



Statewatch analysis

The European Commission proposals to amend the Regulation on access to EU documents (1049/2001)

Tony Bunyan, Statewatch editor, comments:

“The scope of the Commission’s amendments and its consultation do not consider many of the fundamental questions posed by civil society and the European Parliament.

Perhaps the most crucial is the public’s right to know what is being discussed before it is adopted in Brussels - a practice that would never be tolerated at national level.

Two of the Commission amendments are highly retrogressive - the new definition of a document which would exclude most documents and mean they would not have to be listed in public registers and the obligation of institutions to give public access to the full text of documents would be limited to legislative measures - and not cover the hundreds of thousands of other documents produced and received.

The Amsterdam Treaty was agreed 11 years ago (1997) and was meant to herald a new era of openness and transparency - we got half a loaf and are still waiting for the other half.”

The European Commission is due to adopt (Wednesday) a proposal to amend Regulation 1049/2001) on access to EU documents.

It claims legitimation for its proposed amendments from a report produced by the European Parliament in September 2006, a public consultation process conducted by the Commission in 2007, and recent case law.

Many problems raised by civil society and the European Parliament have not even been considered.

There are a number of retrogressive proposals including:

- the definition of a “document” would mean that the majority of “documents” would not be defined as “documents” and would remove the obligation to list *all* documents in the public registers
- The amendment concerning Article 12: the right of public access to the full-text of documents which currently covers *all* documents is restricted to legislative ones only.
- member states’ vetoes over access to documents: the Commission’s proposal would lower standards as compared to the current rules.
- new complete exclusions from the scope of the Regulation in Article 4 - it is doubtful whether the complete exclusion of any category of documents would be legally valid - and a new ground for exception (grounds for refusal of access) covering staff proceedings.
- the period for responding to confirmatory applications (appeals against refusal) is increased from 15 to 30 days

European Parliament

The Commission says it took up five suggestions by the European Parliament (EP).

1. Article 255

The EP asked that Article 255 of the EC Treaty should be referred to and it is proposed that Article 1 contain a reference to this.

2. Full legislative transparency

The EP has called for:

“All preparatory documents to legal acts should be directly accessible to the public”

The Commission says:

“This recommendation is fully accepted and addressed in Article 12”

Here the Commission is economical with the truth. True the EP, quite rightly, says all legislative preparatory documents should be directly accessible. However, the effect of the Commission’s proposed amendment makes no guarantee that preparatory documents will be directly accessible before a measure is adopted.

In fact the Commission uses the EP’s argument to propose a massive backward step.

Current Article 12:

“Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.”

The proposed amended Article 12

1. 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 Articles 4 and 9, be made directly accessible to the public.

2. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible in electronic form.

3. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

4. Each institution shall define in its rules of procedure which other categories of documents are directly accessible to the public.’

Apart from the changes to the definition of a “document” this is the most sweeping change proposed by the Commission.

1. The current Article 12.1. covers **ALL** documents - whether legislative and non-legislative acts of general application such as Commission Decisions or not. This is directly linked to Article 11 which says all documents produced

and received should be listed on the public register without delay and Article 12.1 says that in principle all of these documents should be - “as far as possible” - directly accessible to the public in electronic form.

The proposed amendment by the Commission **REMOVES THIS PRINCIPLE!** So hundreds of thousands of other documents would “exist” - produced and received: evaluations, studies, reports, comments, records of meetings etc - but **there would be no right of public access to them whatsoever as the Regulation would not apply to them.**

The amendment **LIMITS** the commitment to give direct access to legislative (and non-legislative) “acts” - and this would be greatly limited by applying the exceptions in Articles 4 and 9.

To compound matters there is another major change in the new Article 12.4 whereby each institution can decide for itself “**which other categories of documents are directly accessible to the public.**”

This is an utterly outrageous proposal.

3. Confidentiality, Member States documents and Registers

The three other matters the Commission says were raised by the EP are:

The EP wants rules on classified documents to be changed - “to ensure parliamentary control” - the Commission fails to respond to this.

The EP also raised Member States’ vetoes on requests for access to their documents when placed in EU decision-making (see below under Case law).

Finally, the EP wants “a single access point to preparatory legislation”, a common interface to the institution’s registers and common archiving rules. The Commission welcomes this recommendation but proposes no changes to the Regulation.

Public consultation

1. Active dissemination

A large number of respondents wanted the institutions’ registers to be easier to access and more “harmonised”.

Extraordinarily the Commission states that Article 11 (on the obligation to set up public registers listing all documents produced) allows for this so no change is needed.

The failure of the European Commission to maintain a full and proper public register of documents under Article 11 is the subject of a complaint by *Statewatch* to the European Ombudsman:

<http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf>

2. Aligning the Regulation with the Aarhus Convention.

The Commission says that the majority of respondents backed this realigning except *“environmental NGOs and .. the chemical and biotechnological sectors”*

It thus proposes a new Article 4.1.e - a mandatory exclusion:

“the environment, in particular breeding sites of rare species”

Plus a new Article 4.2 (and the application of the amended 5.2, see below)

New Article 4.2 (exceptions allowing refusal of access)

“The institutions shall refuse access to a document where disclosure would undermine the protection of:

*(a) commercial interests of a natural or legal person; **this ground for refusal does not apply to information on emissions which is relevant for the protection of the environment;**”*

3. The protection of commercial interests

The Commission concludes:

“The general feeling is that the current rules strike the right balance. Journalists, NGOs and a majority of citizens claim that more weight should be given to the interest in disclosure.

Therefore, the Commission does not propose to amend this provision.”

In other words, government and big business did not want any changes, just the rest of us.

However, the new exclusion from the scope of the Regulation in Article 2.6 (documents relating to court proceedings) would be of considerable relevance here - as could the redefinition of a “document” and the amendment to Article 12.1 (public access to full-text of documents)

The new exception relating to investigations could be relevant as well regarding commercial interests. See below on a pending appeal by the Commission - this makes clear that the Commission is trying to use the opportunity of amending the Regulation in order to win its appeal against a judgment of the Court of First Instance!

4. “Excessive requests”

A long-standing desire of the Commission is to limit access to people asking for too many documents but this notion was not backed in the consultation.

The Commission is proposing a “clarification” where documents cannot be easily identified in Art 6.2:

Existing Article 6.2:

“If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.”

Proposed “clarification” amendment:

6.2. If an application is not sufficiently precise or if the requested documents cannot be easily identified, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.’

The Commission thus only proposes a clarification, which is unobjectionable, but the two new exclusions from the scope of the Regulation would allow the Commission to refuse access to a considerable number of documents without having to give reasons or consider the public interest, etc.

Moreover, the new Art .2(5) and 2(6) would deal with this by removing large numbers of documents from the scope of the Regulation - thereby relieving the Commission of the obligation to examine them at all - these are often cases concerning large numbers of documents (the new ‘investigations’ exception is in particular relevant here - cf the VKI judgment).

There are two other changes to the processing of requests:

a) in Article 8.1: The time limit for a response to confirmatory applications of 15 days becomes **30** days;

b) There is a new Article 10.5 which includes:

“the payment of a fee or a consultation without the right to take copies”

This could be interpreted to permit the imposition of *additional* fees.

5. The concept of a “document”

In the Commission’s consultation the great majority of responses favoured leaving the definition of a “Document” unchanged and this is acknowledged by the Commission.

The Explanatory Memorandum says:

“The wide definition of the concept of “document” in Article 3(a) is maintained.”

And then goes on to propose a fundamental change without any explanation whatsoever except to claim:

“However, a “document” only exists if it has been transmitted to its recipients or circulated within the institution or has been otherwise registered.”

Where does this come from? It is certainly **not** what the current Art 3.a (which is to be “maintained”) says.

a) The current Art 3.a. in Regulation 1049/2001) says:

“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;”

b) The earlier version put online said:

““document” shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drafted or received by an institution and transmitted to one or more recipients or circulated within the institution or otherwise recorded;”

c). The adopted version says:

“drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution”

This is a major change:

- gone is the term **“circulated”** - the category into which most Commission document fall

- and **“transmitted”** is changed to **“FORMALLY transmitted”** - which may only cover the final versions of COM and SEC documents.

d). The Explanatory Memorandum now says:

"The wide definition of the concept of "document" in Article 3(a) is maintained. However, a "document" only exists if it has been transmitted to its recipients or circulated within the institution or has been otherwise registered."

The previous EM said:

"The wide definition of the concept of "document" in Article 3(a) is maintained. However, a "document" only exists if it has been sent to recipients or circulated within the institution AND has been entered in the institutions' records."

- to say that "The wide definition of the concept of a "document" is maintained" from the current Regulation - when it is clearly being severely restricted is nonsense.

- the word AND has been changed to "OR" regarding "otherwise recorded"

- what does "otherwise recorded" mean? What categories of documents does this cover? This concept utterly lacks precision.

- there is also confusion in the Commission's proposal because the new EM still includes "or circulated..." but this is deleted in the text

- clearly if a document is not "FORMALLY TRANSMITTED" or "otherwise recorded" then it is not a document - when clearly it is.

e) The further ramification of this change is enormous:

- the commitment - as now - in the renumbered Article 2.2 is that:

"This Regulation shall apply to ALL documents etc...."

is now qualified/restricted/limited to/by the new definition of a document above !!

- this also affects Article 11 on public registers of documents which still says:

"References to documents shall be recorded in the register without delay"

but the new definition of a "document" means that only a fraction of the documents produced and received will have to be put on the register under Article 11.

The definition of a document should remain unchanged by deleting:
"drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution"

7. Scope

In the current Regulation a clear distinction is made between making a document “accessible”, simply to list the existence of a document and “directly accessible” which means that the full-text can be downloaded.

Article 2.3 (directly relevant to Article 11 and 12) makes a distinction between:

“legislative documents which shall be made directly accessible in accordance with Article 12 [“Direct access to documents”]; emphasis added]

and the great multitude of other documents which will be “accessible” (note: not “directly” accessible) either:

“following a written application”

which of course can require action by the applicant and can be refused.

or:

“directly in electronic form”

that is if it is made available when the institution chooses, or

“through a register”

this is simply listing the documents on “a” register (note: this could mean one of several registers, signalling the Commission’s continued resistance to providing a single public register of documents).

Second, most of those consulted want the scope of the Regulation to cover all EU institutions, bodies and agencies. The Commission says that this will only be possible under the new Lisbon Treaty.

Even pending or without the entry into force of the Lisbon Treaty, it would be open to the Commission, Council and EP to a) do what they did in 2001 - ie to agree to implement these changes as regards the access to documents rules of entities created by legislation; and b) to call upon all other EU entities to act consistently with the Regulation, as now amended - including those which have no access rules (ie the EU Courts and the European Council).

Recent case-law

1. Access to personal data

The Court of First Instance ruled in the Bavarian Lager case (8.11.07) that the personal data of officials involved in the institutions’ activities can be

released providing disclosure would not adversely affect the persons concerned.

A new Article 4.4 is inserted in the Regulation saying:

“4. Personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EU legislation on the protection of individuals with regard to the processing of personal data. Disclosure of names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities is deemed to be lawful under the data protection legislation unless, given the particular circumstances, disclosure would adversely affect the persons concerned.”

The new Article 4(4) would not enshrine the *Bavarian Lager* judgment of the Court of First Instance, but rather would widen the grounds for refusal as compared to that judgment. The judgment states that personal data must be disclosed under the access to documents rules unless public disclosure of personal data ‘is capable of actually and specifically undermining the privacy and integrity of the persons concerned’ (para. 120 of the judgment). Then the judgment applied this principle to the facts, and stated that disclosing the identity of lobbyists who participated in a meeting lobbying the Commission ‘is not capable of actually and specifically undermining the privacy and integrity of the persons concerned’ (para. 126). There is no mention whatsoever in the judgment of a further test of whether disclosure of the information would “adversely affect” those persons, or any other further test.

Therefore the Commission’s proposal would lower standards as compared to the current rules.

Two further points on Article 4:

First, the distinction made between court proceedings and legal advice presupposes the failure of the *Turco* appeal on this issue - which the Court of Justice has not yet decided.

Second, the exception for staff proceedings is new. There is no convincing explanation why the access rules would undermine staff proceedings, given that staff can rely on the data protection rules to protect their interests - the new exception would arguably therefore only protect the *institutions’* interests to avoid public disclosure of issues relating to hiring (such as alleged cronyism) and to reduce staff members’ ability to use the access rules to find out information relating to their case. The Commission does not suggest that the issue arose in the public consultation or from the case law.

2. Access to documents originating from a Member State

It is proposed that the current Article 4.5 is replaced by a new Article 5.2:

“A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.” (Art 4.5)

“Where an application concerns a document originating from a Member State, as defined in Article 3(3), the authorities of that Member State will be consulted, unless the document is already lawfully in the public domain. The institution holding the document will disclose it unless the Member State gives reasons for withholding it, based on exceptions laid down in Article 4 of this Regulation or on specific provisions in its own legislation preventing disclosure of the document concerned.” (new Art 5.2)

This does introduce an obligation for the institution to disclose a document from a Member State. However, this is limited by the Member State being able to invoke any of the exceptions in Article 4, for example, Article 4.3 where access can be refused where a proposal is under discussion (one of the largest categories for refusal of access by the Council and the Commission).

Member State documents concerning the legislative process should be public.

The revised 3.c which would exclude some documents entirely from the concept of Member States' documents - ie documents relating to the adoption of legal acts - *this is a positive amendment*.

Indeed it could go further, to exclude also documents relating to the national implementation of EU law from the concept of Member States' documents (a point made by the EP).

However, the revised Article 5(2) (ex-4(5)) is problematic as compared to the case law because it would allow Member States to insist on non-release of the document not only in accordance with Article 4 - which is entirely consistent with the case law, because Article 4 would apply anyway if the institutions instead had the sole power to decide on refusal - *but also on grounds of their national legislation*. In fact this overturns the case law and takes us back more or less to the prior position as the Commission and Council (wrongly) understood it, where Member States could veto for their own reasons the release of their documents.

Therefore the Commission's proposal would lower standards as compared to the current rules.

3. Examining requests which are “manifestly unfounded”

This is a specific ruling by the Court concerning documents to be submitted as part of the court’s proceedings prior to an oral hearing. New provisions in Article 2.5 and 2.6:

“5. Documents submitted to Courts in the course of judicial proceedings are not accessible to the public before a public hearing has taken place. Access can only be granted to the Institutions’ own submissions.

6. Without prejudice to specific rights of access for interested parties established by EU law, documents forming part of the file of law enforcement proceedings leading to an administrative act of individual scope are not accessible to the public until such act has become definitive. Information obtained from undertakings in the framework of such proceedings is not accessible to the public.”

The exception in Article 2(6) goes well beyond the case law. The *VKI* case does say, at 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 (the point made in the explanatory memorandum). But the wording of Article 2(6) is broader: the judgment clearly does *not* go so far as to say 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). ‘Finally, 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 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 confirms the link between the proposed new Article 2(6) and the Commission's attempt to reduce its workload surreptitiously without directly amending the rules on so-called 'excessive requests'.

Furthermore, it is clear that the new Article 2(6) is an attempt by the Commission to overturn a judgment of the Court of First Instance on the specific issue of public access to the Commission's investigative files. This can be seen from the arguments set out by the Commission in its appeal to the Court of Justice (see the **Annex** to this analysis).

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 is indisputably seeking to overturn a later judgment of the Court of First Instance on a similar issue].

Moreover, the final sentence of the new Article 2(6), that "information obtained from...undertakings in the framework of such proceedings is not accessible to the public", would apply even *after* a decision is taken, as confirmed by the explanatory memorandum. This would be a further absolute exclusion from access, not limited in time, and not subject to the possible public-interest override as regards the commercial interests of companies, as it is at present.

As for the exception in Article 2.5, it is wider than the judgment of the Court of First Instance in the *API* case, which only applies to documents *drawn up for the purpose of court proceedings* (para. 61 of the judgment, reaffirming long-standing case law). Furthermore, the Court judgment does not suggest that after the public hearing, the institutions would only be able to grant access to their *own* documents, as the proposed Article 2(5) states. As for the question of releasing documents before a hearing date, on this point the *API* judgment is on appeal (three appeals in fact) to the Court of Justice - so enshrining the exception in that case as a complete exclusion from the Regulation is jumping the gun.

Anyway, providing for complete exclusions from the Regulation on these grounds circumvents the possibility that in some cases there might be an overriding public interest in release.

Far from reflecting the existing case law, the Commission is seeking to overturn several key judgments of the EU courts which enlarged public access to documents, and to ensure the results of two pending appeals before the Court of Justice without waiting for the Court's decisions.

STATEWATCH together with other NGOs have called for:

1. The need to abolish the absolute power of Member States to 'veto' the documents which they have 'authored';
2. The need to abolish the power of non-EU states ("third parties") to veto access in practice, especially the USA;
3. The need to restore some meaning to the "public interest" override over the ability of the EU institutions to refuse access to documents, because the case law of the EU's Court of First Instance has effectively wiped out the prospect of using the override; no appeal for disclosure on the basis of the "public interest" of the public to know has ever been successful.
4. The need to re-examine and limit the exceptions to the right of access under the Regulation, in particular the exceptions for decision-making by the EU institutions - establishing the "right to know" as is being discussed before it is decided in Brussels.
5. The need to extend access to documents in practice by clarifying and reinforcing the obligation of the EU institutions to establish full registers of documents and to make as many documents as possible directly accessible via the registers.
6. A need to clarify the status, and regular review, of "Restricted" documents.
7. Documents produced by the Legal Services, where they do not concern a court case, should be public.

The European Parliament report (2006)

In addition, or complementary to, the issues referred to by the Commission:

1. There should be clear rules on access to administrative documents, eg for the implementation of legislative acts.
2. The classification of documents "Confidential" or above should be regularly reviewed
3. Unlike the Commission proposal above the EP says that all preparatory documents should be accessible:

"as soon as those documents are formally submitted by each institution taking part in the decision"

This public access should extend to “*complementary information or documents*” and the “*contributions submitted by the secretariats of the institutions (including the legal service).*”

4. There should be a distinction between access to documents concerning on-going operations - which are understandably secret - and “the requirements of accountability and *a posteriori* control.

5. Documents concerned with bilateral agreements with third countries should be accessible to the EP.

6. Give full access to information submitted by Member States to the Commission when drafting or implementing legislation.

Tony Bunyan, with additional comments by Steve Peers, 20 May 2008
(Version 3)

ANNEX

Appeal brought on 8 March 2007 by Commission of the European Communities against the judgment delivered by the Court of First Instance (Fifth Chamber) on 14 December 2006 in Case T-237/02 Technische Glaswerke Ilmenau GmbH v Commission of the European Communities
(Case C-139/07P)

Language of the case: German

Parties

Appellant: Commission of the European Communities (represented by V. Kreuzsitz and P. Aalto, acting as Agents) *Other parties to the proceedings:* Technische Glaswerke Ilmenau GmbH, Schott Glas, Kingdom of Sweden and Republic of Finland

Form of order sought

set aside the judgment of the Court of First Instance of 14 December 2006 ¹ in Case T-237/02 *Technische Glaswerke Ilmenau v Commission* which annuls the decision of the Commission of 28 May 2002 in so far as it refuses access to documents relating to the investigation procedures in respect of aid granted to Technische Glaswerke Ilmenau GmbH, and order Technische Glaswerke Ilmenau GmbH to pay the costs.

Pleas in law and main arguments

The Commission of the European Communities request the Court to set aside the judgment of the Court of First Instance of 14 December 2006 in Case T-237/02, which annuls the decision of the Commission of 28 May 2002 in so far as it refuses access to documents relating to the investigation of aid granted to Technische Glaswerke Ilmenau GmbH.

According to the settled case-law of the Court of First Instance and the Court of Justice, the parties, and accordingly the recipient of aid, have no right of access to documents in cases of investigation of aid. It follows that the decision of the Court of First Instance erred in law in paragraphs 87 to 89 of the judgment under appeal by stating that there were no special circumstances making it manifestly clear that the access to documents requested should be refused. In fact, it is clear from the case-law that the documents concerned are fully covered by an exception to the right of access to documents and accordingly that each document should not be individually examined.

Furthermore, cases of investigation of aid are proceedings against the State granting the aid, particularly where the recipient of the aid has no entitlement to aid. Accordingly, what is relevant to the question of access to documents is what the Court of Justice itself has ruled in relation to actions for infringement under Article 226 EC, namely that there is no public no right of access to documents in such proceedings.

The judgment under appeal also leads to the absurd result that the general public enjoys, on the basis of the legislation promoting transparency, namely Regulation No 1049/2001, ² more extensive rights of access to documents than a recipient of aid who is directly subject to proceedings against him, who is also - precisely because he is directly and individually concerned for the purposes of Article 230(4) EC - entitled to raise proceedings against the decision ending the procedure. It is even harder to understand why the further consequence, namely that an application of a recipient of aid under reference to the applicable case-law may be rejected where such a response cannot be given to an application of a recipient of aid or an independent third party who relies on the transparency regulation.

With the third ground of appeal, the Commission criticises the judgment under appeal for giving the same expression, namely the word 'document', in the singular, in Article 4(2) of Regulation No 1049/2001 and in Article 6 of the regulation is given a different meaning. While, in Article 4(2), that word means that each document must be considered for a refusal to be given, the Court of First Instance interpreted Article 6 in such a way that access may also be requested to a bundle of documents that has been designated as an administrative file.

With the fourth ground of appeal, the Commission claims that the Court of First Instance infringed Article 255 EC, inasmuch as its decision was not arrived at on the basis of the language of the legislation, but on the basis of assumptions reached without reference to that wording.

Lastly, the Commission claims that the Court of First Instance wrongly held that both the procedures relating to the investigation of the aid granted to Technische Glaswerke Ilmenau GmbH had already been completed at the time of the decision concerning access to the administrative file, so that the authorities had no interest in maintaining the confidentiality of the documents. That is partly incorrect because of the proceedings pending

before the Court of First Instance. The Court of First Instance also appears to have wrongly concluded that Regulation No 1049/2001 made the earlier case-law and the relevant procedural provisions relating to the monitoring of aid obsolete.

BACKGROUND NOTE

1. To keep up to date with the legislative process considering the Commission's proposals - News, analyses and documentation please bookmark: Statewatch's Observatory: FOI in the EU: Statewatch: Observatory on access to EU documents: 2008-2009:

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

2. *Statewatch* has been working on access to EU documents since 1991. It has lodged with the European Ombudsman eight successful complaints against the Council of the European Union (the governments) and two, more recently, against the European Commission - the first of which it won and second decision is due soon. Each of these complaints increased the rights of all to access to EU documents.

In 2001 *European Voice* newspaper: Tony Bunyan, Statewatch editor, was selected by a distinguished panel as one of the "EV50", one of the fifty most influential people in the European Union over the year for Statewatch's work on access to documents in the EU

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