



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 May 2009

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NOTE

From : General Secretariat
To : Working Party on Information
Subject : Proposal for a Regulation of the European Parliament and of the Council
regarding public access to European Parliament, Council and Commission
documents (recast)

In view to the meeting of the Working Party on 3 June 2009, delegations will find attached a proposal made by Denmark, Estonia, Finland and Slovenia concerning Article 5, paragraph 2.

17 April 2009

Proposal by Denmark, Estonia, Finland and Slovenia**Article 5.2**

Where an application concerns a document originating from a Member State, other than documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 ~~or on specific provisions in its own legislation preventing disclosure of the document concerned~~. The institution shall appreciate the adequacy of reasons given by the Member State ~~insofar as they are based on exceptions laid down in this Regulation~~.

Justification

We believe that the formulation proposed by the Commission might risk reconstituting the “Member State veto” specifically abolished by the legislature when adopting Regulation 1049/2001. The current proposal aims at preserving the current level of openness relating to documents held by the institutions but originating from a Member State.

Under the current rules, documents are to be disclosed unless the information is covered by an exception in Article 4. The European Court of Justice established in case C-64/05P (IFAW) that the “institution cannot accept a Member State’s objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001” (para 88). The proposed deletion is necessary in order to make sure that national legislation is not added as a new general exception to the current right to access EU documents, thus effectively risking to create an absolute veto power for the Member States.

We note that a number of delegations have asked the first part of the last sentence proposed by the Commission (“The institution shall appreciate the adequacy of reasons given by the Member State”) to be deleted. We support the Commission proposal in this respect for the following reasons. The EC Treaty places the institutions under an obligation to state the reasons on which their decisions are based. In the Charter of Fundamental Rights and its explanations (OJ 2007/C 303/02) the obligation of the administration to give reasons for its decisions is closely linked to the citizens right to an effective remedy. In the case of an application for a document currently held by an EU institution but originating from a Member State, it is the institution that will ultimately defend the possible refusal before the Community Courts. For this reason, the institution needs to be convinced of the correctness of the reasons behind the refusal. In the IFAW ruling (quoted above) the ECJ required that “the institution to which such an objection [by a Member State under Article 4(5)] is made must, once the possibilities of dialogue in good faith with the Member State [...] have been exhausted, make sure that those reasons exist and refer to them in the decision it makes to refuse access” (para 99, emphasis added).
