Statewatch Analysis
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Proposal on access to documents: Article-by-Article commentary

Steve Peers
Professor of Law, University of Essex

Introduction

The following Statewatch analysis looks at every provision of the access to documents Regulation which the Commission has proposed to amend, as well as several key provisions of that Regulation which the Commission has ***not*** proposed to amend.

This analysis assesses whether each of the Commission's proposals would in turn either reduce the current standards regarding access to documents, or simply maintain the status quo. The proposals which would reduce standards are highlighted. Unfortunately, there are ***no*** provisions of the Commission's proposal which would ***improve*** the current standards.

This analysis also assesses the Commission's proposals in light of the 2006 resolution of the European Parliament (the 'Cashman resolution'), which contained a list of recommendations for improvements of the Regulation and which was approved unanimously by MEPs.

Where the Commission's proposals would ***reduce*** standards, this analysis makes precise recommendations for legislative amendments to maintain those standards. This analysis also suggests precise amendments which would ***improve*** standards, based in particular upon the Cashman resolution.

It should be emphasised that the amendments proposed by the Commission which would reduce standards are not all of equal importance. The amendments which would likely lead to the biggest reduction in standards – and which should therefore be rejected as a matter of priority – are the amendments to:

a) Article 2(6), second sentence (indefinite refusal of access to corporate documents);
b) Article 3(a) (definition of 'document');
c) Article 4(5) (personal data);
d) Article 5(2) (Member States' documents); and
e) Article 12 (registers of documents).

As for the objective of ***improving*** standards, priority should be given to the amendments suggested below to Article 4(3) (or alternatively Article 4(7)), Article 5(2) and Article 12.

Article 1(a)

The change to this provision is not substantive.

Article 2(1)

The change to this Article is substantive. It increases access *in principle*, because it requires, not just permits, the institutions to apply the Regulation to natural or legal persons who or which are not resident or registered in a Member State. However, it will **not** increase access *in practice*, since all of the institutions already take up the current option to apply the access rules to such persons.

Article 2(2)

The new wording added to this provision – 'concerning a matter relating to the policies, activities and decisions falling within its sphere of responsibility' – have simply been moved here from Article 3(a). Therefore this is not a substantive change.

Article 2(5) LOWER STANDARD

This new wording would remove an entire category of documents – document submitted to courts by parties other than the institutions – *entirely* from the scope of the Regulation. This would quite obviously be a **drop in standards** as compared to the current rules. This category of documents was *not* the subject of the *API* judgment (Case T-36/04) referred to by the Commission in its explanatory memorandum in the context of the proposed amendment (at pages 6-7), as that case only concerned the *Commission's* documents submitted to the EU courts.

Arguably it is a violation of Article 255 EC, which is the 'legal base' for this proposal, and/or the EC law principle of proportionality, to exclude a category of documents entirely from the scope of its rules.

Recommendation: to maintain current standards, Article 2(5) should be deleted.

Article 2(6) LOWER STANDARD

This new provision in fact contains two separate lower standards as compared to the existing rules. First, it would completely exclude documents relating to individual decisions and investigations from the scope of the Regulation, until after the end of the decision or investigation. Secondly, it would completely exclude documents 'containing information gathered or obtained from natural or legal persons by an institution within the framework of such investigations', even *after* the close of the investigation. Obviously, since neither category of documents is completely excluded from the Regulation now, both of these changes would again be a **drop in standards** as compared to the current rules.

In its explanatory memorandum (at pages 6-7), the Commission explains this proposed amendment by reference to the judgment in the *VKI* case (Case T-2/03). But the new exception goes well beyond the case law. Although the *VKI* judgment does state (para. 75 of the judgment) that the Commission need not give full reasons for a refusal for each individual document when it is manifestly clear that access to the documents must be refused, due to the particular circumstances of the request, it does *not* go so far as to state that documents forming part of the files of law enforcement proceedings leading to an administrative act of individual scope must always be refused. Quite obviously, the *scope of the Regulation* is a different question from the *extent of the requirement to give reasons*. Moreover, applying these principles to the facts of the *VKI* case, the Court said that 'the Commission was ***not*** entitled to reach such a general conclusion' that documents relating to a pending competition proceeding had to be refused 'without first having carried out a concrete, individual examination' of the relevant documents (para. 82 of the judgment). This was because the Commission had not made certain that the documents in question fell within the relevant categories (para. 83): '[t]he Commission seems to have acted more on the basis of what it imagined the content of the documents in the…file to be than on the basis of an actual examination', and the Commission's arguments 'remain vague and general….[t]he fears expressed by the Commission remain mere assertions and are, consequently, utterly hypothetical' (para. 84); and '[f]inally, and in any event, it is not apparent from the reasons given for the contested decision that each of the documents comprising the file, taken individually, is covered in its entirety' by the exception relating to the protection of investigations.

The Court went on to rule in the *VKI* case that the Commission had also not given sufficient reasons to justify refusal of access on the three other grounds relied upon by the Commission, and it also refused to accept that the Commission could rely upon the administrative workload resulting from the applicant's request to refuse access. This last point suggests that the *real* goal of the proposed new Article 2(6) is to *reduce the Commission's workload*, even though the Commission has not directly suggested an amendment to the rule on 'excessive requests' (see p. 5 of the explanatory memorandum).

Furthermore, the second part of the new paragraph would in particular protect the documents submitted by companies – which would indirectly have the effect of more completely protecting the 'commercial interests' of companies, even though the Commission has not explicitly proposed an amendment to this ground for exception (see p. 5 of the explanatory memorandum). So the rules would offer greater protection for corporate interests, even though the corporate sector and public authorities 'feel…that the current rules strike the right balance' and 'journalists, NGOs and a majority of individual citizens' want '*more* weight' to be 'given to the interest in disclosure' in such cases (ibid). Also, the first part of the new rule would set a time limit before which documents could not be released, even though this suggestion 'has not been given much support' in the Commission's public consultation (ibid).

Moreover, the *VKI* judgment has been subsequently applied in the judgment in *TGI* (Case T-237/02, judgment of Dec. 2006), in which the Court of First Instance ruled that the Commission had not individually examined all of the documents in a file relating to a state aid proceeding. The Commission's explanatory memorandum makes no mention of this judgment, which it has appealed to the Court of Justice.

To conclude, the proposed new Article 2(6) of the Regulation has nothing to do whatsoever with the judgment in *VKI* – except to the extent that the Commission is apparently seeking to *overturn* the consequences of that judgment (and the later *TGI* judgment). This amendment would also offer significantly greater protection for corporate interests, even though corporations did not seek such greater protection and civil society and citizens support changes in the opposite direction.

Again, as with Article 2(5), it is arguably a violation of Article 255 EC and/or the EC law principle of proportionality to exclude a category of documents entirely from the scope of its rules. This is particularly the case with the second part of the proposed Article 2(6), since it would exclude a category of documents from the scope of the Regulation for an unlimited period.

Recommendation: to maintain current standards, Article 2(6) should be deleted.

Article 3(a) LOWER STANDARD

The revised definition of 'document' in Article 3(a) contains two elements. First, it would introduce a restrictive definition of 'document' which is contrary to its normal meaning as understood by both specialists and the general public. In place of the normal meaning of the concept, the proposal would state that a document (in the normal sense of the word) which was 'drawn up' by an institution would only be considered a 'document' for the purpose of the Regulation if it were 'formally transmitted' or 'otherwise registered'. This would likely lead to a delay before which a document (in the ordinary sense of the term) would become a 'document' for the purposes of the Regulation, and therefore subject to the Regulation. Undoubtedly some documents (in the ordinary sense of the term) would never become subject to the rules, particularly since officials would be tempted to avoid the application of the Regulation simply by failing to register a document or to transmit it formally. This is clearly a **drop in standards** compared to the current rules.

Arguably, the EC legislature lacks the legal power pursuant to Article 255 EC to specify that certain documents (in the ordinary sense of the term) are not 'documents' for the purpose of the Regulation on access to documents, since the concept of a 'document' is referred to in the Treaty. Alternatively, it would breach the principle of proportionality to exclude whole categories of documents (in the ordinary sense of the term) from the scope of the access to documents rules.

As for the second part of the revised definition, concerning data held on a database, the proposed definition begs the question which is before the Court of First Instance in a pending case (Cast T-299/06 *Leclerq*). Before the judgment in that case is delivered, it is not clear whether the definition is an improvement or a reduction in standards.

Recommendation: to maintain current standards, the words 'drawn up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution' should be deleted.

The remainder of the new wording (from 'data contained in electronic storage, processing and retrieval systems' to the end of the paragraph) should be reviewed after the *Leclerq* judgment.

Article 4(1)

It is not clear, in the absence of case law, whether the revised definition of the 'public security' exception, to include 'the safety of natural or legal persons', would change the status quo.

As for the mandatory exception for the protection of the environment, this does not change the status quo as compared to the separate Regulation 1367/2006.

The exception in the current Article 4(1)(b) would be moved to the future Article 4(5), which is discussed below.

Article 4(2) LOWER STANDARD

'Intellectual property' is already explicitly protected as an aspect of 'commercial interests', so referring to it instead as a separate ground for protection would not change the status quo.

The extension of the 'court proceedings' exception to cover 'arbitration and dispute settlement' proceedings is new. This would clearly **lower standards** as compared to the current rules.

The exception for 'the objectivity and impartiality of selection proceedings' is also new. This would also clearly **lower standards** as compared to the current rules.

Recommendation: to maintain current standards, Article 4(1)(c) should read only 'legal advice and court proceedings', and Article 4(1)(e) should be deleted.

To ***improve*** current standards, as set out in recommendation 2 of the Cashman resolution, Article 4(1)c) should be amended to read:

> legal advice and court proceedings***, except as regards legal advice in connection with procedures leading to a legislative act or a non-legislative act of general application***;

Article 4(3) LOWER STANDARD

The scope of this exception would be revised. It would apply to *all* documents, rather than just to documents 'drawn up by an institution for internal use or received by an institution'. This change would therefore **lower standards** as compared to the current rules.

The failure to propose changes to this exception is a missed opportunity, particularly in light of recommendation no. 2 in the 2006 Cashman resolution of the Parliament and the moves toward greater transparency in Council proceedings, which would be further developed by the Treaty of Lisbon. At the very least, the obligation to decide on legislation openly must entail an exclusion of legislative activity from the scope of this exception, and the Cashman resolution also calls for the exclusion of other decision-making procedures as well.

Recommendation: to reflect recommendation no. 2 of the Cashman resolution, which would ***improve*** current standards, a new sub-paragraph should be inserted at the end of Article 4(3):

> This paragraph shall not apply to documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application.

In fact, recommendation 2 of the Cashman resolution implicitly rejects ***any*** ground for refusal of access to documents relating to such procedures. To give effect to this ***broader improvement*** of access, a new sub-paragraph should be added to Article 4(7), rather than amendments to Article 4(1)c) and 4(3):

> The exceptions as laid down in this Article shall not apply to documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application.

Article 4(4)

The new second sentence of this paragraph, which provides that the public interest in releasing information concerning environmental emissions prevails over commercial interests, does not change the status quo as compared to the separate Regulation 1367/2006.

Article 4(5) LOWER STANDARD

There are two separate parts to this new provision, which replaces Article 4(1)(b). The first sentence concerns the issue dealt with in the judgment of the Court of First Instance in Case T-194/04 *Bavarian Lager*. In that judgment, the Court of First Instance ruled that the names of persons lobbying the Commission as part of their professional functions should be disclosed, as this disclosure would not affect the 'privacy and the integrity of the individual'. The Commission would replace this ruling with a new rule that disclosure could be refused if it would 'adversely affect the persons concerned'. This would appear to set a **lower standard** than the case law, since the persons concerned would undoubtedly claim that disclosure

would have an 'adverse effect' on them even if it did not affect their privacy or integrity.

As for the second part of the provision, the disclosure of other personal data would be governed by the EC's personal data legislation. This would also set a **lower standard** than the current rules, because at present it is clear from the *Bavarian Lager* judgment that the disclosure of a document cannot be refused simply on the grounds that it contains personal data; it must also be shown that disclosure of this personal data would ***in addition*** affect the 'privacy and the integrity of the individual'. The Commission's proposal would abolish this additional requirement. It should be noted that a number of cases concerning the application of the current Article 4(1)(b) are pending against the Commission before the Court of First Instance.

Recommendation: to maintain current standards, Article 4(1)(b) should be maintained and Article 4(5) should be deleted.

If it is felt necessary to reflect the case law precisely within the text of the Regulation, without lowering standards, the following new sub-paragraph could be added to the end of Article 4(1)(b):

> In any event, the names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed.

Article 4(6)

Although this paragraph would not be amended, it should be noted that the possibility of partial access would in effect be ruled out as regards documents falling within the scope of Article 2(5) or 2(6), or documents (within the normal meaning of the term) falling outside the scope of the definition of 'document', since they would now fall outside the scope of the Regulation entirely.

Article 4(7)

The amendments to this paragraph are not substantive. However, if Article 4(1)(b) is retained, as suggested above, the reference to 'privacy' should not be replaced with 'the protection of personal data'.

Article 5(2) LOWER STANDARD

In the judgment of December 2007 in *Sweden v. Commission*, the Court of Justice ruled that, as regards the current Regulation, Member States could require the

institutions to refuse access to documents originating from a Member State, but **only** on the grounds set out in Article 4(1) to 4(3) of the Regulation. This is unmistakably clear in paragraph 75 of the judgment, according to which the current rule '***cannot*** be interpreted as conferring on the Member State a general and unconditional right of veto…with the effect that access to such documents would cease to be governed by the provisions of that regulation ***and would depend only on the provisions of national law'***. The next paragraph of the judgment continues, '***[o]n the contrary***…the exercise of the power conferred…on the Member State concerned is delimited by the substantive exceptions set out in ***Article 4(1) to 4(3)***'. The point is reiterated in paragraphs 83, 86, 88, 89 and 93 of the judgment. Paragraph 84 of the judgment does refer to the 'possibility that compliance with certain rules of national law' could be relevant – but ***only if*** the interest protected by a national rule 'could be regarded as an interest deserving of protection on the basis of ***the exceptions laid down by [the access to documents] Regulation***'. Therefore there can clearly be absolutely no doubt whatsoever that this judgment permits Member States to use their national law as such to insist that documents shall not be disclosed.

The Commission's proposal for Article 5(2) would establish two different cases. First of all, as regards Member States' documents dealing with legislative proceedings or proceedings for the adoption of a non-legislative act of general application, the normal rules in the Regulation would apply. This would not change the status quo, except that the EC institutions (rather than the Member States) would decide *de facto* on whether to release the documents in such cases. But undoubtedly the EC institutions would be strongly influenced by the views of Member States, who would have to be consulted before release, pursuant to Article 5(1).

As regards ***all other*** Member States' documents, Article 5(2) would permit the Member States to insist on non-disclosure on the basis of EC law ***or*** national law. This would quite clearly **lower standards** as compared to the status quo.

Recommendation: to maintain current standards, the wording of the current Article 4(5) should be maintained.

If it is felt necessary to reflect the case law precisely within the text of the Regulation, without lowering standards, the following wording should replace the current Article 4(5):

> Where an application concerns a document originating from a Member State, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4.

In order to reflect recommendation 4 of the Cashman resolution, which would ***improve*** current standards by limiting the Member States' veto in particular cases, the following text could instead replace the current Article 4(5):

> Where an application concerns a document originating from a Member State, other than documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application, ***or as regards information submitted to the Commission concerning the implementation of Union legislation, until such time as any proceedings before a court have begun***, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4.

This amendment should be read together with the proposed amendment to Article 4(3), which would rule out the application of the 'decision-making' exception to documents relating to procedures for the adoption of legislative acts or non-legislative act of general application. Taking the two amendments together, Member States' documents relating to the procedures for the adoption of such acts could only be refused at the discretion of the EU institutions, and only for the reasons set out in Article 4(1) and (2).

Article 6 LOWER STANDARD

There are three proposed amendments here, relating to cases where a document cannot be identified, the starting period for time limits, and the requirement to find a 'practical' solution where a very long document, or a very large number of documents, is or are requested. The first two changes would not alter the substance of the current rules, but the third change would appear to reduce current standards.

Recommendation: to maintain current standards, the wording of the current Article 6(3) should be maintained.

Article 8 LOWER STANDARD

The first amendment would extend the time period to reply to an application. The second amendment would not change the substance of the Regulation, as the deleted words would simply be moved to Article 8(3).

Recommendation: to maintain current standards, the time periods in the current Article 8(1) should be maintained.

Article 9

The Commission does not propose any changes to Article 9, which concerns classified documents. This Article was the subject of a detailed recommendation in the Cashman resolution.

Recommendation: to ***improve*** current standards, as set out in recommendation 3 of the Cashman resolution, Article 9 should be amended as follows:

a) Article 9(7) should read as follows:

> The Commission and the Council shall **ensure adequate control by** the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions**, which shall be made public**.

b) A new Article 9(8) should be inserted as follows:

> Bilateral agreements with third countries or international organisations shall not prohibit the Council or the Commission from sharing information with the European Parliament.

Article 10 LOWER STANDARD

The amendment to Article 10(1) appears to increase the possibility for charging a fee to applicants. However, the amendment to Article 10(2) does not appear to change the substance of the Regulation.

Recommendation: to maintain current standards, Article 10(1) should not be amended and Article 10(5) should not be added.

Article 11

This Article is unchanged but the proposed definition of a "document" under Article 3.a could lead to even fewer documents being listed on the public registers of the institutions.

In the case of the Commission *Statewatch* has lodged a complaint with the EU Ombudsman for its failure to register many of its documents. The Ombudsman has accepted the complaint and issued a formal Recommendation requiring the Commission to put on its register all documents not included and to provide a time-table for its implementation.

If the Commission's proposal on the definition of a document were to be adopted it would subvert the Ombudsman's Recommendation.

Article 12 LOWER STANDARD

The deletion of the current Article 12(1) removes the current obligation to make all documents publicly available on a register as far as possible. It is therefore a **significant lowering of standards**

Article 12(2) is a clarification of the extent of the obligation to make certain categories of documents publicly available. While it would improve the current position *in principle*, it would not really alter the status quo *in practice* as regards the EP or the Council (see in particular the Council's rules of procedure) or the Commission's practice as regards publication of its legislative proposals or draft 'comitology' measures. It would not go as far as recommendation 2 of the Cashman resolution, which would improve the current status quo.

The Commission's proposal does not take any account of recommendation 5 of the Cashman resolution, which aims to improve the practicalities of citizen access to documents.

Recommendation: to maintain current standards, Article 12(1) should not be amended and Article 12(4) should not be added.

To ***improve*** the current status quo, as set out in recommendation 2 of the Cashman resolution, Article 12(2) should read as follows:

> In particular, documents drawn up or received in the course of procedures for the adoption of EU legislative acts or non-legislative acts of general application shall, subject to Article 9, be made directly accessible to the public.

This amendment would be consistent with the amendment to Article 4(7) proposed above, and would be bolstered by the amendment to Article 5(2) suggested above.

To deal with the issues addressed by recommendation 5 of the Cashman resolution, in order to ***improve*** current standards, a new Article 12(4) should be inserted as follows:

> The institutions shall establish a common interface for their registers of documents, and shall in particular ensure a single point of access for the direct access to documents drawn up or received in the course of

procedures for the adoption of EU legislative acts or non-legislative acts of general application.

Article 13

The Commission proposes no amendments here. At the very least, Article 13(2)(a) should be amended, since Member States can no longer propose initiatives pursuant to Article 67(1) EC. If the proposed amendment to Article 4(3) or 4(7) is adopted, along with the corresponding changes to Articles 5(2) and 12(2), then there will in fact be an obligation to publish all of the legislative documents listed in Article 13(1) in the Official Journal, since Article 4 would no longer be applicable to such documents.

Since Article 13(2)(a) essentially concerns legislative activity, it should be inserted instead into Article 13(1), which contains a stronger obligation to publish measures.

Recommendation: to ***improve*** current standards, Article 13(2)(a) should be replaced by a new Article 13(1)(g):

initiatives presented to the Council by a Member State pursuant to Article 34(2) of the EU Treaty.

Article 16

The amendment proposed by the Commission appears to ***lower current standards.***

Recommendation: to maintain current standards, Article 16 should not be amended.

For full background and documentation from 1993 see:

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

And FOI in the EU: **Observatory on access to EU documents: 2008-2009**

http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm

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