



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION**

**on the application in 2006 of Regulation (EC) No 1049/2001 regarding public access to  
European Parliament, Council and Commission documents**

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#### FOREWORD

Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup> provides that each institution must publish an annual report stating the number of cases in which it has refused to grant access to documents and the reasons for such refusals. The report must also specify the number of sensitive documents for which references have not been included in the public register of documents.

This report on 2006 is the fifth report submitted by the Commission under this provision.

The annex to this report contains statistics on the processing of applications for access. A series of tables provide figures for the last three years of application of the Regulation, showing how implementation has evolved. The statistics refer only to applications for access to unpublished documents and do not cover orders for published documents or requests for information.

#### 1. TRANSPARENCY POLICY

The debate on the revision of the legislation on public access to documents, launched by a decision of principle taken on 9 November 2005, continued throughout 2006. In particular, the Commission worked internally on preparing for the public consultation that took place in 2007.

#### 2. ONLINE REGISTERS AND SITES

- 2.1. At the end of 2006, the register of Commission documents recorded 73 708 documents (see annexed table).
- 2.2. Article 9(3) of the Regulation provides that documents defined as "sensitive"<sup>2</sup> may be recorded in the register only with the consent of the originator. In 2006 no sensitive document within the meaning of this provision was included in the register.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> "documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters" (Article 9(1)).

- 2.3. The table below shows the statistics on consultation of the *Openness and Access to Documents* website on EUROPA.

	Number of visitors	Number of sessions	Pages viewed
Total	71 241	109 780	131 124
Monthly average	5 937	9 148	10 927

### 3. COOPERATION WITH THE OTHER INSTITUTIONS AND THE MEMBER STATES

The **Interinstitutional Committee** provided for in Article 15(2) of the Regulation did not meet at political level in 2006.

The departments of the three institutions responsible for implementing the Regulation continued their forum for discussing legal issues concerning application of the Regulation.

### 4. ANALYSIS OF ACCESS APPLICATIONS

- 4.1. The constant increase in the number of **initial applications** since the Regulation was adopted was again observed in 2006, when 3841 initial applications were registered by departments, 445 more than in 2005.
- 4.2. The number of **confirmatory applications** fell appreciably; 140 such applications were registered in 2006 as against 233 in 2005.
- 4.3. There was little change in the **breakdown of applications by area of interest**, except that the number of applications concerning cooperation in judicial matters nearly doubled. Competition, cooperation in judicial matters, the environment, the internal market and transport and energy accounted for nearly 40% of applications.
- 4.4. The **breakdown of applications by social and occupational categories** reveals a significant increase in applications from the academic world, accounting for over 30% of the total.
- 4.5. Finally the **geographical breakdown of applications** remained constant. Over 20% of applications came from persons of bodies established in Belgium because of the number of enterprises, law firms, associations and NGOs operating at European level. Apart from that, the bulk of the applications came from the most highly populated Member States, i.e. Germany, France, Italy, the United Kingdom, the Netherlands and Spain, which together accounted for just over half the applications. The share of applications from the new Member States remained modest, despite a slight increase for most of them.

## **5. APPLICATION OF THE EXCEPTIONS TO THE RIGHT OF ACCESS**

- 5.1. The percentage of initial applications receiving positive responses increased compared with previous years.

In 73.83% of cases the documents were disclosed in full, while in 2.94% of cases partial access was granted.

- 5.2. The percentage of decisions confirming the initial decision increased slightly (69.29% of cases compared with 68.24% in 2005).

The percentage of cases in which applications were granted in full after initial refusal also increased slightly (8.57% as against 7.30% in 2005). The percentage of cases in which partial access was granted after initial refusal, on the other hand, fell slightly (22.14%, as against 24.46% in 2005).

- 5.3. The two main reasons for refusing an initial application continued to be:

- protecting the purpose of inspections, investigations and audits (third indent of Article 4(2)), although significantly down on 2005 (30.72% of refusals, as against 41.80% in 2005);
- protecting the Commission's decision-making process (Article 4(3)), with a percentage of 19.06% for cases concerning opinions for internal use and 14.30% for those where the decision had still to be taken, totalling 33.36% of refusals.

Protection of commercial interests was the reason cited for 8.94% of refusals at the initial stage, as against 7.78% in 2005.

- 5.4. The main grounds for confirming refusal of access were the same as those for initial refusal:

- protecting the purpose of investigations (27.18%);
- protecting the decision-making process (17.48%).

Protection of commercial interests was cited in 16.50% of the cases of refusal (compared with 14.32 % in 2005), a marked increase. The same applies for protection of personal data (13.59% compared with 10.61% in 2005).

## **6. COMPLAINTS TO THE EUROPEAN OMBUDSMAN**

- 6.1. In 2006 the Ombudsman closed seven files on complaints against the Commission for refusing to disclose documents. In five of these cases the Ombudsman closed the case with a critical remark. Two cases were closed without a finding of maladministration.

### *6.1.1. Complaint 617/2003/IP:*

A company that took part in a call for tenders but failed to win the contract was refused access to the documents contained in the bids of the other tenderers. These

included documents that were public in a Member State but for which a charge was made; access was refused on the basis of the principle of loyal cooperation between the institution and the Member State concerned as set out in the Regulation. The Ombudsman took the view that the Commission had not applied the Regulation correctly and closed the case with two critical remarks, one on the decision to refuse access and the other on the failure to abide by the time limit for handling the application.

*6.1.2. Complaint 1764/2003/ELB:*

The complainant wanted access to an audit report on counterpart funds in support of structural adjustment in Niger. When asked by the Ombudsman to reconsider its position, the Commission disclosed part of the report. The Ombudsman nevertheless closed the case with a critical remark, considering the document register inadequate.

*6.1.3. Complaint 3531/2004/PB:*

A law firm was refused access to a document sent to the Commission by the UK authorities on the grounds that these authorities opposed disclosure. The Ombudsman concluded that the Commission had applied the Regulation correctly as regards refusing access. But he still closed the case with a critical remark concerning the Commission's failure to abide by the time limit for handling the application.

*6.1.4. Complaint 582/2005/PB:*

An ONG wanted access to a document relating to a dispute settlement proceeding before a panel of the World Trade Organisation (WTO) Dispute Settlement Body. The Commission refused access, citing the exception for court proceedings. The Ombudsman took the view that this exception could not be applied to the WTO dispute settlement procedure and closed the case with a critical remark.

*6.1.5. Complaint 1463/2005/TN:*

The complainant, a lawyer, wanted to be given access to CO<sub>2</sub> emission quota allocation plans that had already been approved at a time when certain plans were still awaiting approval. The Commission refused access (on the basis of the exceptions relating to the protection of the decision-making process and ongoing investigations) as long as all the plans had not been approved, but sent them to the applicant after they had been approved. The Ombudsman took the view that the Commission had not applied the Regulation correctly and closed the case with a critical remark.

*6.1.6. Complaint 260/2006/BU*

The complainant had applied for access to the documents relating to the revision of Directive 91/414/EEC concerning the placing of plant protection products on the market. The Commission refused access to some documents on the ground that disclosure would seriously undermine the Commission's decision-making process. In his decision the Ombudsman found that the Commission had taken steps to satisfy the applicant and therefore closed the case without making any remark.

6.1.7. *Complaint 2654/2006/PB:*

The complainant had requested access to two experts' reports from 2006 concerning the fight against organised crime and the general state of the judicial system in Bulgaria. Because of an administrative error the application was not processed on time. The Commission admitted that because of this error the application had not been handled in an appropriate manner. As the application had been dealt with in the meantime, the Ombudsman closed the case without any remark.

6.2. In the course of 2006 the Ombudsman received five complaints concerning refusal to disclose documents.

## 7. COURT ACTIONS

7.1. The Court of First Instance handed down two judgments on cases relating to Commission decisions completely or partially refusing access to documents under Regulation (EC) No 1049/2001.

7.1.1. *Judgment of the Court of 14 December 2006, Case T-237/02, Technische Glaswerke Ilmenau (TGI) v Commission:*

The Court annulled the Commission decision refusing access to a file on a state aid proceeding, pointing out that the institution is required to conduct a concrete, individual examination of the content of the documents requested. However, the institution can dispense with such an examination where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Also, only in exceptional cases and where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, may a derogation from the obligation to examine the documents be permissible. The Commission has lodged an appeal with the Court of Justice against this judgment.

7.1.2. *Judgment of the Court of 6 July 2006, Joined Cases T-391/03 and T-70/04, Franchet and Byk v Commission:*

The Court annulled in part an OLAF decision and a Commission decision refusing access to investigation (OLAF) and audit (Commission) reports, stating that the "exception based on the protection of the purpose of inspections, investigations and audits" applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits. The Court added that various acts of investigation or inspection may remain covered by this exception as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed.

The Court also confirmed that the purpose of the Regulation is to guarantee access for everyone to documents and not merely access for the requesting party to documents concerning him. Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account to justify disclosure.

- 7.2. The Court of First Instance also handed down a judgment in a case relating to a Commission decision on a competition matter that is worth mentioning here as the Court establishes a link between the competition rules and the rules of transparency. This was the judgment of 30 May 2006 in Case T-198/03 *Bank Austria Creditanstalt AG v Commission*.

The Court found that the competition rules afford special protection to information that has come to the knowledge of the Commission in the performance of its functions and that, by its nature, is covered by professional secrecy, which is a broader concept than business secrets.

In this connection the Court stated that a distinction should be made between the protection that must be afforded to information covered by the obligation of professional secrecy in relation to parties having a right to be heard in the context of proceedings applying the competition rules, and that which should be afforded to such information in relation to the general public. The Commission may communicate to such parties certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation. However, that possibility does not apply to business secrets, which are afforded very special protection. Conversely, information covered by the obligation of professional secrecy cannot be disclosed to the general public, irrespective of whether business secrets or other confidential information are involved.

- 7.3. Five new actions were brought in 2006 against Commission decisions under Regulation (EC) No 1049/2001. Three of them are still pending, while one has been declared inadmissible and one has been removed from the register.

7.3.1. *Landtag Schleswig-Holstein v Commission, Case T-236/06*<sup>3</sup>:

The application is from the Parliament of the German Land of Schleswig-Holstein, which would like to have access to a document containing a legal analysis of the Community's competence in the field of the retention of personal data by operators of electronic communications networks. Access was partially refused on the grounds that disclosure would undermine protection of the Commission's legal advice. The applicant contests the application of this exception and also argues that the principle of loyal cooperation between institutions has been breached.

7.3.2. *Landtag Schleswig-Holstein v Commission, Case T-68/07 (ex C-406/06)*:

This action relates to the same application as mentioned above. On 14 June 2007 the Court ordered the action to be dismissed as manifestly inadmissible.

7.3.3. *Meyer-Falk v Commission, Case T-251/06 JA (Judicial assistance)*<sup>4</sup>:

This action concerns the same documents as are referred to in point 6.1.7. It relates to the decision refusing access and not the administrative procedure.

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<sup>3</sup> OJ C 261, 28.10.2006, p.24

<sup>4</sup> OJ C 281, 18.11.2006, p.39.

7.3.4. *S. Leclercq v Commission, Case T-299/06*<sup>5</sup>:

The applicant is seeking access to an extract from the databases containing information relating to the Commission's staff. Her request was rejected on the grounds that it was outside the scope of Regulation No 1049/2001 in that it was not an application for access to an existing document held by the institution, within the meaning of that Regulation.

7.3.5. *Eurostrategies SPRL v Commission, Case T-203/06*<sup>6</sup>:

The applicant is a company wishing to gain access to certain documents concerning a tendering procedure for a project to be carried out in Poland. The case was removed from the register by order of the Court of 1 December 2006.

## 8. CONCLUSIONS

As in past years, the overall picture that emerges from analysis of access applications is that a large proportion of them relate to Commission monitoring of the application of Community law. In a very large number of cases access was applied for in order to obtain documents likely to support the applicant's position in a complaint concerning, for example, an alleged infringement of Community law or an administrative or judicial action. These applications generally relate to large volumes of documents, analysis of which gives rise to a substantial administrative burden.

It should be added that as in past years too, the exception relating to protection of the Commission's decision-making process is cited more to protect decision-making on individual issues than the legislative process. In the legislative field, more and more documents are made available to the public directly, without waiting for applications for access. The Commission's Directorates-General have developed their websites on specific policies and have used them to make a large number of documents publicly available.

Most of the complaints closed by the Ombudsman in 2006 prompted critical remarks. Apart from the cases where applications were not handled within the time limits, these remarks reveal divergences in the interpretation of the provisions of the regulation, on which only the Community courts can give a definitive ruling. The number of complaints to the Ombudsman relating to application of Regulation (EC) No 1049/2001 fell sharply in 2006 (five complaints compared with fifteen in 2005).

The Court of First Instance confirmed its earlier rulings on two points:

- there is a requirement in principle for concrete, individual assessment of documents to which access is requested;
- the specific interest that an applicant may claim is not relevant for assessing the validity of a decision refusing access.

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<sup>5</sup> OJ C 326, 30.12.2006, p.59.

<sup>6</sup> OJ C 224, 16.9.2006, p.51.



The Court also clarified two other points:

- the "investigation" exception applies for as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the document to which access is sought is completed;
- information covered by professional secrecy may not be disclosed to the general public, irrespective of whether business secrets or other confidential information are involved.

## ANNEX

### Statistics relating to the application of Regulation (EC) No 1049/2001

#### 1. CONTENTS OF THE REGISTER

	COM	C	OJ	PV	SEC	Total
2001	1 956	5 389	-	-	4 773	12 118
2002	2 095	6 478	134	116	3 066	11 889
2003	2 338	6 823	135	113	2 467	11 876
2004	2 327	7 484	134	145	2 718	12 808
2005	2 152	7 313	129	126	2 674	12 394
2006	2 454	6 628	129	380	3 032	12 623
Total	13 322	40 115	661	880	18 730	73 708

#### INITIAL REQUESTS

#### 2. NUMBER OF REQUESTS

2004 <sup>(1)</sup>	2005 <sup>(1)</sup>	2006
3 093	3 396	3 841

#### 3. REPLIES

	2004 <sup>(1)</sup>		2005 <sup>(1)</sup>		2006	
	nbr	%	nbr	%	nbr	%
Positive	2 005	64.82	2 188	64.43	2 836	73.83
Refusal	981	31.72	1 084	31.92	892	23.22
Partial access	107	3.46	124	3.65	113	2.94
<i>total</i>	3 093	100.00	3 396	100.00	3 841	100.00

## CONFIRMATORY REQUESTS

### 4. NUMBER OF REQUESTS

2004 <sup>(1)</sup>	2005 <sup>(1)</sup>	2006
219	233	140

### 5. REPLIES

	2004 <sup>(1)</sup>		2005 <sup>(1)</sup>		2006	
	nbr	%	nbr	%	nbr	%
Confirmation	157	71.69	159	68.24	97	69.29
Partial revision	40	18.26	57	24.46	31	22.14
Full revision	22	10.05	17	7.30	12	8.57
<i>total</i>	219	100.00	233	100.00	140	100.00

(1) These figures differ appreciably from those in earlier reports as a result of the clarification of the definition of requests that is now applied for processing data records.

## BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

### 6. INITIAL REQUESTS

	2004	2005	2006
4.1.a Protection of the public interest – 1st indent – public security	0.28	0.28	1.53
4.1.a Protection of the public interest – 2nd indent - defence and military matters	0.75	0.21	0.60
4.1.a Protection of the public interest – 3rd indent - international relations	5.04	4.17	7.06
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	8.40	2.55	1.19
4.1.b. Protection of the privacy and the integrity of the individual	5.79	3.68	4.85
4.2. 1 <sup>st</sup> indent - Protection of commercial interests	8.78	7.78	8.94
4.2. 2 <sup>nd</sup> indent - Protection of court proceedings and legal advice	8.50	8.63	7.49
4.2. 3 <sup>rd</sup> indent - Protection of inspections, investigations and audits	33.24	41.80	30.72
4.3. 1 <sup>st</sup> subparagraph - No decision yet taken – undermining of decision-making process	11.02	12.73	14.30

4.3. 2 <sup>nd</sup> subparagraph - Opinions for internal use as part of deliberations and preliminary consultations	15.41	14.36	19.06
4.5 Refusal by Member State	2.80	3.82	4.26
total	100.00	100.00	100.00

## 7. CONFIRMATORY REQUESTS

	2004	2005	2006
4.1.a Protection of the public interest – 1st indent – public security	0.34	0.00	0.00
4.1.a Protection of the public interest – 2nd indent - defence and military matters	0.00	0.00	0.49
4.1.a Protection of the public interest – 3rd indent - international relations	4.76	5.31	3.40
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	7.82	0.53	0.97
4.1.b. Protection of the privacy and the integrity of the individual	9.52	10.61	13.59
4.2. 1 <sup>st</sup> indent - Protection of commercial interests	15.31	14.32	16.50
4.2. 2 <sup>nd</sup> indent - Protection of court proceedings and legal advice	5.78	10.88	10.19
4.2. 3 <sup>rd</sup> indent - Protection of inspections, investigations and audits	25.85	28.38	27.18
4.3.1 <sup>st</sup> subparagraph - No decision yet taken – undermining of decision-making process	12.59	7.96	7.77
4.3. 2 <sup>nd</sup> subparagraph - Opinions for internal use as part of deliberations and preliminary consultations	9.52	12.47	9.71
4.5 Refusal by Member State	8.50	9.55	10.19
total	100.00	100.00	100.00

## BREAKDOWN OF REQUESTS

### 8. ACCORDING TO SOCIAL AND OCCUPATIONAL PROFILE OF REQUESTERS (%)

	2004	2005	2006
Academics	11.23	10.49	32.08
Civil society (interest groups, industry, NGOs, etc.)	27.31	29.44	17.27
Members of the public whose profile was not indicated	32.15	31.89	16.55

Public authorities (other than the EU institutions)	10.15	12.32	15.67
Lawyers	13.65	11.00	10.43
Other EU institutions	5.00	3.78	06.85
Journalists	0.5	1.07	01.14

**9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)**

	<b>2004</b>	<b>2005</b>	<b>2006</b>
Belgium	26.42	22.63	20.26
Germany	12.77	13.24	18.67
France	8.62	9.71	09.31
Italy	10.35	9.77	08.41
United Kingdom	8,00	6.62	05.73
Netherlands	4.96	5.29	05.35
Spain	5.69	5.52	05.33
Austria	1.73	1.92	03.18
Poland	1.58	1.48	02.61
Luxembourg	0.65	0.66	02.15
Not specified	5.65	7.44	01.64
Denmark	2.08	2.14	01.55
Portugal	1.38	1.54	01.31
Sweden	1.19	1.10	01.24
Lithuania	0.19	0.28	01.21
Greece	1.54	1.92	01.20
Ireland	1.19	1.70	01.15
Czech Republic	0.5	0.63	01.08
Hungary	0.73	0.60	0.95
United States	0.92	0.69	0.89
Finland	0.69	0.88	0.78
Switzerland	0.62	0.85	0.77
Other			0.63
Norway	0.35	0.44	0.51
Malta	0.27	0.35	0.49
Slovakia	0.27	0.38	0.37
Estonia	0.15	0.13	0.37
Slovenia	0.23	0.19	0.31
Cyprus	0.31	0.16	0.26
Bulgaria	0.04	0.25	0.25
Turkey	0.12	0.09	0.22
Croatia	0.04	0.09	0.22

Latvia	0.08	0.28	0.20
Romania	0.12	0.16	0.20
Japan	0.04	0.03	0.18
Canada	0.12	0.16	0.15
Australia			0.15
Ukraine		0.03	0.14
Liechtenstein	0.15	0.09	0.12
Russia	0.12	0.06	0.11
Israel		0.06	0.09
China (incl. Hong Kong)		0.06	0.08
FYROM <sup>7</sup>	0.04	0.03	0.08
Albania		0.03	0.05
Brazil		0.03	0.05
Iceland		0.06	0.03
Mexico		0.03	0.02
Egypt		0.06	
India		0.03	
Taiwan		0.03	
		0.03	

	2004	2005	2006
EU countries	91.58	89.13	93.93
Candidate countries	0.27	0.54	0.22
Other	2.48	3.34	3.49
Not specified	5.65	7.50	2.37

#### 10. ACCORDING TO AREAS OF INTEREST (%)

	2004	2005	2006
Competition	14.58	12.70	09.85
Secretariat-General, Cabinets and European Policy Advisers	8.66	9.41	09.48
Justice, freedom and security	3.81	4.70	08.85
Environment	7.23	8.19	06.88
Internal market	8.5	8.01	06.68
Transport and energy	5.54	6.37	06.45

<sup>7</sup> Former Yugoslav Republic of Macedonia.

Taxation and customs union	7.5	6.27	04.73
Enterprise and industry	3.31	4.63	04.67
Administration, personnel and recruitment	2.35	2.23	03.71
Employment and social affairs	4.15	2.62	03.60
Health and consumer protection	2.38	2.68	03.38
External aid and development	2.39	3.06	03.35
Regional policy	2.96	3.91	03.20
Agriculture	5.15	4.44	03.09
Enlargement	1.31	1.99	03.06
External relations	2.5	1.92	02.84
External trade	2.27	1.67	02.27
Budget and internal audit	2.19	2.11	02.12
IT and information society	0.88	1.83	02.11
Education and culture	1.38	1.07	02.11
Research and technology	1.92	1.36	01.49
Legal matters	2.81	1.92	01.46
Economic and financial affairs	1.92	1.92	01.21
Fisheries	1	1.64	01.00
Press and communication	0.69	0.69	0.92
Fraud protection	2.12	1.39	0.68
Statistics	0.15	0.32	0.58
Interpreting and translation	0.31	0.25	0.17
Official publications	0.04	0.03	0.06