



The right to know or the right to try and find out? The need for an EU freedom of information law

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“Open, transparent and accountable decision-making is the essence of any democratic system. Secrecy is its enemy and produces distrust, cynicism and apathy among citizens and closed minds among policy makers” ²

I’m not sure if you are aware of this but it’s fitting that we’re here today discussing Freedom of Information (FOI) because today is the third international right to know day.³ As far as FOI in the EU is concerned however, there is not much to celebrate. Only nine of the twenty-five EU member states have FOI regimes that come close to the standards advocated internationally by experts and the EU itself has a very long way to go.

For those of you who don’t know *Statewatch*, we’re a civil liberties group founded in 1990.⁴ We do a huge amount of work around EU justice and home affairs policy which has meant we have had to do a huge amount of work campaigning for openness in the European Union.

We took the first complaints on access to EU documents to the European ombudsman in 1996; eight successful complaints were lodged against the Council of the EU, each of which established new rights for all applicants.

In 1999 we formed a coalition with the *International Federation of Journalists*, the *European Environmental Bureau*, the *European Citizens Advisory Service* and other civil society groups to campaign for openness

¹ This paper is based on a talk given to the “International Symposium of on Freedom of Information and Data Protection”, organised by the Brandenburg Data Protection Commissioners Office, Potsdam, 28-29 September 2005, and a seminar on “Getting inside the EU”, organised by *Journalists@Yourservice* and the European Journalism Centre, Brussels, 3-4 October 2005.

² Tony Bunyan, 2002, “Secrecy and openness in the European Union - the ongoing struggle for freedom of information”, see: <http://www.statewatch.org/secret/freeinfo/index.html>

³ Organised by the Freedom of Information Advocates Network, see: http://www.foiadvocates.net/index_eng.html

⁴ See: <http://www.statewatch.org/>.

during the negotiation of the EC regulation on public access to documents. The regulation - 1049/2001/EC - was adopted in 2001.⁵

You will have guessed from the title of my talk to day that I believe there is a crucial difference between access to documents and full freedom of information regimes as far as the so-called “right to know” is concerned.

Access to documents is dependent, in the first instance, on transparency - by which I mean the provision of preliminary information by institutions. To request access to documents, you must first know which documents exist and which ones to request.

Freedom of information, on the other hand, does not require prior knowledge about the documentation that exists (or at least requires only very basic knowledge). Instead, the onus is instead on the institution to locate and supply the relevant material.

This is a fundamental difference. If the right to ask is undermined, the “right to know” is meaningless.

On transparency

Policy-makers in the EU have long had a narrow view of “openness”, based on an equally narrow view of transparency. The EU believes that the more information it provides to the public, the more the public will get involved, and the more open - and hence legitimate - the EU will become. This, unfortunately, does not appear to be the case. The EU Constitution springs to mind.

The Council’s public register of EU documents represents the most significant step in terms of transparency and is certainly a very useful source of information.⁶ Since 1999, taking all languages together, more than 600,000 documents have been added! However, less than two-thirds of the documents are available online (62.8%) - you will have to apply for the others under the Regulation.

The European Parliament is improving too, though has always been the most open of the three main institutions. Least open is the European Commission. Its public register of documents is - at least in comparison to the Council’s - a joke. The commission freely admits that its register only includes the references to a fraction of the documents it produces. This is a clear breach of the Regulation and plainly unacceptable because four years have now passed since it entered into force.

What sort of information are the institutions providing? As a matter of course, all formal legislative proposals are published (online and in the

⁵ Available at: <http://www.statewatch.org/news/2001/jul/newregoj.pdf>

⁶ See: <http://register.consilium.eu.int/>

Official Journal) along with all adopted measures. However, this is not the case with the so-called “soft-law” (Resolutions, Conclusions, Recommendations etc.) which can still be very influential in shaping the development of EU policy.

But what about the other aspects of the policy process? What about the initial decisions to pursue a certain policy and the preparatory texts that shaped the content of the proposal? And what about the legislative process - amendments and changes to draft policies - and the positions of the member states and EU institutions?

For those of us interested in *where policy comes from*, why certain policies were chosen ahead of others and so forth, these documents are crucial. Before looking at the problem in accessing these kinds of documents under the EC Regulation on access to documents, I would like to provide an example of why this hidden aspect of the decision-making process is crucial.

An example: the SIS II

Lets say, for example, the data protection commissioners among you are interested in the development of the Schengen Information System, the now EU law enforcement database dealing with policing and immigration controls. More specifically, you are interested in the development of SIS II - the second generation Schengen Information System - or Europe’s Big Brother database as *Statewatch* has dubbed it.⁷

An exaggeration? We’ll see.

The SIS II legislative proposals were released by the Commission three months ago. But construction of SIS II began more than a year ago with the award of a 40 million euro contract. This was possible because the Council and Commission managed to agree the crucial technical requirements - including the categories of persons and data to be included - in advance of any formal legislation (the member states simply agreed soft-law Council Conclusions in 2002, 2003 and 2004). It was an entirely undemocratic process with no consultation of the European or national parliaments.

To understand this process you will need to examine the minutes of the regular meetings of the three EU Council working parties that deal with SIS II. You will have to apply for many of these documents. The older documentation will tell you that the requirements for SIS II were agreed on the basis of a law enforcement wish list that evolved over three years, and will help you track this wish list down.

You will also have to check the minutes of the European Commission’s SIS II working party. This would tell you that it has also been decided - arbitrarily

⁷ Ben Hayes, 2005, “SIS II fait accompli? Construction of EU's Big Brother database underway”, see: <http://www.statewatch.org/news/2005/may/sisII-analysis-may05.pdf>.

- to build a single technical platform for the biometric data in SIS II and the Visa Information System. Does this matter?

It matters because this “platform”, under existing plans, is ultimately to contain the fingerprints and other personal details of every passport holder, every residence permit holder, every visa entrant and every refugee in the European Union. The majority of the people in the EU will be registered into what will become, for all intents and purposes - particularly policing - an EU population database. Much of the legislation is now in place.

All this is documented by the EU institutions, and most of the relevant texts *can* be found on the internet. And, if you know what to ask for, you will also be able to request, under regulation 1049/2001/EC, access to documents pertaining to the most recent developments - which are not yet available on the internet.

But, with the greatest respect, unless you have a decent working knowledge of the SIS and the language and processes of the EU, many documents you will find will not make much sense. If you do have sufficient expertise on these matters, you will know already that most of the key political decisions - many of which have significant implications for civil liberties and data protection - are being taken in the corridors of power in Brussels without any meaningful democratic scrutiny.

The point is that the increased provision of documents by the institutions does not necessarily make those institutions any more transparent. On the contrary, the sheer complexity of EU decision-making is a barrier to transparency, which also requires that citizens be able to understand the decisions being taken in their name.

Making millions of texts available on the internet has only “opened-up” the EU decision-making process to the expert. And even then many of the crucial documents are still withheld from scrutiny. The EU rules on access to documents offer no guarantee that the applicant will be able to get the information they are looking for, even if they identify the right documents for which to apply. This is a generic problem with an “access to documents” system.

The Regulation ⁸

Regulation 1049/2001/EC on public access to documents was supposed to “enshrine” the public’s right of access to EU documents. This it did only in the sense that it broadly incorporated the previous EU code of public access to documents as amended by the case-law of the European courts and the administrative rulings of the European ombudsman. In doing so the

⁸ See also Steve Peers, 2004, “Attacking the citizens’ right of access?”, *Statewatch bulletin*, vol 14 no 6.

regulation incorporated the deficiencies of the existing system and enshrined only a limited public right of access to EU documents.

During the two year period in which the regulation was drafted, negotiated and adopted three words summed-up the position of the EU institutions - with the admirable exception of a minority of parliamentarians and the Nordic member states - "space to think". *Statewatch* and others argued, and continue to argue, that space to think means *space to act* away from public and parliamentary scrutiny. As one former commissioner put it: "it is not a case of wishing for secrecy, its just easier to reach an agreement if there are no listeners" (the words of Neil Kinnock).

There are a number of readily identifiable problems with the existing regulation and its implementation. Primarily, these concern the exceptions under Article 4 of the Regulation which should, as "exceptions", be interpreted very narrowly by the institutions. Generally they are not. Some are being interpreted very broadly indeed.

This is certainly the case with Article 4(1)(a) of the Regulation which allows the EU institutions to refuse access to documents concerning security, defence, the military, international relations and economic policy if their release would "undermine the protection of the public interest" - the so-called "harm test" (or "public interest" exception). Fifty per cent of the requests for documents that are refused by the Council are refused on the various grounds in this article.⁹

This means whole categories of documents are excluded from public scrutiny. The concept of "national security", for example, is invoked to withhold many justice and home affairs documents concerning "terrorism" even though many of these concern policy issues (which should be public) rather than operational matters (which might legitimately be withheld).

The international relations "exception" in article 4(1) is regularly used to withhold swathes of documents on EU-US cooperation. It took *Statewatch* four years and two complaints to the European Ombudsman just to get access to the agendas of the EU-US senior officials groups. These groups were established under the 1997 "New Transatlantic Agenda" and facilitate constant dialogue between the EU and US on a host of global policy issues. The agendas that we applied for are merely one or two page documents that contain nothing more than a list of the issues discussed (for example: "Iraq", "terrorism", "global warming" etc.). When we were finally supplied with 35 agendas, 458 of these agenda items had been deleted!

⁹ See "Third annual report of the Council on the implementation of Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents", EU Council document 8896/05, 12 May 2005.

When we apply for the actual documents concerning EU-US cooperation, we are routinely told that the release of the documents would “prejudice the relations between the EU and the United States”. This is what we were told with the EU-US extradition and mutual legal assistance treaties, treaties which have significant constitutional and human rights implications for the member states (not least here in Germany where the constitutional court has just ruled the European Arrest Warrant (an extradition system) unlawful).

When we appealed the General Secretariat’s decision to refuse access to the two draft EU-US treaties we cited a fundamental public interest in democratic debate and human rights. The EU Council ruled that the “public interest” in negotiating these treaties in secret outweighed any public interest in democracy or fundamental rights.

According to the Commission’s review of the Regulation of last year *not one single* “public interest” argument made by an applicant for documents has ever been accepted by the EU institutions.¹⁰ The obvious question is how can we trust the EU to protect the public interest if we don’t know what it believes our interests are? And how can we challenge the decision to refuse access to the documents if the EU decides arbitrarily that its secrecy is in the public interest?

Current practise means that many treaties between the EU and third states/bodies are not published until they have been finalised or even adopted. This means that it is all but impossible for parliaments and civil society to intervene in this crucial area of policy-making until policy has been agreed, shielding the entire process from democratic scrutiny. Article 4(4) of the Regulation compounds this problem by allowing third parties to veto the release of their documents. If these documents are shaping EU policy (and thus national policy) is it legitimate to keep them secret? I don’t think so.

Article 4(1)(b) of the regulation, allowing documents to be withheld on data protection grounds, is also problematic. The European Commission has used this provision to refuse to disclose the names of all commercial lobbyists meeting secretly with Commission officials. This contradicts the new European Data Protection Supervisor’s recent interpretation of the relationship between FOI and data protection, which makes it clear that the latter should not be invoked as a justification to undermine the former, and certainly not in cases like this.

Article 4(2) of the regulation similarly allows the refusal of documents that would prejudice commercial interests. The Commission has stated that this

¹⁰ See “Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents”, European Commission document COM (2004) 45 final, 30 January 2004.

exception is interpreted in a “wide sense”. This plainly breaches the regulation. The whole point about an “exception” is that it must be interpreted narrowly. The wider we interpret exceptions, the more the exceptions become the rule.

This is precisely what has happened with documents authored by the EU legal services -also covered by article 4(2). These documents are withheld as a matter of course, even after the decisions to which the legal advice relates have been taken. How do we know then, that the EU is following its own legal advice or acting in accordance with the treaties? As a rule, we don't. But on the occasions that we have been leaked EU legal advice it is clear that this is not always the case. Given the decision in the UK to release the attorney general's advice to the prime minister on the legality of the Iraq war on “public interest” grounds, is it acceptable that *all* EU legal advice is excluded from the scope of the Regulation?

Next, article 4(3) allows the institutions to documents to withhold documents relating to draft decisions “if disclosure would undermine the decision-making process”. The principle is that efficient decision-making is more important than freedom of information. It is hard to think of a more undemocratic argument. Yet, according to Council reports, this is the (single) “exception” it invokes the most when refusing access to documents. One third of its refusals have this justification.¹¹

Article 4(3) also covers “non-legislative” and “internal” documents, meaning that documents like feasibility studies, internal reviews and informal decisions are also routinely withheld unless there is an “overriding public interest in their disclosure” - something which under current practise is never going to happen. This means that the “preparatory documents” I mentioned earlier - the documents that might explain where policy came from and why - are also arbitrarily withheld.

To give another example, Tony Bunyan, *Statewatch* director, recently noticed that the Commission has decided to move the data protection portfolio from within its Internal Market directorate to the Justice and Home Affairs directorate. This decision is of serious concern because where the Internal Market DG has extended data protection and generally sought to uphold citizens rights, the Justice and Home affairs DG has recently championed policies that undermine data protection (the recent proposals on “data retention” and the “principle of availability” for example). The data protection commissioners among you will realise this decision is akin to letting the wolf guard the sheep.

But when *Statewatch* requested documentation from the Commission on the decision we were initially told that no documents exist. Upon appeal we were supplied with a letter, from the Director General of the Internal Market DG (the no.2 in the DG) to his boss, the Commissioner for the

¹¹ See note 9, above.

Internal Market. But the crucial passages were blanked out on the grounds that they represent the personal opinion of the Director General! Is it right to withhold this information? Should crucial decisions regarding data protection be taken on the basis of personal opinion? We don't think so.

Finally, article 4(5) of the regulation has become another blanket exception. This provision allows individual member states to "request" that the EU institutions do not release their negotiating positions. But in practise *all* member states negotiating positions are blanked out of documents as a matter of course. This means that we are unable to find out which member states are shaping EU policy.

What we should be asking ourselves, I think, is whether in an EU in which some member states are more equal than others - in terms of not just their voting weight in the Council but more importantly in this case their political influence behind the scenes - whether it is acceptable that the influence these countries have over the direction of EU policy should, as a rule, be kept secret. I do not believe this is acceptable.

Other issues

The problems with the regulation do not stop there. The European Council - the six monthly prime ministerial summits - are not covered by the Regulation. Why? There can be no justification for such an exemption. The EU courts have refused to adopt rules on access to documents. Most national courts have them - why not the EU courts? Eurojust (the EU prosecutions agency) has still not adopted its rules. The same is true of the EU Police Chief's Task Force meetings.

I'd also like to say something about the EU court rulings on access documents. There have been, I think, twenty-four cases.¹² In the first ten cases, the courts ruled in favour the applicant on seven occasions, improving significantly the old code on public access to EU documents. But in eleven of the last fourteen cases, the Court has ruled in favour of the institutions. The EU Court of First Instance has so far heard six cases concerning the new regulation and has ruled in favour of:

- the member states' right to veto Council documents (on three occasions);
- the Council's right to protect the confidentiality of its legal service opinions; and
- on the Council's right to refuse documents concerning the drafting of the EU "terrorist lists".

¹² Cases submitted to EU Court of First Instance (i.e. not including appeals). See *Statewatch* "Observatory" on access to documents - case law: <http://www.statewatch.org/caselawobs.htm>

The only “victory” for openness under the new regulation has been the Court’s decision to overturn a Commission decision to withhold a document on the grounds that it was a “very large document” - hardly a ground-breaking decision.

If the EU Courts, or the lower court at least, is intent on preserving the current “institutional balance” as is it is sometimes called, the question is where do we go from here?

The future

There has been one review of the Regulation by the Commission. That was in January 2004.¹³ The Commission recognised the need to make sure all Community bodies meet their obligations under the Regulation (though made no recommendation as far as EU bodies are concerned). It also recommended necessary improvements to the public registers - though we are still yet to see any results - and other initiatives to increase the provision of information by the institutions. But it ruled out, at least in the near future, any potential amendment of the Regulation itself. We don’t even know when the next review of the Regulation is going to be.

So as far as the institutions are concerned, the Regulation is a great success. They state proudly that 77 % of requests to the Council and 65 % of requests to the Commission result in the disclosure of documents.¹⁴ However, the other way of looking at these figures is to say that between one-quarter and one third of the requests are refused. And yet another way of looking at the figures is to say that they are entirely meaningless as a measure of transparency.

What the statistics do not tell us is what kinds of documents are being released on application, and what kind are being withheld? There is more than a suggestion that many of the documents released by the Council and Commission after an application has been made under the Regulation should simply have been publicly available in the first place. Why not review the system with a view to introducing procedures so that such documents are simply released onto the public register straight away? This would obviously be more efficient than maintaining the existing system.

Unfortunately, we look to be more heading for more secrecy rather than more transparency. The draft EU Constitution included a worrying distinction between “legislative” and “non-legislative” measures. The principle is that all legislative documents should be public but that documents relating to non-legislative or “operational” matters should be

¹³ See note 10, above.

¹⁴ See Council report 2005 (note 9, above) and “Commission staff working paper: Annex to the Report on the application in 2004 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents [COM(2005)348 final]”, European Commission document SEC (2005) 1025, 29 July 2005.

kept secret. The problem is that many areas of EU activity fall within the non-legislative or supposedly “operational” realm and are just as likely to contain far-reaching “policy” decisions as legislative documents. To use the example of the development of the Schengen Information System, we have just seen four years of policy-making based entirely on non-legislative documents.

Commentators from across the political spectrum are quick to pronounce that the constitution is “dead”. Unfortunately this is not the case and the discussion within the institutions is as much about “cherry-picking” certain provisions as it is with “reconnecting” with the citizen. Our fear is that any further review of the access to documents rules is to proceed on the basis of this bogus distinction between legislative and non-legislative documents and will ultimately result in many more EU documents being withheld from public view, representing a retrograde step in terms of FOI.

Conclusion

In March 2000, the European Ombudsman, then Jacob Soderman, wrote in the *Wall Street Journal* that under the Commission’s first draft of the Regulation on public access to documents that “there won’t be a document in the EU’s possession that couldn’t legally be withheld from public scrutiny” (and was duly attacked as polemic and extreme by the Commission president). I am in no doubt that that same fundamental problem exists today. My conclusion, therefore, is that the EU has not “enshrined the public’s right of access” (in accordance with the Amsterdam Treaty) or even “ensured the widest possible access to documents” (in accordance with its own Regulation). In place of the right to know is a limited right to try and find out - a right that may be limited further still the near future.

If the EU genuinely believed in openness and democracy - rather than protecting the status quo and its cherished “space to think” - we might instead be looking forward to EU Freedom of Information laws, covering both the EU institutions (a Regulation) and the member states (a Directive). In much the same way as the EU data protection directives, EU FOI rules would force the secretive member states to adhere to internationally advocated minimum standards (such as independent Information Commissioners etc.) as well as injecting a much needed dose of “democratisation” (so-called) into the EU institutions. Unfortunately, I fear that day is a long way off. But I invite all of you to support *Statewatch’s* call for an open and democratic Europe and full freedom of information in the EU.

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