

Response of the European Ombudsman, P. Nikiforos Diamandouros, to the Commission's green paper "Public Access to Documents held by institutions of the European Community: a review".

I welcome the Commission's decision to consult widely and openly before making proposals for amending Regulation 1049/2001.

My response to the consultation is in three parts.

The first part contains suggestions to improve the usefulness of the Regulation for citizens who want to know how the Union functions.

The second part contains general comments on certain points raised by the Commission in the green paper.

The third part answers the specific questions in the green paper.

All three parts of the response draw on the Ombudsman's experience of handling complaints made under the Regulation and under the former joint Council and Commission code of conduct¹.

1 Transparency, democracy and citizenship

Transparency (or openness) is an essential aspect of pluralist democracy. It ensures that citizens can have the information they need to participate effectively in the political process and to call public authorities to account. The right of access to documents empowers citizens in relation to the flow of information. It enables them to take the initiative to obtain information, in its original context, that has not yet been put into the public domain.

Moving to a situation in which availability of information is the norm and confidentiality the exception involves a major cultural change. Whilst the situation is by no means perfect, the Union's institutions have, in the period since the adoption of the Maastricht Treaty, made real progress towards greater transparency. The ability of citizens to monitor the exercise of powers by the Union's institutions has increased. So has the quality of the institutions' systems for managing and retrieving information and documents, thereby enabling them to operate more efficiently and effectively, as well as more transparently.

Managing information and documents, administering the right of public access and communicating with citizens are resource-intensive activities. The provision of adequate resources for these purposes should be regarded as a necessary investment to ensure the efficiency, effectiveness and transparency of the Union's institutions and bodies.

¹ Council and Commission Code of Conduct concerning public access, 1993 *Official Journal* L 340, p. 41; Council Decision 93/731 of 20 December 1993 on public access to Council documents 1993 *Official Journal* L 340, p. 43; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, 1994 *Official Journal* L 46, p. 58.

My first concrete suggestion, therefore, is to add a sentence to the second recital to the Regulation², pointing out that adequate resources should be made available to put the principle of openness into practice, thereby achieving greater legitimacy, effectiveness, and accountability to the citizen, as well as strengthening the principles of democracy and respect for fundamental rights.

1.1 Access to information about EU-related activities of the Member States.

The administrative implementation of Community law is, in principle, the responsibility of the Member States³. As the transparency of the Union's institutions has increased, it has become ever more obvious both that constant interaction between the national and Union levels is the norm and that networks linking the two levels flourish in many fields.

Access to documents held by the institutions is a right under the EC Treaty (Article 255). Community law does not, however, confer on citizens any general right of access to information about the EU-related activities of the Member States. Such rights as do exist are limited to specific fields⁴. Moreover, the Court of First Instance has held that Article 4 (5) of Regulation 1049/2001 gives the government of each Member State the right to veto public access, at the Union level, to any document of which it is the author, without giving any reason⁵.

For citizens of the Union who want to monitor how the Union's policies are made and implemented, the current situation thus presents a systemic problem. On the one hand, the exercise of public authority closely connects the national and Union levels. On the other hand, there is a rigid separation of those levels when it comes to the legal framework of transparency⁶.

² The present text of the second recital is as follows: “*Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.*”

³ See the Declaration relating to the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam (Declaration 43). The conclusions of the Essen European Council (December 1994) concerning subsidiarity also stressed that “administrative implementation of Community law must in principle remain the preserve of the Member States”.

⁴ See, in particular, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, 2003 *Official Journal* L 041, p. 26.

⁵ Case T-168/02, *IFAW Internationaler Tierschutz-Fonds v Commission*, 2004 ECR II-4135. The Green Paper points out that the judgement is under appeal to the Court of Justice. Article 4 (5) of Regulation 1049/2001 reads: “*A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.*”

⁶ The consequences of this separation are mitigated in the case of the Council by the latter's practice of treating the written positions of delegations and documents summarising the oral statements by members of the Council or of one of its preparatory bodies as Council documents: see Bart Driessen, “The Council of the European Union and access to documents”, 2005 *European Law Review* 675 at p. 687.

The lack of congruence between how authority is exercised and how it is made accountable constitutes a serious weakness in the democratic structure of the Union.

Within the limits of my competence as European Ombudsman, I have tried to encourage greater transparency in the Member States' handling of EU matters. For example, I publicly supported the Commission's proposal, in its Transparency Initiative, that citizens should be entitled to know who receives EU funds in each Member State⁷. Furthermore, in two inquiries concerning the Commission's refusal to provide access to Member State documents, I sought the views of the relevant Member State, so as to clarify possible maladministration by the Commission⁸. Following my approach to the national authorities, the Commission agreed to disclose the documents concerned.

Legislative action is needed, however, to tackle the fundamental problem of making the interactions between different levels in the Union more transparent for citizens.

Reasons for refusal of access

The obligation of the administration to state reasons for its decisions is part of the fundamental right to good administration enjoyed by citizens of the Union⁹. Regardless of the outcome of the pending appeal to the Court of Justice in the case mentioned above, the Community legislature could amend Article 4 (5) of the Regulation so as to provide that a Member State which requests an institution not to disclose a document shall state the reasons for its request and that the institution shall communicate those reasons to the applicant.

Such an amendment would benefit citizens of the Union by enabling them to understand, in their own language, why the Member State in question (which may be different from the Member State of which the applicant is a national, or resident) does not wish a particular document to be disclosed. I therefore hope that the Commission will take this proposal on board.

Towards minimum standards for access to EU-related documents and information

The ability of citizens to understand and monitor how the Union functions would be strengthened if there were minimum standards for (not harmonisation of) public access to EU-related documents and information held by Member State authorities. The voluntary development of such standards could be facilitated and encouraged by the establishment of an independent working party on access to EU-

⁷ See European Ombudsman Press Release No. 17/2006, 22 September 2006, available on my website: <http://www.ombudsman.europa.eu/release/en/2006-09-22.htm>

⁸ See the European Ombudsman's Annual Report for 2005, p. 49. The request to the Member State authorities was made in accordance with Article 3 (3) of European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, *Official Journal* 1994, L 113, p. 15.

⁹ Article 41 of the Charter of Fundamental Rights of the European Union.

related documents and information in the Member States. The working party, which would have an advisory status, could be composed of representatives of information commissioners or similar bodies in the Member States and of the European Ombudsman as an analogous body at the Union level¹⁰.

I encourage the Commission to include the creation of such a working party in its proposals for amendment of Regulation 1049/2001.

1.2 Improving the procedure for review by the Ombudsman.

Regulation 1049/2001 rightly establishes short time limits for the institutions to respond to initial and confirmatory applications for access. The normal time limit is 15 working days from registration of the application, with a maximum of 30 working days in exceptional cases.

If a confirmatory application is refused in whole or in part, the applicant may contest the refusal by judicial proceedings in the Court of First Instance, or by making a complaint to the European Ombudsman.

The normal time limit for an institution to give its initial response to an inquiry by the Ombudsman is three calendar months. In May 2004, I asked the European Parliament, the Council and the Commission to agree to a shorter time limit for complaints against refusal of access to documents, on the grounds that the two-stage administrative procedure (initial application, followed by confirmatory application) ensures that, before any inquiry by the Ombudsman begins, the institution that has refused access will already have had the opportunity to examine the relevant legal and factual issues thoroughly. It should, therefore, be in a position to respond rapidly to a complaint.

I did not, however, suggest a shorter time limit for responding to complaints about refusal of *information* since the relevant codes do not provide for the same two-stage procedure for handling information requests¹¹.

The European Parliament and the Commission agreed to reduce the time limit to two months. The Council did not agree to my proposal, but undertook to continue doing its utmost to reply within the shortest time possible¹².

In my view, a normal time limit of 30 working days for an institution's initial reply to the Ombudsman would make it possible to begin the search for a

¹⁰ In formal terms, the working body could consist of the authorities in each Member State responsible for providing access to justice as required by Article 6 (1) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, 2003 *Official Journal* L 041, p. 26.

¹¹ See Article 22 of the European Code of Good Administrative Behaviour and, e.g., Article 4 of Commission Decision 2000/633/EC, ECSC, Euratom of 17 October 2000 amending its Rules of Procedure, 2000 *Official Journal* L 267, p. 63; Article 6 of the Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, 2001 *Official Journal* C 189, p. 1.

¹² See the European Ombudsman's Annual Report for 2004, p. 42.

solution, if appropriate, early enough to be useful to the applicant, whilst also giving the institution sufficient time to complete necessary internal procedures¹³. Article 8 of the Regulation could be amended accordingly, with provision for the Ombudsman to extend the deadline at the request of the institution concerned, provided that the latter gives detailed reasons for its request.

2 Comments on certain points raised by the Commission.

2.1 Incorporating case-law in the Regulation.

The Green Paper states (page 6) that “incorporating settled case law in a new legal text would provide more legal clarity for citizens and better guidance for the institutions when handling access requests”.

Whilst legislative incorporation of established case law can indeed help to make the law clearer and more accessible, it is questionable how far the case law concerning Regulation 1049/2001 meets this criterion.

It is in the very nature of case law that the full meaning and significance of a judgment may emerge only gradually, as its implications are explored in subsequent cases that involve different contexts and circumstances. This point is of particular importance in relation to the scope of the exceptions under Regulation 1049/2001, which, as the Court has emphasised on numerous occasions, must be interpreted restrictively, in the light of the general principle of access.

Moreover, as the Green Paper itself points out, much of the case law consists of judgements of the Court of First Instance (CFI) and concerns issues that the Court of Justice has not yet had the opportunity to consider.

Legislative incorporation at the present stage of development of the case law would, therefore, risk pre-empting the role of the Court as the highest authority on the interpretation of Community law, particularly as regards the scope of exceptions to the general principle of access.

2.2 The concept of “legislative documents”.

According to the Green Paper (page 11), “the main purpose of laws on freedom of information is to enable citizens to participate more closely in democratic decision-making”. The Green Paper goes on to state that the first priority with regard to the implementation of Regulation 1049/2001 has therefore been to make the legislative process of the EU institutions more transparent and more easily accessible to the general public. It adds that the definition of “legislative documents” in Article 12 of the Regulation lacks precision.

The above analysis by the Commission calls for the following comments.

¹³ The Commission has indicated to the Ombudsman that, due to its internal procedures necessary to respect collegiality, it needs six weeks to reply to his inquiries.

First, the concept of "legislative documents" is inherently imprecise in the present state of Community law, because the Treaty does not distinguish between legislative and non-legislative acts. The draft IGC mandate agreed by the European Council of 21-22 June 2007, envisages that the Treaty will be amended to provide for such a distinction (cf. Article I-33 of the Constitutional Treaty), whilst retaining the existing nomenclature of legally binding acts (regulations, directives, decisions). The precise definition of legislative and non-legislative acts should thus be determined by the future Treaty, rather than through amendment of Regulation 1049/2001.

Second, whilst the ability of citizens to participate in the legislative process (using the term "legislative" as a general constitutional category) is of crucial importance, it is not the only purpose of transparency. Citizens also have a legitimate interest in being able to monitor the exercise of the administrative and regulatory powers that are vested in public authorities. It is important, therefore, to ensure that any amendment of Regulation 1049/2001 as regards "legislative documents" does not diminish the existing right of public access to documents concerning administrative and regulatory activities.

3 Responses to the questions in the consultation document.

Question 1 - Registers

The Green Paper identifies (on page 6) a need to improve the scope of registers of documents, in particular those of the Commission, and invites views on the information provided through registers and websites. I will refrain from commenting on the Commission's register, since I am currently dealing with a complaint from *Statewatch* concerning its adequacy¹⁴. I note, however, that the complainant takes the view that the registers of the European Parliament and of the Council "can broadly be said to meet the requirements of the Regulation".

Registers play a vital role in making it possible for citizens to use the right of access effectively. It needs to be recognised, however, that the definition of "document" under the Regulation 1049/2001 is very broad¹⁵ and that it would be unnecessary and impractical to register everything that falls within the definition. For example, although some internal e-mails should be registered, it would be excessive to require every such e-mail to be registered.

In my view, the broad definition of "document" should be retained, since to narrow it would represent a step backwards for transparency. The worst option of all would be to tell citizens "you cannot even apply for access unless the document appears on a register". Whilst the existing definition of document should be retained, however, the duty to register should be focused more precisely than is the

¹⁴ Complaint 3208/2006/GG.

¹⁵ "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".

case at present. Accordingly, the Regulation should lay down principles as to what kinds of documents must be registered and require each institution to adopt and publish more specific internal rules to implement those principles.

Question 2: active dissemination of information.

Question 2 asks whether more emphasis should be put on promoting active dissemination of information.

It is important to preface a reply by recalling that transparency imposes two parallel requirements on public authorities, one proactive, the other reactive. The first requirement is to take the initiative to communicate effectively with citizens, developing an information strategy targeted to the needs of specific audiences. The second requirement is to react properly when citizens take the initiative by asking for information or a document that is not already in the public domain.

A positive answer to question 2 does not, therefore, imply that less emphasis should be given to responding accurately and promptly to applications for access to unpublished documents and information.

Against that background, I very much welcome the Commission's focus on more active dissemination of documents. To promote that objective, it would be useful for each institution and body to adopt and publish a publication scheme, setting out its policy as regards electronic and conventional publication of material, including the languages of publication. Consideration could be given to amending the Regulation so as to provide for publication schemes, in addition to registers.

Question 3 – Integration of the Aarhus Regulation

Question 3 asks, in substance, whether the specific regime for environmental information established by Regulation 1367/2006 on the application of the provisions of the Aarhus Convention to European Community institutions and bodies should be integrated with the general framework for access to documents established by Regulation 1049/2001.

Regulation 1367/2006 came into force on 28 June 2007. It confers new rights on individuals and NGOs as regards access to information, public participation in decision-making and access to justice in environmental matters. The European Ombudsman can deal with complaints against Community institutions and bodies that fail to comply with the Regulation. The Regulation also gives NGOs that meet certain criteria the right to bring proceedings in the Court of Justice, after requesting an internal review of an administrative act under environmental law.

Regulation 1367/2006 thus concerns not only transparency, but also rights of participation and access to judicial remedies.

As regards transparency, the approach taken by the Aarhus Convention and hence by Regulation 1367/2006 differs from that of Regulation 1049/2001, since its focus is on access to information rather than access to documents. Full integration of the two regimes would thus require that Regulation 1049/2001 either be (i)

fundamentally re-cast so as to focus on information rather than documents or (ii) expanded, so as explicitly to cover information as well as documents.

The first option would put at risk the achievements of over a decade of rules on access to documents at the Union level. The second option would either duplicate Regulation 1367/2006 or, if the relevant provisions were transferred to Regulation 1049/2001, deprive the implementation of the Aarhus Convention at the Union level of coherence.

Since neither of the above options is attractive, it would be better to limit the substantive amendment of Regulation 1049/2001 to consolidation of the changes as regards access to documents that have already been made by Regulation 1367/2006.

To promote public knowledge of rights to information on environmental matters, Regulation 1367/2006 could be mentioned in a new recital to Regulation 1049/2001. It would be useful for the new recital to point out, more generally, that it is good administrative behaviour to reply to requests for information. (On the latter point, see the provisions of the Council and Commission codes mentioned in footnote 11 above).

Since the Member States are bound by the Aarhus Convention¹⁶, questions are likely to arise about the interaction between the Member State and Union levels as regards access to environmental information, especially in relation to the enforcement of EU environmental law. The Advisory Committee that I propose in section 1.1 above could usefully tackle such questions, among others.

Finally, it should be pointed out that the table on page 10 of the Green paper is not entirely accurate. For example, “the public”, rather than only EU citizens and residents, may have access to any documents held by the Ombudsman.

Question 4 - protection of personal data

Question 4 asks how to clarify the exception laid down in Article 4(1) (b) of Regulation 1049/2001 in order to ensure adequate protection of personal data.

The question assumes that clarification is needed, but this is not the case. In fact, the relationship between public access and data protection is clearly set out in an excellent paper produced by the European Data Protection Supervisor in 2005¹⁷. The problem, as the EDPS points out on page 36 of his Annual Report for 2006, is that the Commission does not accept what he has said in this regard.

In my view, the only clarification that is needed as regards both this exception and the one to which question 7 below relates, is one to which I drew attention last year in welcoming the European Investment Bank’s acceptance of a friendly solution:

¹⁶ See Directive 2003/4/EC, footnote 4 above.

¹⁷ EDPS, *Public access to documents and data protection*, Background paper No 1. July 2005, available on the website of the EDPS at <http://www.edps.europa.eu/EDPSWEB/Jahia/lang/en/pid/21>.

“... although public access to documents should be as wide as possible, privacy and commercial confidentiality are legitimate interests that limit public access. However, the very person whose privacy or commercial interests are concerned should not be denied access on that ground.”¹⁸

Since this represents, in my view, the correct application of existing law, the clarification could be included in a new recital.

Question 5 - protection of commercial and economic interests of third parties

Question 5 asks how to clarify the exception laid down in Article 4(2), 1st indent of Regulation 1049/2001 in order to ensure adequate protection of commercial and economic interests of third parties. The Green Paper refers in this regard to the obligation of professional secrecy under Article 287 of the EC Treaty.

Save as noted already in the answer to the previous question, it is doubtful whether any clarification is needed. The judgement of the Court of First Instance (CFI) in Case T-198/03, *Bank Austria Creditanstalt AG v Commission* makes clear that the legislator has already carried out a balancing exercise and that a prohibition on the disclosure of information “of the kind covered by the obligation of professional secrecy” is not a bar to publication of information with which the public has the right to be acquainted through the right of access to documents¹⁹.

Contrary to the impression given by the second paragraph on page 16 of the Green Paper, therefore, the Commission’s concrete proposal for an amendment would represent a reversal, not an incorporation, of the CFI’s judgement in Case T-198/03.

Question 6 - “excessive or improper” requests.

Question 6 asks whether, in the light of experience so far, there is a case for specific provisions for handling requests, which are clearly excessive or improper, in particular with regard to time frames.

I am not aware of any evidence that would justify an amendment of this kind. On the contrary, The second and third paragraphs of Article 6 of the Regulation provide an adequate framework to tackling the kind of problem that the Commission appears to have in mind.

I would also emphasise that good administration and transparency are not conflicting objectives. An administration that organises itself to meet the needs of transparency will, in general, be more efficient and effective than one that does not. For example, it will be able to locate documents rapidly and accurately when needed, rather than mislaying them.

¹⁸ Press release 15/2006, available on my website at <http://www.euro-ombudsman.eu.int/release/en/2006-07-03.htm>

¹⁹ See paragraphs 72 and 75 of the judgement.

As mentioned above (point 1.1.), the provision of adequate resources for managing information and documents and administering the right of public access should be regarded as a necessary investment to ensure the efficiency, effectiveness and transparency of the Union's institutions and bodies.

The most cost-effective approach is to take transparency into account when designing new information systems for management purposes, so that, as far as possible, the same system can meet both the internal requirements of management and the external requirements of transparency. This point is also relevant to the next question, about databases.

Question 7- databases.

Question 7 asks whether the concept of "document" should cover sets of information that can be extracted from a database using the existing search tools.

The widespread development and use of electronic databases confronts transparency regimes based on access to documents with a number of conceptual problems, with which I am dealing in an on-going inquiry into a complaint²⁰.

Expanding the definition of document so as to include all databases would put at risk one of the advantages of a transparency regime based on access to documents. That advantage is that it is easy, in principle, to identify the contents of a document, so that requests for access can be dealt with rapidly. On the other hand, to limit the right of access to information that can be extracted using existing search tools would risk undermining the usefulness of the right of access, because such tools will normally have been developed only with the needs of internal information management in mind.

Establishing instead a general obligation on the institutions to take the needs of transparency into account in the design and operation of databases would be a useful step, which would encourage future learning.

Question 8 – temporal application of the exceptions.

Question 8 asks whether the Regulation should indicate events before and after which exceptions would, or would not, apply.

The exceptions under paragraphs (1), (2) and (3) of Article 4 of Regulation 1049/2001 all include a harm test, which is that disclosure of the document concerned would undermine (first two paragraphs), or seriously undermine (third paragraph), the protection of the interest concerned.

The passage of time reduces the likelihood of harm. For example, information that is market-sensitive at a certain moment is unlikely to remain so indefinitely. However, since market developments cannot be reliably predicted, it may be difficult to establish in advance when information could be released without causing damage to commercial and economic interests.

²⁰ Complaint 1693/2005/PB.

The answer to question 8 should therefore be no, since a positive answer would risk either denying disclosure of documents that could be released without causing harm, or require disclosure even though harm is still likely to occur.

Furthermore, the suggested provision would nullify the possibility of an overriding public interest in disclosure under Article 4 (2) or (3) of the Regulation.

Strasbourg, 11 July 2007

P. Nikiforos Diamandouros