issue, of how to respond to the ECJ judgment in the Access-Info case, the Outcomes of the 11 December COREPER meeting take some decoding because they refers back to paras 4 and 5 of document 17177/13 [23] – which although listed in the public register is "Partially accessible" (censored) which renders the remaining content useless.

COREPER's conclusion was first, that current practice should continue namely that documents concerning "on-going legislation" should be made public, either by immediately giving access or on an access application, except:

"where such documents, in whole or in part, fall within the scope of Article 4 of Regulation 1049/2001"

That is where Article 4.3 is applied to documents where the Council claims that access would "seriously undermine the decision-making process", as it does in nearly 50% of applications for access to documents concerning the legislative process. The ECJ's judgment concerned not just revealing Member States' positions but the wide question of democracy at work:

[20] **http://www.statewatch.org/news/2014/feb/eu-council-access-ruling-pa-17177-13.pdf**
[21] **http://www.statewatch.org/news/2014/feb/eu-council-access-info-ecj-17177-13.pdf**
[22] **http://www.statewatch.org/news/2014/mar/eu-council-acc-follow-up-7356-14.pdf**
[23] **http://www.statewatch.org/news/2014/feb/eu-council-access-info-ecj-17177-13.pdf**

"Law-making [is an] activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'. Otherwise, it would not be possible to ascribe to 'law' the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict."

The Council chose, yet again, to ignore the Court - **nothing will change.**

Having resolved this position COREPER decided that the recording of Member States' positions would continue and that access to such documents should be given. However, Article 4.3 could still be invoked to refuse access in "exceptional cases". The Council thus tacitly accepts the Court judgment that the recording of Member State position could not of itself be grounds to refuse access to a document, apart from in "exceptional cases".

Secrecy regimes

In combination these two secrecy regimes have been constructed to severely limit openness on decision-making procedures and the accountability of operational practices.

The Council's Annual Report on public access covering 2012 states that:

> *"In 2012, almost 40% of the total number of documents relating to draft legislative acts produced by the Council were issued as public documents, and were thus immediately accessible via the register. The remaining documents were or will be made entirely public in the public register upon final adoption of the legislative act."* [24]

And that is exactly the point. **60% of the documents relating to legislative decision-making are made public after "*the final adoption*" of a measure**. In what kind of democracy are citizens and civil society denied access to 60% of law-making documents?

The Lisbon Treaty, Article 4.3 and secret trilogues

The failure to review and improve Regulation 1049/2001 on public access to EU documents has been noted above. The Commission is responsible for another, equally crucial failure. The Lisbon Treaty came into effect in December 2009 and Article 15.3, paragraph five, was meant to bring about greater legislative openness. It states that: *"The European Parliament and the Council shall ensure publication of the documents relating to legislative procedures*," and gives effect to Article 15.2:

"The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act."

[24] Annual Report on public access to documents for 2012: see page 10: **http://www.statewatch.org/news/2014/feb/eu-council-access-report-2012.pdf**

The intent of the Lisbon Treaty could hardly have been clearer – all meetings of the European Parliament and the Council when discussing legislative acts shall be held in public and **all** documents "relating to the legislative procedure" shall be made public. "All documents" is also unequivocal, meaning all documents from the first to the last have to be made public. The second paragraph of Article 15.3 states how this is to be given effect: by "*means of a regulation in accordance with the ordinary legislative procedure*" between the European Parliament and the Council.

Over four years later, nothing has happened. The European Commission has failed to put forward a proposal to give effect to the intent of the Treaty in Article 15. [25]

The reason for this failure is very clear. To put into effect Article 15.3, paragraph five would require deleting Article 4.3 of Regulation 1049/2001.

Article 4.3, paragraph one, states that:

> *"access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

Under this clause in 2012 the Council refused access to nearly 50% of applications for documents concerning on-going legislative discussions that had not been made immediately made public. [26] 40.9% of all initial applications were refused under Article 4.3, as well as a portion of the 25.3% of refusals given for "several reasons together". [27]

The refusal to implement Article 15 of the Lisbon Treaty also affects Article 11, which says that EU institutions shall make available to citizens and civil society the means and opportunity: "*to make known and publicly exchange their views **in all areas** of Union action*" (emphasis added). How can citizens and civil society make their views known on legislative matters if they do not know what is going on, and cannot find out?

The widespread use of Article 4.3 and the secretiveness of the Council on legislative matters have a knock-on effect. Since 2006, when the European Parliament first obtained co-decision powers on most immigration and asylum legislation, the Council persuaded the parliament to agree to participate in secret first reading

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[25] The Commission did put forward a proposal in 2011 which was solely concerned with extending the Regulation to EU bodies and agencies:
http://www.statewatch.org/news/2011/mar/eu-com-access-reg-1049-proposal.pdf
[26] In 2012 the Commission refused 25% of initial applications on the same grounds.
[27] See: Proposed Commission changes to Regulation on access to documents fail to meet Lisbon Treaty commitments:
http://www.statewatch.org/news/2011/mar/05eu-access-regulation-com-amend-mar-11.htm and:
Regulation on public access to documents: the European Commission is the problem:
http://www.statewatch.org/news/2011/may/065eu-access-reg-commision-the%20problem.htm

"trilogue" meetings, where the two institutions meet to decide the content of legislation, with the Commission also in attendance. Today over 80% of measures going through the European Parliament and its Civil Liberties Committee (LIBE) are agreed by first reading trilogues. [28] When a "compromise" is agreed in a trilogue a formal letter is sent from the Council Presidency to the Chair of the LIBE Committee and neither this Committee nor the parliament's plenary session can change a 'dot or comma'.

The adoption of new legislative measures in the EU is the express responsibility of the Council and the European Parliament. This means that when they meet together in secret first reading trilogues they constitute the "European legislature". [29] This secretive process and a policy of restrictive access to documents may suit the legislators and may make for speedier decision-making, but it has no place in a democracy.

Tony Bunyan, Statewatch Director, comments:

"The Council have constructed a two-tier system of secrecy to keep from public view thousands and thousands of documents. This has been compounded by the failure of the European Commission to put forward proposals to implement the provision in the Lisbon Treaty to make all documents concerning the legislative procedure public.

In place of the need to deepen democratic openness and accountability in EU the Council has entrenched a system of secrecy based on its discretion to decide whether and when to make documents public.

The result is that the European legislature – the Council of the European Union and the European Parliament – meet in secret trilogues to decide over 80% of new laws going through the EU."

[For the record this Analysis includes five "LIMITE" documents the contents of which are not accessible on the Council's public register of documents]

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See statistical ANNEX below.

[28] In addition to formal trilogues there are also "technical" trilogues between the parliament's Rapporteur and Council Presidency officials and "informal" trilogues involving the same two parties. "Shadow Rapporteurs", from other political groups, are excluded from both
[29] Secret trilogues and the democratic deficit:
http://www.statewatch.org/analyses/no-64-secret-trilogues.pdf and European Parliament: Abolish 1st [and 2nd] reading secret deals - bring back democracy "warts and all":
http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf

ANNEX

RESTRICTED handled by the Council between 2001-2011 [1]

	RESTRICTED
2001	10699
2002	10936
2003	11276
2004	11779
2005	11346
2006	10135
2007	10468
2008	9738
2009	8859
2010	7869
2011	7051
2012	7500
Total	117,656

RESTRICTED documents: appearance and reality

	Number listed in public register	Actual figure	Number not listed in public register
2001-2012	13,817	117,656	103,839

NB: The discrepancy shown by the number not listed may well illustrate the extensive use of "originator veto": *"Sensitive documents shall be recorded in the register or released only with the **consent of the originator**"* (Article 9.3 of Regulation 1049/2001) [emphasis added]

EU classified information handled by the Council between 2001-2011 [2]

	CONFIDENTIAL	SECRET	TOP SECRET
2001	489	1	0
2002	359	12	0
2003	504	16	0
2004	373	9	0
2005	451	46	0
2006	542	32	0
2007	467	29	0
2008	972	16	0
2009	513	20	0
2010	481	31	0
2011	468	32	0
2012	353		
Total	5619	244	0

CONFIDENTIAL documents: appearance and reality

	Number listed in public register	Actual figure	Number not listed in public register
2001-2012	1,390	5,619	4,229

NB: The discrepancy shown by the number not listed may well illustrate the extensive use of "originator veto": *"Sensitive documents shall be recorded in the register or released only with the **consent of the originator**"* (Article 9.3 of Regulation 1049/2001) [emphasis added]

[1] Source 2001 to 2011: http://www.statewatch.org/news/2014/jan/eu-council-euci-handled-2001-2011.pdf
[2] Source: http://www.statewatch.org/news/2014/jan/eu-council-euci-handled-2001-2011.pdf