Statewatch analysis
and Postscript

Statewatch wins European Ombudsman complaint against the European Commission over its public register of documents – but it refuses to comply

by Tony Bunyan

The European Ombudsman and the European Parliament call on the Commission to maintain a proper public register but it refuses to comply and reacts by trying to change the definition of a "document". There are indications it is creating new system to "vet" documents before they are placed on its public register

Full documentation on:

http://www.statewatch.org/news/2009/jan/07sw-ombs-com-register-complaint.htm

On 16 October 2006 *Statewatch* registered a complaint against the European Commission with the European Ombudsman for its failure to maintain a proper public register of documents under Article 11.1 of the Regulation. This Article says:

> *"To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay."*

The definition of the "documents" to be placed on the public register "without delay" is set out in Article 3.a:

> *" 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;"*

These obligations have to be seen in the context of Article 1 of the Regulation which obliges the institutions "to ensure the widest possible access to documents". And Recital 2 says access to documents: "enables citizens to participate more closely in the decision-making process".

We said the Commission's register of documents does not fulfil the requirements of Regulation 1049/2001 because it contains only a fraction of the documents produced and received by the Commission in the course of its activities.

> *"Furthermore, as four years have now passed since the deadline set down in the Regulation, I believe that the Commission's failure to implement Community law by ensuring the widest possible access to its documents via a public register is a case of maladministration."*

Article 11.3 of the Regulation says that each of the three main EU institutions was obliged to "establish a register which shall be operational by 3 June 2002".

Finally, the question was asked why could not the documents registered on the Commission's Adonis information system be placed on the register?

The complaint was forwarded to the Commission and Mr Barossi, the President, responded on 22 May 2007 with the comment:

> *"A fully comprehensive register requires a precise definition of what is a "document" that has to be included in the register."*

It was hard to see how much clearer Article 3.a had to be. The Commission also argued that Article 11:

> *"does not stipulate that public registers should include references to all documents."*

Again Article 11 could not be clearer: "References to documents shall be recorded in the register without delay." Its response repeated its long-stated position:

> *"The Commission will continue to **gradually** extend the scope of its public registers and other information tools available to the public. (emphasis added)."*

On the question of why the Adonis system could not feed through documents into the public register the Commission replied:

> *"Adonis is the common software used by the Commission services for the internal registration and follow-up of mail and documents. Each Directorate General or administrative unit has its own internal register of documents. In the near future, a new centralised document management system should replace the Adonis software.* [1]"

On 27 June 2007 we responded asserting the clarity of the definition of a "document" and of the intended content of public registers of documents. As to the content of the public register the Regulation:

> *"does not say some documents or certain documents, it clearly refers to all documents. Since the Regulation contains a number of express exceptions to its rules, it follows that if the drafters of the Regulation wanted Article 11 to apply to some documents only, they would have specified this expressly."*

As to the possibility that a "new centralised document management system" might provide an answer we said:

> *"in the light of their contention that:- the definition of a "document" in the Regulation is not acceptable to the Commission: there is no obligation under Article 11 to include references to all documents and there is no guarantee whatsoever that a new "centralised document management system" will lead to a proper public register of documents being provided." [2]*

Ombudsman seeks clarification

On 5 July 2007 the Ombudsman wrote to the Commission, on his own initiative, to seek clarification on a number of points.

In its earlier reply the Commission had claimed that the Regulation had "a particular focus" on legislative activity (Article 12) and in its 2004 report on implementation that documents "other than" the latter would be "gradually extended". However the extensions in the register's coverage until now (ie: 2003-2007) "would essentially appear to be limited to the Commission's activity concerning legislation" and:

> *"Could the Commission therefore please specify if it considers that its register(s) only need to list documents concerning its involvement in the legislative process of the Communities and, if so, what the reasons for this belief are?"*

The same 2004 report recognised that most applications for access to documents concerned not legislative matters but:

> *"rather the monitoring of the application of Community law."*

and in the light of this:

> *"Could the Commission please explain why it nevertheless considers that its present approach to Article 11 of Regulation 1049/2001 is in conformity with the letter and the spirit of that Regulation?"*

Six months later, on 10 January 2008, the Commission replied. They said that because of the "wide" definition of a "document" in Article 3.a it was "impossible" to operate a comprehensive register. However, it admitted that each DG (Directorate-General) had its own "internal register of documents", why could these not be used to extend the scope of the register under Article 11?

The Commission claimed that it operated a number of "registers" (the public register, one on comitology and another with the Commission President's correspondence) but *Statewatch* said Article 11 does not refer to registers in the plural but rather to "the register" (singular).[2]

The Commission agreed that the Regulation does not only cover legislative documents but then reiterated the view that it placed "particular emphasis" on them. On the second point the Commission simply repeats its position, it does not agree with the definition of a "document" (Article 3a) and that is "impossible to set up a fully comprehensive register". And it rejected the view that Article 11 referred to a single register.

The most revealing aspect of the Commission response concerned "Internal registers" and whether they could be transposed into the public register. In the Directorate-Generals:

> *"There are common rules for the registration of documents and all administrative units use common software. However, these registers do not have a uniform data format. Furthermore, these registers were set up for internal administrative purposes and their content cannot be simply transferred to a public register. The data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. This would require important investments, which would be useless since the current system will be replaced with a new single registration system."*

Let us break this statement down.

- All DGs have *"common rules"* and use *"common software"* (Adonis).

- However, *"these registers"* were set up for *"internal"* purposes and their content *"cannot be simply transferred"* to a public register.

- Why not? Because the documents in the internal registers would have to be:

> ***"screened, selected** and reformatted through interfaces before they could be fed into a public register (emphasis added)"*

- The Commission cannot use the *present system* because documents would have to be **selected and vetted**

- this would be too expensive and "useless" as the present system is to be replaced with a *"new registration system"* (this is called "Ares", see below)

- so is the *"new registration system"* being constructed so that it can "screen" and "select" the documents to be placed on the public register?

On 7 March 2008 *Statewatch* responded contesting the Commission opinion that it was not obliged to create a single public register (Article 11) and observed:

> *"Moreover, if the other institutions took a similar stance access to EU documents would become partial and piecemeal as each could pick and choose what to include in its register."*

The same, it was argued, goes for the Commission's continued rejection of the definition of a "document". We also asked why "internal" documents had to be "screened" and "selected".

Ombudsman's Draft Recommendation and the Commission's response

On 7 April the Ombudsman issued his Draft Recommendation which, having examined all the arguments was:

"The Commission should, as soon as possible, include references to all the documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of this regulation, to the extent that this has not yet been done.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 15 July 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation."

Strasbourg, 7 April 2008

The Ombudsman's finding and Recommendation could not have been clearer – the Commission had to list all the documents in its possession on the public register.

The Commission did not respond until 18 August 2008 by which time – on 30 April – it had proposed that the definition of a "document" should be changed! (see below).

In its response the Commission simply repeated its rejection of the definition of a "document" and that it was obliged to list all documents held on the public register. And it concluded:

"it regrets that it is unable to accept the Ombudsman's draft recommendation as it is formulated since it suggests that the register has to contain the references to all documents as defined in Article 3(a) of the Regulation.

Indeed, it is logically impossible to combine a wide and imprecise definition of documents with a fully comprehensive public register."

What was illuminating in this final response from the Commission was a bit more detail on why the current Adonis registration system used by the DGs cannot be used to load up lists of documents held. We are told that:

"There are common rules and common software for the registration of documents but no single data base.

The Commission is in the process of phasing out the existing system and introducing a new centralised registration system. Some Directorates-General operate the new system (Ares). This new system will gradually be introduced in the whole of the Commission. Substantial financial and human resources are being invested in this huge project (migration period 2009 to 2010).

The reason why under the current system (Adonis), there is no single Commission-wide database is the lack of security levels in this system. Therefore, each administrative unit operates its own local register. The data in Adonis has been entered under the assumption that it would only be seen by a limited number of people, usually the members of the relevant administrative unit. Therefore, the records in the Adonis registers contain information which legitimately must be protected. For this reason the information contained in the Adonis registers cannot simply be transferred into a public register. Before transfer to a public register,

every single Adonis record would have to be vetted, and possibly edited, by a person who is familiar with the subject matter.

Such a screening and editing exercise of all existing Adonis records would require considerable resources. The Commission intends starting transferring records into a public register once the new internal single registration system (Ares) has become operational."

The argument for not using the current Adonis system is again stated to be "the lack of security levels". Why, because "every single Adonis record would have to be vetted, and possibly edited, by a person who is familiar with the subject matter."

The clear implication is that the new Ares registration system will have "security levels" built in and that only documents that have been "vetted" and possibly "edited" will go on to the public register of documents.

Statewatch responds and Ombudsman issues Critical remarks"

Statewatch responded to the Commission's letter on 6 October 2008. Opening with the remark that:

"The Commission response is very disappointing. Its response adds little to the views it had already expressed prior to the Ombudsman's Recommendation."

We observed that the Commission has invested in a "huge project" (Ares) and that:

"it would appear that the Commission is actually constructing a registration system (over the period 2008-2010) designed to ignore the Regulation and Articles 3.a and 11 in particular."

And asked the question:

"Could there be any connection between the new "Ares" registration system being under construction from 2008 (which appears to presume the "vetting" and "editing" of documents to be made public), the Ombudsman's Recommendation on 7 April 2008 and the change to the definition of a "document" agreed by the Commission on 30 April?"

This echoed a speech to a hearing held in the European Parliament on 2 June 2008 where Professor Steve Peers observed in relation to this *Statewatch* complaint that:

"it seems that the Commission has proposed changes to the rules in order to avoid complying with a pending ruling of the Ombudsman against them."

On 18 December 2008 the Ombudsman found it an instance of maladministration by the Commission and issued "Critical remarks" and said:

"The Ombudsman remains unconvinced that it would be impossible, or logically impossible, to maintain a register of all documents that are in possession."

As to the new Ares document registration system the Ombudsman notes that:

> *"the Commission has not provided any explanations as to which documents will be added to these registers" [that is, DG registers] … and that the effect of the introduction of the new registration system on the contents of the Commission's register* ***remains far from clear****.(emphasis added)."*

It should be noted that before issuing his "Critical remarks" the Ombudsman discussed with the Commission its response to the complaint – which makes his comment that the effect of the new Ares system "***remains far from clear***" all the more worrying.

On 14 January the European Parliament adopted a Resolution on the implementation of Regulation 1049/2001 (Rapporteur: Cappato) which:

> *"Urges the Commission to follow the recommendation of the European Ombudsman (Complaint 3208/2006/GG) on the Commission register as regards its obligation to "include references to all documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of [Regulation (EC) No 1049/2001], to the extent that this has not yet been done."*

The Ombudsman said that the case "raises important issues and that making a special report would therefore be justified" but that as the European Parliament was about to adopt a Resolution a special report was not needed.

How Statewatch's complaint led the Commission to try and change the law

In a perverse turns of events it appears that Statewatch's successful complaint instead of leading to lawful compliance by the Commission has lead instead to it trying to change the law, to propose amending the Regulation by changing the definition of a "document". Let us go back in history to see how this occurred.

In December 1993 the Council of the European Union and the Commission both adopted a Code on access to documents, following the implementation of the Maastricht Treaty. The Code contained the following definition of a "document":

> *"Document" means any written text, whatever its medium..*

After the Amsterdam Treaty the definition of a "document" in Article 3a of 2001 Regulation was the same.

In April 2007 when the Commission put out a consultation paper on the Regulation it might have been thought that if it wanted to change the definition of a "document" the paper would have included this question - it did not. When the Commission reported back on the results of the consultation in January 2008 it noted that:

> *"The concept of a document: As regards the concept of a "document" the general feeling was that the current wide definition should be maintained."*

So in January 2008 some 15 years after the definition of a "document" had been in place there was no demand to change it by the Commission or anyone else.

Yet just three months later, on 30 April 2008, the Commission proposed that it should be changed and narrowed down:

> *"«document» shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution;"*

At a stroke a "document" would not be a "document" until is is "formally transmitted".

What changed between January and April 2008? Quite simply on 7 April 2008 the European Ombudsman made his Recommendation saying all documents held had to be listed on the Commission's register of documents. The Commission had lost the argument so it sought to change the law.

This was not all, the *Statewatch* complaint revealed yet another question.

Is the Commission installing a new information management system to "vet" which documents are listed on its public register?

The Commission's proposal to change the law by re-defining what is a "document" may have had an even more disturbing reason than simply its view that the definition is too wide. The Commission has argued since at least 1998 that each of its 20+ Directorate-Generals had their own document registration systems. But with the Amsterdam Treaty, and its commitment in Article 255 to greater openness, coming into force in 1999 and the Regulation on access to EU documents in 2001 the Commission could have been in no doubt as to its legal obligations. The Regulation clearly stated in Article 11 that pubic registers "shall be operational by 2 June 2002".

In its penultimate and final representations the Commission said that documents held under the current "Adonis" information management system cannot be put on the Commission's public register as they would have to "be vetted, and possibly edited, by a person who is familiar with the subject matter. This is said to be due to "the lack of security levels" in Adonis. The Commission goes on to say that it will:

> *"start transferring records into a public register once the new internal single registration system (Ares) has become operational."*

This implies that the new "Ares" system has "security levels" built into it and that only certain documents – those which have been "vetted" or "edited" or otherwise cleared – will be placed on the public register.

Conclusions

Access to documents is the life-blood of a democracy. It allows citizens, civil society and parliaments to find out what is being proposed so that they have an informed debate and make their views known before measures are adopted or implemented.

Throughout the 26 months of correspondence the Commission has been utterly intransigent. It says it does not agree with the definition of a "document" as set out in EU

law and does not agree that is obliged to list all documents on its public register as set out in EU law. The European Ombudsman and the European Parliament have called on the Commission to act on its obligations under EU law yet it refuses to do so.

This refusal is compounded by the fact that the Commission is charged under the Treaties with enforcing the implementation of EU law, especially EU Regulations. If the Commission, the custodian of EU law, can simply ignore the law why should not other institutions and agencies covered by the Regulation do the same? The Commission's refusal to act is simply unlawful, they have to be called to account.

Chronology

29 January 2009: European Ombudsman: Press release: The European Ombudsman criticises Commission for inadequate register of documents

14 January 2009: European Parliament adopts Resolution: Resolution on public access to European Parliament, Council and Commission documents (implementation of Regulation 1049/2001: Rapporteur: Marco Cappato)

18 December 2008: European Ombudsman: Issues detailed Critical Remarks

6 October 2008: Statewatch response to Commission's final response

18 August 2008: European Commission: Final response to Ombudsman's Recommendation

30 April 2008: Commission adopts proposal to amend the Regulation and to change the definition of a "document"

7 April 2008: European Ombudsman: European Ombudsman issues Draft Recommendation giving the Commission until 15 July 2008 to [1] accept the Ombudsman's decision and [2] to provide to the Ombudsman a "description of the measures taken to implement the draft recommendation".

7 March 2008: Statewatch responds to Commission

22 January 2008: the Commission finally responds - given that it did not budge an inch it is hard to see why it took over six months to reply to the Ombudsman.

- The Ombudsman did not hear from the Commission by 15 December and on 10 January 2008 wrote to the Commission asking for a response to the letter of 5 July 2007 by 31 January 2008.

25 October 2007: Letter from the European Ombudsman stating that the Commission have asked for a further delay until 15 December 2007 in responding to the Ombudsman's letter of 5 July below

5 July 2007: Letter from the European Ombudsman states that the further complaint on Article 12 cannot be taken up in this context but attaches a three-page letter from the Ombudsman to the Commission seeking clarification of their position

27 June 2007: Statewatch responds to the Commission's letter

22 May 2007: after six months the Commission sends in its response to the complaint

11 October 2006: Statewatch lodges complaint against the Commission for its failure to maintain a proper public register of documents (Article 11 of 1049/2001)

Footnotes

1. In this letter we raised that additional issue that the Commission was not giving full access to the content of many, many documents under Article 12 (legislative documents) – the Ombudsman later said this should be the subject of a separate complaint.

2. The Ombudsman notes that the much-vaunted register of documents of the President of the European Commission had been discontinued.

This analysis first appeared in Statewatch Journal, Vol 19 no 1 – the Postscript below is new

Postscript

The European Commission has now published its annual report for 2008.

There is no mention of the Statewatch complaint or its implications except for a reference to the European Ombudsman's case no: 3208/2006/GG.

It contains no commitment to "improve" the content of its public register.

There is no reference to the current Adonis or the planned Ares document registration systems.

As usual the number of formal applications for access to its documents has risen again by 25% to 5,197.

Why is this?

Let's look at the comparable statistics from the Commission and the Council for 2008 which tell their own story.

The total number of documents referenced on the Commission register over the seven years since 2001 is 102,582 while the number referenced on the Council register over nine years since 1999 is 1,195,509 – over ten times more.

The number of documents referenced to which full access is given to the content of documents is 73.9% for the Council – of course, the many of the remaining 16.1% of documents include discussions on new measures which are of the most interest to people.

The Commission report gives no figures! The Commission public register gives references to **less than 10% of the documents it holds** and a survey by Statewatch in 2007 for three DGs showed a very low number of documents were publicly accessible full-text: See: **http://www.statewatch.org/news/2009/jul/eu-com-art-12-2007.pdf**

Perhaps the most telling comparison between the Commission and the Council public registers are their web usage figures:

Year 2008	User sessions	Pages viewed
Commission	57,419	72,410
Council	895,299	11,920,634

In truth the Commission's public register is pathetic and hardly anyone uses it - and which is why they get an increasing number of applications for documents.

The Council public register is not perfect, and we know of a number of categories of documents which are not listed however, it is streets ahead of the Commission.

This is partly as a result of the way each interprets its legal duties under the Regulation. The Commission does not agree with the definition of a "document" and therefore does not list the great majority in its possession. This is essentially based on its repeated contention of the need to

> *"protect internal consultations and deliberations" (2008 report, p9)*

The Council on the other hand says in its 2009 report that:

> *"all non-sensitive documents submitted to the Council or to one of its preparatory bodies which are to serve as a basis for deliberations, could influence the decision-making process or reflect the progress made on a given subject are automatically listed in the register."*

The Commission's public register is a travesty. Its rejection of the European Ombudsman's Recommendations and failure to respond to the European Parliament's Resolution is an instance of institutional intransigence which, in the interests of basic democratic standards, must not go unchallenged.

References:

- European Commission: Annual report for 2008:

http://www.statewatch.org/news/2009/jul/eu-com-access-report-2008.pdf

- Council of the European Union: Annual report for 2008:

http://www.statewatch.org/news/2009/may/eu-council-2008-ann-rep-on-reg.pdf

For full background and historical documentation (1992 – ongoing) on access to EU document see Statewatch's Observatory:

http://www.statewatch.org/foi/foi.htm

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Historical background

Sixteen years ago John Carvel, then the *Guardian* newspaper's Brussels correspondent, made one of the first requests to the Council of the European Union under the newly adopted Code of access to documents (December 1993). John asked for copies of all the documents put before the first meeting of the new Justice and Home Affairs Council meeting in November 1993 and when the Council refused access he took a case to the European Court of Justice (ECJ). He won the case in November 1995 and received a thick package of documents from the Council. John rang me so that he could come round to my home to look at the contents. Sitting at my kitchen table the package revealed a grand total of eight documents and the press release.

I too had been at the November 1993 JHA Council in Brussels and just about the only document we did get hold of was the Agenda of the meeting so I rushed upstairs to my study and managed to find it.[1] This revealed that he should have received 49 documents plus the Minutes and the press release. After the threat of a further court case by 23 May 1996 all the documents were handed over. It had taken nearly two and a half years to find out what had been decided back in 1993.

This tale is recalled partly to show how far we have come over the past 15 years – with the Council, European Commission and European Parliament having voluminous numbers of documents available – and partly to highlight that one of the fundamental issues back then is back on the table again.

At the heart of access to documents, a basic democratic standard, is that citizens, parliaments and NGOs have a right to know what is being discussed – what are the options on the table, which ideas are accepted or rejected and why?

And just as fundamental in a democracy is the principle that we know what is being discussed **before** a decision is taken and the measure adopted, so that there can be a public debate and people can make their views known. It is so obvious it should not even arise.

Image what would happen at national level if a government did not publish a Bill, then discussed and adopted it in secret sessions or without any of the documents being available - what an outcry there would be. Of course today not all EU documents are withheld from public view but many of the most crucial ones are. The Council now gives direct access to around 70% of the documents listed on its public register of documents which sounds very high, the problem is with the 30% it does not give access to. These are largely documents where the measure is still under discussion, precisely the ones that the public need to see to know what is going on.[2] In 2000 the Council refused *Statewatch* access to proposals on the proposed Regulation on access to documents because it could embarrass "the Council's partners" and:

> *"could fuel public discussion on the subject"*

Access to documents is the life-blood of a healthy, vibrant, democracy and this means that every "document" produced and received by EU institutions is a "document", that every document must be listed on a public register and be accessible full-text. Any exceptions to giving full access to the text of a document should be extremely restricted to instances where "life and limb" could be threatened and should **not** extend to documents "under discussion" (Article 4.2) or documents from EU Member States (governments, Article 4.5) and certainly not documents from "third parties" (especially those involving the USA, Article 4.4).

A classic Commission response to diligent researchers – like *Statewatch* – who monitor a specific area of EU activity (ie: Justice and Home Affairs) – was given in its 2004 Report on the implementation of the Regulation:

> *"Some systematic and repetitive applications can constitute unfair use of the Regulation. For instance applications that are obviously being used on a regular basis* ***to fuel campaigns that are systematically hostile to Community policies****.[emphasis added]"*

Since 1996 Statewatch has taken ten complaints to the European Ombudsman concerning the EU Regulation on public access to documents (1049/2001) against the Council of the European Union and the European Commission. All 10 have been successful - and nine of them have led to an increase in the right of access for all.

Footnotes

1. Later Statewatch would have to take a successful complaint to the European Ombudsman to stop the Council's practice of destroying Agendas after one year.

2. Under Art 4.3 of the Regulation (1049/2001) the Council and Commission can refuse access to a document where "the decision has not been taken" and if disclosure would "seriously undermine the institution's decision-making process".

Tony Bunyan is the Director of Statewatch. Over the last 14 years he has taken ten successful complaints against the Council of the European Union and the European Commission to the European Ombudsman – all of which increased the rights of access to documents for everyone.