



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**on the application in 2008 of Regulation (EC) No 1049/2001 regarding public access to
European Parliament, Council and Commission documents**

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FOREWORD

This report, which covers 2008, was drawn up pursuant to Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹.

The annex to this report contains statistics on the processing of access applications. The statistics refer only to access applications to unpublished documents and do not cover orders for published documents or requests for information.

1. Transparency Policy²

On 30 April 2008 the Commission adopted a proposal to amend the Regulation regarding public access to documents. This was in follow-up to a public consultation held in 2007 on the basis of a Green Paper³ and responded to a frequently expressed wish of the European Parliament. The two branches of the legislative authority examined it over the second half of the year.

2. Registers and Internet Sites

2.1. At the end of 2008, the register of Commission documents recorded 102 582 documents (see table at annex).

2.2. Article 9(3) of the Regulation states that documents classified as "sensitive"⁴ may be recorded in the register only with the consent of the originator. In 2008 no sensitive document within the meaning of this provision was included in the register.

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
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¹ OJ L 145, 31.5.2001, p. 43.

² For further information on transparency policy, see the Bulletin of the European Union at the following address: <http://europa.eu/bulletin/en/200804/p101006.htm#anch0006>

³ COM (2007) 185 of 18 April 2007.

⁴ "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)).

Total	40 845	57 419	72 410
Monthly average	3 404	4 785	6 034

3. Cooperation with the other institutions and the Member States

The departments of the three institutions responsible for implementing the Regulation continued their forum for discussing legal issues concerning application of the Regulation in 2008.

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 2008, with 1001 applications more than in 2007, a 25% increase.

4.2. The number of **confirmatory applications** fell appreciably: 156 such applications were registered in 2008 as against 273 in 2007.

4.3. With regard to the **breakdown of applications by area of interest**, transport and energy, the internal market, competition, cooperation in judicial matters, the environment and enterprise policy accounted for nearly 40% of applications.

4.4. The **breakdown of applications by social and occupational categories** confirmed the significance of applications from the academic world, which remained the largest single category, accounting for more than 30% of the total.

4.5. Lastly, the **geographical breakdown of applications** remained constant. Almost 20% of applications came from persons or 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, Italy, France, the United Kingdom, Spain and the Netherlands, which together accounted for half the applications (49.86%). The share of applications from the new Member States remained modest.

5. Application of exceptions to the right of access

5.1. The percentage of initial applications receiving positive responses has risen sharply (by nearly 10%) compared with the previous year.

In 82.68% of cases (compared with 72.71% in 2007) the documents were disclosed in full, while in 3.33% of cases (compared with 3.88% in 2007) partial access was granted.

5.2. The percentage of decisions confirming the initial position fell steeply (down by nearly 20% from 66.30% of cases in 2007 to 48.08% in 2008).

The percentage of cases in which applications were granted in full after initial refusal rose slightly (18.59% against 15.38% in 2007). The percentage of cases in which

partial access was granted after initial refusal, on the other hand, almost doubled (33.33%, as against 18.32% in 2007).

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)), with a slight increase on 2007 (26.63% of refusals against 23.48% in 2007);
- protecting the Commission's decision-making process (Article 4(3)), with a percentage of 15.22% for cases concerning opinions for internal use and 13.5% for those where the decision had still to be taken, totalling 28.72% of refusals (against a total of 31.31% in 2007).

The proportion of refusals based on protection of commercial interests and protection of international relations remained significant at 14.4% (against 10.79% in 2007) and 10.24% (against 10.98% in 2007) of the total.

5.4. The main grounds for confirming refusal of access were:

- protection of the purpose of investigations (27.85%, against 24.75% in 2007);
- protection of commercial interests (24.89% against 25.5% in 2007);
- protecting the Commission's decision-making process, with a percentage of 17.3% for cases where the decision had still to be taken and 12.24% for those concerning opinions for internal use, totalling 29.54% of refusals (against a total of 17.4% in 2007).

6. Complaints to the European Ombudsman

6.1. In 2008 the Ombudsman closed the following 16 complaints against the Commission for refusing to disclose documents⁵:

Four cases closed without a finding of maladministration				
3006/2004/BB	3114/2004/IP	576/2005/GG	1129/2007/MF	
Five cases closed with a critical remark and/or other remark				
3303/2005/GG	1881/2006/JF	3208/2006/GG	255/2007/PB	2681/2007/PB
Seven cases closed without further action				
101/2004/GG	2465/2004/TN	3090/2005/GK	3492/2006/WP	
3824/2006/GG	1452/2007/PB	2420/2007/BEH		

6.2. In the course of the year the Ombudsman dealt with 14 complaints concerning refusal to disclose documents.

⁵ See <http://www.euro-ombudsman.eu.int/decision/en/default.htm> for details.

7. Court action

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

7.1.1. Court judgment of 30 January 2008 in case T-380/04, Ioannis Terezakis v Commission

The Court annulled in part the Commission decision refusing access to two documents: an audit report and a contract concluded between Athens airport and a consortium.

The Court found that the refusal to disclose the audit report was justified as the report was protected during the whole of the investigation/audit proceedings.

As to the contract, some of the information in it had already been disclosed by the Commission so the Court found that this information at least should have been given to the applicant. The Court therefore annulled in part the Commission decision because it refused partial access to the contract.

7.1.2. Court judgment of 5 June 2008 in case T-141/05, Internationaler Hilfsfonds v Commission

The Court upheld the Commission's arguments and dismissed the action for annulment as inadmissible, confirming that the disputed act constituted a decision that merely confirmed a previous decision which was not challenged within the prescribed period.

It clearly distinguished between the Ombudsman procedure and the judicial procedure, and confirmed that these were two alternative avenues. The Court also said that a decision of the Ombudsman, even where he finds that there has been a case of maladministration, cannot constitute a new factor enabling the applicant to lodge an action for annulment against a decision confirming an earlier decision because the prescribed period has elapsed.

The applicant has lodged an appeal with the Court of Justice against this judgment.

7.1.3. Court judgment of 9 September 2008 in case T-403/05, MyTravel Group plc v Commission

The Court confirmed two decisions (except in the case of one document) of the Commission refusing access to competition-related documents on the basis of a number of exceptions ("decision-making process", "legal advice" and "investigations and audits"). It did, however, annul part of the decision concerning refusal of access to a document on the basis of the "investigations" exception, finding that the arguments for refusing this document were too vague.

In particular, the Court noted that:

- in the case of the decision-making process, institutions must be allowed to protect their internal consultations and deliberations where it is necessary in the public

interest in order to safeguard their ability to carry out their tasks in particular when they are exercising their administrative decision-making powers;

- given that the Regulation concerns public access to document, individual or private interests do not constitute an element which is relevant to the weighing up of interests as provided for in that Regulation.

Sweden has lodged an appeal with the Court of Justice against this judgment.

7.1.4. Court judgment of 10 September 2008 in case T-42/05, Rhiannon Williams v Commission

In this case the applicant entered two main pleas: firstly, an implicit refusal to give access to documents that "had to exist" and, secondly, misinterpretation and misapplication of the exceptions to refuse access to documents identified in the disputed decision.

As regards the first, the Court annulled the Commission's decision, noting that the institutions had an obligation to assist the applicant with her request and, if the request was still not clear despite this assistance, the institution had to be precise as failure to be so might constitute an implicit refusal of access to non-identified documents. Implicit refusal was still a refusal without stating reasons, and could therefore be annulled on those grounds alone.

The Court upheld the Commission's decision in full on the explicitly refused documents.

7.1.5. Court judgment of 18 December 2008 in case T-144/05, Pablo Muñoz v Commission

The Court annulled the Commission's refusal to grant access to documents of a comitology procedure relating to tariff classification on the basis of the exception relating to the decision-making process.

It allowed that protection of the decision-making process against targeted external pressure might constitute a legitimate ground for restricting access to documents. Nevertheless, the reality of such external pressure had to be established with certainty and it be shown that there was a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure.

7.2. 23 new actions, including four appeals, against Commission decisions under Regulation 1049/2001 were submitted in 2008⁶:

Case C-506/08 P <i>Sweden/other parties: MyTravel Group plc, Commission</i>	Case C-362/08 P, <i>Internationaler Hilfsfonds e.V./ other party: Commission</i>	Case C-281/08 P, <i>Landtag Schleswig- Holstein/ Commission</i>
Case C-28/08 P, <i>Commission/other party:</i>	Case T-509/08, <i>Ryanair Ltd v</i>	Case T-500/08, <i>Ryanair Ltd v</i>

⁶ See <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> for details.

<i>The Bavarian Lager Co. Ltd</i>	<i>Commission</i>	<i>Commission</i>
Case T-499/08, <i>Ryanair Ltd v Commission</i>	Case T-498/08, <i>Ryanair Ltd v Commission</i>	Case T-497/08, <i>Ryanair Ltd v Commission</i>
Case T-496/08, <i>Ryanair Ltd v Commission</i>	Case T-495/08, <i>Ryanair Ltd v Commission</i>	Case T-494/08, <i>Ryanair Ltd v Commission</i>
Case T-474/08, <i>Dieter C. Umbach v Commission</i>	Case T-437/08, <i>CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v Commission</i>	Case T-383/08, <i>New Europe v Commission</i>
Case T-380/08, <i>Netherlands v Commission</i>	Case T-362/08, <i>IFAW Internationaler Tierschutz-Fonds gGmbH v Commission</i>	Case T-344/08, <i>EnBW Energie Baden-Württemberg AG v Commission</i>
Case T-342/08, <i>Edward William Batchelor v Commission</i>	Case T-250/08, Edward <i>William Batchelor v Commission</i>	Case T-221/08, <i>Guido Strack v Commission</i>
Case T-186/08, <i>Liga para Protecção da Natureza (LPN) v Commission</i>	Case T-29/08, <i>Liga para Protecção da Natureza (LPN) v Commission</i>	

8. Conclusions

8.1. Characteristics of requests and reasons for refusals

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 in an administrative or judicial action concerning, for example, a Commission decision on competition policy. These applications generally relate to large volumes of documents, analysis of which gives rise to a substantial administrative burden.

It should also be noted that the exception relating to protection of the Commission's decision-making process is cited mainly to protect decision-making on individual issues. In the legislative field, more and more documents are made available to the public directly, without waiting for access applications. 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.

The exception concerning the protection of commercial interests is mainly cited in connection with requests for access to competition policy documents.

These trends, which have become more marked over the years, guided the Commission's thinking when it drew up the proposed amendments to the Regulation.

8.2. Developments in case-law

The Court of First Instance confirmed its earlier rulings on a number of 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;
- the investigation/audit exception applies throughout the investigation/audit proceedings.

The Court also clarified other points:

- the Ombudsman procedure is distinct from the judicial procedure, these being alternative procedures;
- institutions must be allowed to protect their internal consultations and deliberations, notably against targeted external pressure, where it is necessary in the public interest in order to safeguard their ability to carry out their tasks in particular when they are exercising their administrative decision-making powers;
- nevertheless, they had to establish the reality of such external pressure with certainty and show that there was a reasonably foreseeable risk that the decision to be taken would be substantially affected, particularly in the legislative field;
- implicit refusal was still refusal without stating reasons, and could therefore be annulled on those grounds alone.

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
2007	2 431	6 647	129	717	3 255	13 179
2008	2 295	8 882	131	747	3 640	15 695
Total	15 753	46 762	790	1 597	21 985	102 582

INITIAL REQUESTS

2. NUMBER OF APPLICATIONS

2006	2007	2008
3841	4196	5197

3. RESPONSES

	2006		2007		2008	
	nbr	%	nbr	%	nbr	%
Positive	2836	73.83	3051	72.71	4314	82.68
Refusal	892	23.22	982	23.40	703	13.99
Partial access	113	2.94	163	3.88	180	3.33
<i>total</i>	3841	100.00	4196	100.00	5197	100.00

CONFIRMATORY REQUESTS

4. NUMBER OF APPLICATIONS

2006	2007	2008
140	273	156

5. RESPONSES

	2006		2007		2008	
	nbr	%	nbr	%	nbr	%
Confirmation	97	69.29	181	66.30	75	48.08
Partial revision	31	22.14	50	18.32	52	33.33
Full revision	12	8.57	42	15.38	29	18.59
<i>total</i>	140	100.00	273	100.00	156	100.00

BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

6. INITIAL REQUESTS

	2006	2007	2008
4.1.a. Protection of the public interest – 1st indent – public security	1.53	1.19	0.18
4.1.a. Protection of the public interest – 2nd indent - defence and military matters	0.60	2.23	0.82
4.1.a. Protection of the public interest – 3rd indent - international relations	7.06	10.98	10.24
4.1.a. Protection of the public interest – 4th indent - financial, monetary or economic policy	1.19	1.26	2.9
4.1.b. Protection of the privacy and the integrity of the individual	4.85	5.04	5.98
4.2. 1st indent - Protection of commercial interests	8.94	10.79	14.4
4.2. 2nd indent - Protection of court proceedings and legal advice	7.49	6.08	6.52
4.2. 3rd indent - Protection of inspections, investigations and audits	30.72	23.48	26.63

4.3. 1st indent – Decision-making process, no decision yet taken	14.30	12.02	13.5
4.3. 2nd indent – Decision-making process, decision already taken: Opinions for internal use as part of deliberations and preliminary consultations	19.06	19.29	15.22
4.5. Refusal by Member State	4.26	7.64	3.62
total	100.00	100.00	100.00

7. CONFIRMATORY REQUESTS

	2006	2007	2008
4.1.a. Protection of the public interest – 1st indent – public security	0.00	0.9	0.42
4.1.a. Protection of the public interest – 2nd indent - defence and military matters	0.49	0.4	0.42
4.1.a. Protection of the public interest – 3rd indent - international relations	3.40	2.2	5.91
4.1.a. Protection of the public interest – 4th indent - financial, monetary or economic policy	0.97	0.4	0.84
4.1.b. Protection of the privacy and the integrity of the individual	13.59	4.8	5.06
4.2. 1st indent - Protection of commercial interests	16.50	25.25	24.89
4.2. 2nd indent - Protection of court proceedings and legal advice	10.19	4.8	3.8
4.2. 3rd indent - Protection of inspections, investigations and audits	27.18	24.75	27.85
4.3. 1st indent – Decision-making process, no decision yet taken	7.77	5.7	17.3
4.3. 2nd indent – Decision-making process, decision already taken: Opinions for internal use as part of deliberations and preliminary consultations	9.71	11.7	12.24
4.5. Refusal by Member State	10.19	19.1	1.27
Total	100.00	100.00	100.00

BREAKDOWN OF REQUESTS

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

	2006	2007	2008
Academics	32.08	31.85	31.03
Civil society (interest groups, industry, NGOs, etc.)	17.27	17.77	18.26
Members of the public whose profile was not indicated	16.55	15.33	16.75
Public authorities (other than the EU institutions)	15.67	15.69	14.19
Lawyers	10.43	9.69	11.01
Other EU institutions	6.85	6.75	6.3
Journalists	1.14	2.90	2.46

9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)

	2006	2007	2008
Belgium	20.26	19.86	18.93
Germany	18.67	15.58	16.89
Italy	8.41	8.18	8.54
France	9.31	9.32	8
United Kingdom	5.73	5.76	6.34
Spain	5.33	5.92	5.29
Netherlands	5.35	4.42	4.83
Other	0.63	1.76	2.63
Luxembourg	2.15	2.8	2.61
Not specified	1.64	1.16	2.61
Poland	2.61	2.41	2.57

Denmark	1.55	1.23	2.45
Austria	3.18	2.71	2.11
Greece	1.2	1.5	1.93
Portugal	1.31	1.18	1.5
Sweden	1.24	1.46	1.44
Ireland	1.15	0.82	1.28
Czech Republic	1.08	0.89	1.26
Switzerland	0.77	0.82	1.18
Finland	0.78	1.43	1.08
United States	0.89	0.61	1.02
Hungary	0.95	0.86	0.86
Lithuania	1.21	0.55	0.62
Romania	0.2	0.96	0.58
Norway	0.51	0.32	0.36
Bulgaria	0.25	0.94	0.36
Slovenia	0.31	1.8	0.32
Latvia	0.2	0.14	0.28
Liechtenstein	0.12	0.45	0.28
Slovakia	0.37	0.59	0.24
Japan	0.18	0.2	0.24
Cyprus	0.26	0.25	0.22
Malta	0.49	0.45	0.2
China (incl. Hong Kong)	0.08	1.01	0.14
Estonia	0.37	0.29	0.1
Russia	0.11	0.05	0.1
Mexico	0.02	0.05	0.1

Croatia	0.22	0.43	0.08
Ukraine	0.14	0.04	0.08
New Zealand			0.08
Australia	0.15	0.07	0.06
Brazil	0.05	0.04	0.06
Turkey	0.22	0.12	0.04
Canada	0.15	0.25	0.04
Israel	0.09	0.12	0.04
South Africa			0.04
<u>FYROM</u>	0.08	0.04	0.02
Albania	0.05	0.02	0.02
Iceland	0.03	0.02	0
Egypt		0.14	0

	2006	2007	2008
EU countries	93.93	92.28	99.46
Candidate countries	0.22	0.12	0
Other	3.49	4.55	0
Not specified	2.37	3.05	0.54

10. ACCORDING TO AREAS OF INTEREST (%)

Directorate-General / Service	2007	2008
SG – Secretariat General	10.19	9.38
TREN – Energy and Transport	7.54	8.18
MARKT – Internal market	6.46	7.28
COMP – Competition	7.32	7.18
JLS – Justice, Freedom and Security	8.45	6.69
ENV – Environment	6.11	6.07
ENTR – Enterprise	5.48	5.91
SANCO – Health and Consumer Protection	4.27	5.74
TAXUD – Taxation and Customs Union	4.82	5.17
ADMIN – Personnel and Administration	2.34	4.08
EMPL – Employment and Social Affairs	3.1	3.72
AGRI – Agriculture	4.11	3.6
REGIO – Regional Policy	3.69	3.42
TRADE – Trade	2.48	2.72
RELEX – External Relations	4.09	2.39
INFSO – Information Society	2.21	2.3
SJ – Legal Service	1.34	1.75
DEV – Development	2.12	1.67
AIDCO – EuropeAid Cooperation Office	1.27	1.55
ELARG – Enlargement	3.18	1.5
EAC – Education and Culture	1.58	1.4
RTD – Research	1.64	1.23
ECFIN – Economic and Financial Affairs	1.07	1.23
FISH – Fisheries	0.95	1.13
BUDG – Budget	1.31	1.07
COMM – Communication	0.73	0.85
OLAF – European Anti-fraud Office	0.45	0.62
CAB – Commissioners' private offices	0.16	0.43
DGT – Directorate-General for Translation	0.4	0.32
ADMIN (OIB)	0.22	0.28
EPSO – Recruitment Office	0.08	0.23
ESTAT – Eurostat	0.24	0.22
PMO – Office for Administration and Payment of Individual Entitlements	0.13	0.18
ECHO – Humanitarian Office	0.21	0.15
JRC – Joint Research Centre	0.02	0.13
IAS – Internal Audit Service	0.1	0.07
BEPA – Bureau of European Policy Advisers	0.06	0.07
OPOCE – Publications Office	0.03	0.05

SCIC – Joint Interpreting and Conference Service	0.02	0.02
DIGIT	0.03	0
FC – Financial Control	0.02	-
Total	100	100