



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 23 March 2011

**7450/1/11
REV 1**

LIMITE

**INF 25
API 13
JUR 81**

NOTE

from : General Secretariat
to : Working Party on Information

Subject : Ninth annual report of the Council on the implementation of Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

Under Article 17(1) of Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, each institution is required to publish an annual report on the Regulation's implementation.

The General Secretariat herewith submits to delegations the attached draft annual report for 2010.

The draft report will be scrutinised by the Working Party on Information before being submitted to Coreper with a view to adoption by the Council.

DRAFT

**NINTH ANNUAL REPORT OF THE COUNCIL ON THE IMPLEMENTATION
OF REGULATION No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL OF 30 MAY 2001 REGARDING PUBLIC ACCESS TO
EUROPEAN PARLIAMENT, COUNCIL AND COMMISSION
DOCUMENTS**

CONTENTS

	Page
INTRODUCTION	4
I. REGULATORY, ADMINISTRATIVE AND PRACTICAL MEASURES	5
1. <i>Public register of Council documents</i>	5
2. <i>Practical measures</i>	7
3. <i>Legislative transparency</i>	9
4. <i>In-house instructions, training sessions, staff</i>	10
II. ANALYSIS OF APPLICATIONS FOR PUBLIC ACCESS	11
• Occupations and geographical distribution of applicants	11
• Fields covered by applications	13
• Number of documents examined and refusals of access	14
III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF PUBLIC ACCESS	15
• Grounds for refusal	15
IV. KEY DEVELOPMENTS	17
1. <i>Proposal for a recast of Regulation (EC) No 1049/2001</i>	17
2. <i>Interinstitutional Committee on Access to Documents</i>	18
V. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN AND LEGAL ACTION TAKEN	19
A. COMPLAINT LODGED WITH THE EUROPEAN OMBUDSMAN	19
B. LEGAL ACTION	21
VI. FINAL REMARKS	24
ANNEX: STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS	26

INTRODUCTION

Article 17(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents provides that "*Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register*"¹.

This report covers the implementation of Regulation (EC) No 1049/2001 by the Council in 2010.

As in the earlier annual reports², Part I of this report sets out the regulatory, administrative and practical measures taken by the Council in 2010 in order to ensure compliance with the provisions of Regulation (EC) No 1049/2001. Part II analyses the statistics for applications for public access during the reference period. Part III relates more specifically to the Council's application of exceptions to the right of access under Article 4 of Regulation (EC) No 1049/2001. Part IV lists the key events of the ninth year of implementation of the Regulation, and Part V deals with complaints made to the European Ombudsman and with legal actions. A final section, Part VI, presents the report's conclusions.

¹ See earlier reports by the Council (7957/03, 8036/04, 8896/05, 13354/1/06 REV 1, 8184/07, 8475/08, 8503/09 and 8486/10 + COR 1) and the Commission (COM(2003) 216 final, COM(2004) 347 final, COM(2005) 348 final, COM(2007) 548 final, COM(2007) 841 final, COM(2008) 630 final, COM(2009) 331 final and COM(2010) 351 final). For the European Parliament's reports on the years 2002-2010, see the Notes from the Secretary-General of the European Parliament to the Bureau dated 23 January 2003 (PE 324.992/BUR), 19 February 2004 (PE 338.930/BUR/NT), 7 March 2005 (PE 352.676/BUR./ANN.), 22 March 2006 (PE 371.089/BUR./ANN.), 23 April 2007 (PE 388.097/BUR), 18 April 2008 (PE 402.460/BUR/ANN), 9 June 2009 (PE 421.924/BUR/ANN) and 30 April 2010 (PE 439.692/BUR.ANN.1). Moreover, in accordance with Article 17(2) of Regulation (EC) No 1049/2001, the Commission published a report on the implementation of the principles of the Regulation on 30 January 2004 (COM(2004) 45 final).

² See documents 7957/03, 8036/04, 8896/05, 13354/1/06 REV 1, 8184/07, 8475/08, 8503/09 and 8486/10 + COR 1.

I. REGULATORY, ADMINISTRATIVE AND PRACTICAL MEASURES

1. *Public register of Council documents*

Under Article 11 of Regulation (EC) No 1049/2001, the institutions are required to make a document register available in electronic form. The public register of Council documents, which has been operational since 1 January 1999, contains references to the Council documents entered in it via an automatic archiving system. Accordingly, all non-sensitive documents submitted to the Council or to one of its preparatory bodies which are to serve as a basis for deliberations, could influence the decision-making process or reflect the progress made on a given subject are automatically listed in the register. In the case of sensitive documents³, the author specifies the references which may be permitted to appear in the register⁴.

The register allows public access to the full text of a large number of documents which, pursuant to Article 11 of Annex II to the Council's Rules of Procedure, must be made directly available to the public as soon as they have been circulated⁵. These include documents in the following categories:

- provisional agendas for Council meetings and for its preparatory bodies⁶;
- documents submitted to the Council which are listed under an item on its agenda included in the "*legislative deliberations*" part or marked with the words "*public deliberation*" or "*public debate*" in accordance with Article 8 of the Rules of Procedure⁷;

³ For the purposes of Regulation (EC) No 1049/2001, "sensitive documents" means documents classified as "CONFIDENTIEL", "SECRET" or "TRÈS SECRET/TOP SECRET". On this subject, see Article 9(1) of that Regulation.

⁴ See Article 9(2) and Article 11(2) of Regulation (EC) No 1049/2001.

⁵ In 2010, 131 204 documents were made available to the public via the register as soon as they had been circulated.

⁶ By way of exception, provisional agendas of Council preparatory bodies, covered by an exception to the right of public access laid down in Article 4 of Regulation (EC) No 1049/2001, are not made directly accessible as soon as they have been circulated. This exception typically applies to certain preparatory bodies dealing with military and security questions.

⁷ See Article 11(5)(b) of Annex II to the Council's Rules of Procedure, OJ L 325, 11.12.2009, pp. 53-54. For additional information on this issue, see also point I.3 of this report, pp. 7-8.

- in the legislative field, "I/A" and "A" item notes submitted to Coreper and/or the Council for approval and acts referred to in Article 8(1) of the Rules of Procedure, as well as draft legislative acts and acts referred to in Article 8(1) of the said Rules to which they refer;
- acts adopted by the Council during an ordinary or a special legislative procedure and joint texts approved by the Conciliation Committee under the ordinary legislative procedure;
- any other text adopted by the Council which is intended for publication in the Official Journal;
- documents originating from a third party which have been made public by the author or with his agreement.

As of 31 December 2010, the register listed 1 545 754 documents (all languages taken together), of which 1 163 489 (75,3 % of those registered) were public and available in downloadable format (documents in PDF or HTML format). This represented an increase of 12,7 % on the number of documents appearing in the register in 2009 (1 545 754 at the end of 2010 against 1 371 608 at the end of December 2009) and an increase of 11,8 % in the number of documents directly accessible via the register (1 163 489 by the end of 2010 against 1 039 973 at the end of 2009).

It should be noted that during 2010, a considerable number of public Council documents (22 680), initially established in other formats than PDF or HTML, have been converted into PDF format and have thus become downloadable via the public register.

Moreover, as of 31 December 2010 the register contained 24 093 documents bearing the code "P/A" (i.e. partially accessible), including 4 317 which were accessible on-line (in PDF format)⁸. "P/A" documents registered before 1 February 2004 (from when all new documents classified as partially accessible have been directly available to the public via the register) are not usually downloadable but are available on request.

⁸ Partial disclosure is practised in conformity with Article 4(6) of the Regulation.

In 2010, 589 279 different users logged on to the Council's public document register. The total number of visits in 2010 was 1 411 312, while consultations (in terms of number of screens viewed) totalled 17 110 172.

393 (original language) sensitive documents were produced in the period concerned, 31 classified as "SECRET UE" and 362 as "CONFIDENTIEL UE". Of these, 25 "CONFIDENTIEL UE" documents are mentioned in the register, in accordance with Article 9(2) and Article 11(2) of Regulation (EC) No 1049/2001.

2. *Practical measures*

Under Regulation (EC) No 1049/2001, all applications for public access to documents held by the Council concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility must be given consideration, including applications relating to classified documents.

The processing of applications for public access to classified documents requires thorough investigation by the relevant departments of the General Secretariat of the Council. In 2010 the Transparency Department examined a total of 617 classified documents including 41 classified as "CONFIDENTIEL UE" and 576 classified as "RESTREINT UE" ⁹.

In order to conduct their examination, officials at the Transparency Department systematically consult the authors/departments concerned.

⁹ The documents in question concerned notably the areas of justice and home affairs (39 %), CFSP (24 %) and ESDP (22 %).

In 2010, the General Secretariat of the Council had recourse to the possibility of extending the time-limit for examining initial applications in 28% of the cases. Processing time averaged 17 working days in 2010 (against 14 days in 2009). This was partly due to the fact that in 2010, the General Secretariat received more complex applications than in 2009 relating to a very large number of documents in 2010 and had to confer, as provided for in Article 6(3) of Regulation (EC) No 1049/2001, with the applicants with a view to finding a fair solution as regards the processing time of these applications. For confirmatory applications, which are examined by the Working Party on Information before referral of a draft confirmatory decision to Coreper and the Council for approval, the average time was 28 working days in 2010 against 26 working days in 2009¹⁰. Two meetings of the Working Party on Information were cancelled in May and June 2010, and this obliged the staff working in the Transparency service of the General Secretariat to extend the time-limit for examining the confirmatory applications in more cases than the previous year.

As provided for in Article 4(6) of Regulation (EC) No 1049/2001, the Council routinely considers disclosing parts of requested documents. This makes for greater openness, particularly in the legislative field.

Where a document is still subject to discussions within the Council or its preparatory bodies, and this document reflects the positions of delegations, the situation may arise that full release of the document can interfere with the proper conduct of the negotiations. In such cases, the Council applies Article 4(3) of the Regulation by granting public access to the content of the preparatory documents while these are still being discussed, removing only the references to names of delegations. Interested parties can thus follow the progress of discussions without the institution's decision-making process being undermined. This practice does not, however, prejudice the possible application of other exceptions provided for in Article 4 of the Regulation.

¹⁰ The time-limit for replying laid down in Regulation (EC) No 1049/2001 is 15 working days, with a possible extension of a further 15 working days in duly justified cases, e.g. where the application concerns a very large number of documents.

3. *Legislative Transparency*

In addition to the documents which are made accessible via the register following a request for public access under Regulation (EC) No 1049/2001, a considerable number of legislative documents are made public each year, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure¹¹. This provision prescribes that, unless one or more of the provisions of Article 4 Regulation (EC) No 1049/2001 are applicable, all preparatory documents relating to a legislative act shall be made available to the public in full after adoption of one of the acts by the Council during an ordinary or special legislative procedure and joint texts by the Conciliation Committee under the ordinary legislative procedure or the final adoption of the act¹².

Note in this connection, that the gradual opening of the Council's decision-making process following the adoption, by the European Council, of the overall policy on transparency in June 2006¹³ as well as the entry into force of the Lisbon Treaty on 1 December 2009, has contributed to further widening of public access to Council documents. This is notably, but not only the case in the legislative field. Thus, Article 11(5)(b) of the Annex II to the Council's Rules of Procedure provides that all documents submitted to the Council which are listed on the Council's agenda under an item included in the 'legislative deliberations' part or marked with the words 'public debate' shall be made available to the public as soon as they have been circulated¹⁴. In practice, these documents are made electronically available on the Council's Internet website in the official languages of the European Union .

¹¹ It should be recalled in this context that, pursuant to Article 15(3) of the Treaty on the Functioning of the European Union, each institution, body, office or agency shall elaborate, in their respective rules of procedure, specific provisions regarding public access to documents. In the case of the Council, these specific provisions are set out in Annex II to the Rules of Procedure.

It moreover follows from Article 12(2) of Regulation (EC) No 1049/2001 that the three institutions directly involved in the legislative process shall provide for greater public access to their documents when they are acting in their *legislative capacity*.

¹² Thus, in 2010, more than 1 500 preparatory documents were made available to the public in full following final adoption of the legislative acts to which they relate.

¹³ See the Council's annual reports on public access to documents in 2006 (pp. 17-18) and in 2007 (pp. 20-21).

¹⁴ See, in particular, Article 11(5) of Annex II to the Council's Rules of Procedure.

Parallel to this, the General Secretariat of the Council prepares a monthly summary listing *inter alia* all legislative acts which have been adopted by the Council during a given month. The summary also includes information on the results of votes, the voting rule applicable as well as statements concerning the legislative acts which have been entered into the minutes of the Council ¹⁵.

4. *In-house instructions, training sessions, staff*

As in previous years, in 2010 the Council Secretariat ran a series of training sessions ¹⁶ for Council staff responsible for document production in order to familiarise them with the procedures and practice to be followed as regards public access to documents.

Following an internal re-organisation of the Council Secretariat, a new Directorate for Transparency was set up in 2009, within which the Council's Access to documents Service became a branch of a new unit (DG F 2 A) that currently encompasses the areas of Access to Documents and Legislative Transparency (16 officials).

¹⁵ The monthly summary can be consulted on the Council's website <http://www.consilium.europa.eu> under "Documents" - "Legislative Transparency" - "Summary of Council acts". The results of voting in Council deliberations on acts adopted by co-decision may be consulted at the same address under "Documents" - "Legislative Transparency" - "Public votes".

¹⁶ In all, five training sessions were organised during the reference period.

II. ANALYSIS OF APPLICATIONS FOR PUBLIC ACCESS

Requests from the public for access to Council documents are processed in the initial phase by the General Secretariat of the Council. In the event of a total or partial refusal of public access by the General Secretariat of the Council to a document, the applicant may submit a confirmatory application asking the institution to reconsider its position. In the event of a total or partial refusal of a confirmatory application, the applicant may lodge a complaint with the European Ombudsman or institute proceedings before the General Court of the European Union.

The Annex to this report provides statistics on public access to Council documents for the last five years (2006-2010).

During the reference period the Council received 2 764 requests from the public for access to a total of 9 184 documents. The number of documents disclosed in full or in part (following initial or confirmatory applications) totalled 7 844 in 2010.

As the statistics for Internet consultation of the public register of Council documents demonstrate, the Internet register continues to be an important research tool for citizens wishing to keep close track of the activities of the European Union.

Occupations and geographical distribution of applicants

Initial applications came mainly from students and researchers (33,7 %). Lawyers (10,1 %), as well as industry and commerce and pressure groups (18,3 %) were also high on the list of social and professional categories represented. Since applicants are not required to give their identity or provide reasons for their applications, which are usually sent by e-mail, the occupations of a significant proportion (13,4 %) of them is unknown. Most confirmatory applications originated from the academic environment, i.e. students and researchers (42,3 %). However, the number of confirmatory applications from civil society, including various interest groups and the industrial and commercial sector, also increased in 2010 (23,1 % against 15,6 % in 2009).

While 7,7 % of the confirmatory requests for public access in 2010 were submitted by journalists, this category of applicants only accounted for 2,6 % of the requests at the initial stage. This is mainly due to the fact that the institutions' public registers of documents represent only one of several possible sources of information for the press. Moreover, the vast majority of journalists are mainly interested in the latest news. It is therefore not surprising that the few applications for public access from journalists came mainly from the field of investigative journalism and were thus similar to applications from academics.

As regards the geographical distribution of applicants, the majority of initial applications came from Belgium (29,3 %), Germany (13,9 %) and the United Kingdom (9 %). Applications originating from non-EU countries represented 6,8 % of the total. Confirmatory applications came mainly from Belgium (28 %), Germany (20 %) and the United Kingdom (16 %) ¹⁷. The number of requests for public access to documents originating from EU-candidate countries catered for 4 % of all confirmatory applications, whereas no confirmatory applications were received from other third countries in 2010.

The relatively high number of initial and confirmatory applications originating from Belgium is explained by the fact that several multinational companies and international law firms, as well as numerous associations representing various economic and industrial sectors at European level have their headquarters in Brussels.

¹⁷ In 2009, most confirmatory applications came from Germany (25,8 %) and Belgium (22,6 %).

Fields covered by applications

As regards the fields covered by the applications, the interest in external relations and the common foreign and security policy (CFSP) increased compared to the previous year (14,4 % in 2010 as against 12,2 % in 2009). On the contrary, the number of applications covering the area of freedom, security and justice continued to decrease (14 % in 2010 as against 15,3 % in 2009 and 25,4 % in 2008)¹⁸. This was followed, in descending order, by applications for documents on environment (10,7 %), internal market (7,9 %), taxation (7,5 %) and health and consumer policy (5,6 %). Furthermore, the interest in parliamentary questions increased (5,3 % of applications in 2010 as against 4,1 % in 2009). A field also worth mentioning is the economic and monetary policy, interest in which almost doubled in 2010 compared to the previous year (4,4 % as against 2,6 % in 2009).

Applications concerning the environment (10,7 % in 2010 as against 8,6 % in 2009) increased quite remarkably¹⁹. It should, however, be noted that while applications for access to documents related to legislative procedures have been falling fairly steadily in recent years, that is not necessarily indicative of a lack of interest in the legislative field on the part of the public but is rather due to the fact that a considerable number of legislative documents are made publicly accessible through the public register of Council documents as soon as they are circulated. In 2010 a total of 131 204 documents (i.e. 75,5 % of the 173 856 produced and listed in the register during the year) were thus circulated as public documents.

¹⁸ Between 2005 and 2007, this figure increased steadily (22,5 % in 2005, 24,5 % in 2006 and 26,8 % in 2007).

¹⁹ Of the documents disclosed in full following application for public access, 12,6 % concerned the environment, 12,6 % the area of freedom, security and justice, 11,7 % the CFSP, 6,9 % taxation and 6,3 % social policy. Of the total number of documents disclosed (in full or in part), 14,2 % concerned the area of freedom, security, 12,6 % the environment, 11 % the CFSP, 6,4 % social policy and 6 % taxation.

Number of documents examined and refusals of public access

During the reference period, the General Secretariat examined 9 184 documents, 7 844 of which were made available (6 475 in full and 1 369 in part) in the initial stage (reply supplied by the General Secretariat on behalf of the Council). 28 confirmatory applications were made in respect of 181 documents, as a result of which the Council decided to disclose an additional 118 documents (38 in full and 80 in part). Of the 9 184 documents examined during the reference period (initial and confirmatory applications combined), 1 340 were therefore refused, which makes an access rate of 70,5 % (documents requested and fully disclosed) or 85,4 % if documents to which partial access was granted are also taken into account.

III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF PUBLIC ACCESS

Grounds for refusal

With regard to the initial applications, the grounds for refusal most frequently invoked in 2010 were the protection of the decision-making process, which accounted for one third of all refusals (33 %), followed by the protection of the public interest as regards international relations (24,3 %), public security (7 %), and defence and military matters (1,9 %).

In 31,7 % of cases several grounds for refusal were invoked: protection of the public interest as regards public security was often given as a reason for refusal in conjunction with protection of the public interest as regards international relations (45,3 %), while the protection of the decision-making process of the institution was regularly mentioned together with the protection of the public interest as regards international relations, including negotiations on trade, enlargement, etc. (37,4 %).

As for the confirmatory applications, protection of the public interest as regards international relations was invoked as grounds for 55,5 % of the refusals in 2010 (14,5 % in 2009), while the protection of the public interest as regards public security was invoked in 38,1 % of cases (7,6 % in 2009). In 4,8 % of cases several grounds for refusal were invoked. Most frequently, the protection of the public interest as regards public security was given as a reason for refusal in conjunction with protection of the public interest as regards international relations (66,6 %).

The protection of court proceedings and legal advice (exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001) was invoked as grounds for total refusal in the initial stage in 0,8 % of cases in 2010 (against 0,4 % in the initial phase in 2009); at the confirmatory stage, it was never mentioned as a single grounds for a total refusal in 2010, as was the case in 2009 as well.

If only parts of the requested document are covered by any of the exceptions, the remaining parts of the documents are released in conformity with Article 4(6) of the Regulation. The grounds for partial refusal most frequently invoked at the initial phase in 2010 were the protection of the decision-making process, which accounted for more than half of all partial refusals (51,7 % as against 40% in 2009), followed by the protection of the public interest as regards international relations (11,9 %) and the protection of court proceedings and legal advice (8,1 %). Regarding the confirmatory applications, the grounds for partial refusal most frequently invoked in 2010 were the protection of the public interest as regards international relations (26,2 %) and the protection of the decision-making process (15 %). In 57,5 % of the cases in which partial access was granted in the confirmatory phase in 2010, several grounds were invoked. The most frequently invoked combination of grounds was the protection of the public interest as regards public security in conjunction with the protection of the public interest as regards international relations (60,3 % of the cases).

IV. KEY DEVELOPMENTS

1. *Proposal for a recast of Regulation (EC) No 1049/2001*

On 7 May 2008, the Commission submitted a proposal to the Parliament and the Council for a recast of Regulation 1049/2001²⁰ designed to amend certain provisions of the Regulation, mainly to take account of the entry into force of the "Aarhus Regulation"²¹ on access to information in environmental matters and of the case law on access to documents.

The European Parliament did not finalise its first reading of the proposal before the European elections in June 2009, but resumed its work on this file in 2010. In the Council, the Working Party on Information is expected to continue examining the recast proposal as soon as the Parliament has completed its first reading in the course of the first half of 2011.

The entry into force of the Lisbon Treaty on 1 December 2009 has made it necessary to bring the Regulation into line with the new Treaty provisions, notably to extend public right of access to the documents of all the Union's institutions, bodies, offices and agencies.

Under these circumstances, the Commission has stated in its explanatory note concerning the alignment of the proposal²² that the changes needed to adapt the Regulation to Article 15(3) of the TFEU could be made as part of the recast of Regulation 1049/2001, but that, if the current legislative procedure does not progress within a reasonable time frame, it could contemplate submitting a proposal for amendment of Regulation 1049/2001 confined to the changes brought in by Article 15(3) of the TFEU.

²⁰ COM(2008) 229 final. See also Council Annual Report on public access to documents in 2008, pp. 15–16.

²¹ Regulation (EC) No 1367/2006, see Annex 3.

²² See doc. 5461/10.

2. *Interinstitutional Committee on Access to Documents*

According to Article 15(2) of Regulation (EC) No 1049/2001, the institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

The committee has not met at political level since December 2009. However, the departments of the European Parliament, the Council, and the Commission with responsibility for implementing Regulation (EC) No 1049/2001 met five times in 2010 to compare and exchange practical experience in applying the Regulation, also in the light of the recent case law on public access to documents.

V. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN AND LEGAL ACTION TAKEN

A. COMPLAINT LODGED WITH THE EUROPEAN OMBUDSMAN

This section of the report refers to the complaints lodged against the Council concerning the latter's application of Regulation (EC) No 1049/2001. The only complaint lodged in 2010 against the Council concerning public access to documents is summarised in the sub-section below. This complaint was closed by the Ombudsman by his decision of 22 November 2010. There is one complaint currently pending before the European Ombudsman against the Council regarding an alleged maladministration in the latter's application of Regulation (EC) No 1049/2001, as already mentioned in the Council's annual report on 2009, to which the reader is referred ²³.

In accordance with Article 3(2) of the Statute of the European Ombudsman, two documents concerned by the above-mentioned complaints have been inspected by the Ombudsman services at the premises of the Council Secretariat on 10 September and 11 November 2010.

In addition, the Ombudsman gave his decision on three cases during 2010 regarding complaints lodged against the Council in 2008 and 2009. In cases 944/2008/OV ²⁴ and 90/2009/(JD)OV ²⁵ which were closed on 29 June and 23 July 2010, the Ombudsman concluded that the Council had been entitled to apply the exception it had used for refusal of public access to the documents in question and that there had thus been no maladministration made by the Council. Regarding complaint 523/2009/TS ²⁶, the Ombudsman closed the case on 14 October 2010 and concluded that the Council had duly complied with the obligation to provide an appropriate statement of reasons for its decision to refuse full public access to the document in question and that there had thus been no maladministration made by the Council.

²³ Complaint 1170/2009/KM submitted to the Ombudsman on 30 April 2009 (still pending) is summarised in the Council's annual report on public access to documents in 2009, p. 18.

²⁴ See the 2008 annual Council report on public access to documents, page 17.

²⁵ See the 2009 annual Council report on public access to documents, page 17.

²⁶ See the 2009 annual Council report on public access to documents, pages 17-18.

Complaint 1505/2010/VIK submitted to the Ombudsman on 5 July 2010

This complaint concerns the Council's decision of 31 May 2010 by which it refused full public access to document 16869/1/09 REV 1, concerning the area of justice and home affairs, more specifically to the matter of unaccompanied minors arriving in the EU, pursuant to Article 4, paragraph 1, point a), first indent of Regulation 1049/2001 (protection of the public interest as regards public security). . However, in accordance with Article 4(6) of the Regulation, the Council had granted partial access to those parts of the document which it considered not to be covered by the above-mentioned exception.

In his complaint, the applicant alleged that the Council's decision to withhold certain parts of document 16869/1/09 REV 1 was wrong. The applicant claimed that the Council should have given public access to the entire document.

On 27 July 2010, the Ombudsman informed the complainant and the Council that he considered it useful, as a first step, for him to inspect the document in question. On 11 November 2010, the Ombudsman's representatives consulted the document at the Council's premises. On the basis of the results of this inspection, the Ombudsman concluded that there were insufficient grounds to open an inquiry into this complaint and, therefore, closed the case.

B. LEGAL ACTION

Actions for annulment dismissed or removed from the register by the General Court

In 2010 the General Court delivered two orders in cases brought against the Council for the annulment of the latter's decision concerning public access to Council documents.

Case T-359/09 Jurašinović v. Council concerns an action for annulment brought against the General Secretariat of the Council's refusal of 17 June 2009 to give public access to reports of the European Union's monitors in the area of Knin in Croatia during the month of August 1995, and against the Council's implicit decision rejecting the applicant's confirmatory application²⁷. In its order of 17 June 2010, the General Court dismissed the action as inadmissible as far as it was directed against the General Secretariat's response to the initial application, and declared that there was no need to adjudicate on the remainder of the action since the applicant's interest in bringing proceedings against the Council's implicit confirmatory decision disappeared in the course of proceedings.

Case T-3/08 Coedo Suárez v. Council concerns an action for annulment brought against the Council's decision of 30 October 2007 rejecting public access to a report by the General Secretariat of the Council's Security Office regarding an incident involving two members of the staff²⁸. Following the applicant's notification of the General Court that he wished to discontinue the proceedings, the General Court, by order of 10 January 2011, removed the case from the register and ordered the applicant to pay his costs as well as those of the Council.

²⁷ See the 2009 annual Council report on public access to documents, page 19.

²⁸ See the 2008 annual Council report on public access to documents, page 18.

Actions for annulment pending before the General Court

Five cases challenging the legality of decisions by the Council refusing public access pursuant to Regulation (EC) No 1049/2001 are at present pending before General Court, three of which were covered in the 2009 Council report on public access to documents ²⁹. The two legal actions brought against the Council in 2010 are summarised in the sub-section below.

New legal actions lodged against the Council for annulment of decisions refusing public access to documents

Two actions for annulment were lodged in 2010 against Council decisions refusing public access pursuant to Regulation (EC) No 1049/2001.

In Case T-63/10 *Jurašinović v. Council*, the applicant lodged an action for annulment against the Council's decision of 7 December 2009 rejecting his confirmatory application for public access to the documents transmitted by the Council to the International Criminal Tribunal for the former Yugoslavia (ICTY) in the framework of the proceedings against Ante Gotovina before that Tribunal, as well as the correspondence between the European Union institutions and the ICTY in that context.

In Case T-452/10 *ClientEarth v. Council of the European Union* brought before the General Court, the applicant challenged the Council's decision to refuse full public access to document 6865/09 which concerns an opinion of the Council Legal Service concerning a Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast), and notably the European Parliament's recommended amendments contained in the report drawn up by its rapporteur, Michael Cashman, in February – March 2009.

²⁹ T-233/09 *Access Info Europe v. Council*, T-465/09 *Jurašinović v. Council* and T-529/09 *Sophie In't Veld v. Council*. See the 2009 annual Council report on public access to documents, page 19.

Legal action against the Commission regarding public access to documents in which the Council intervened

In 2010, the Court of Justice handed down one judgment on appeal in Case C-28/08 P Commission v. Bavarian Lager Co. Ltd., where the Council had intervened in support of the Commission's conclusions. In its judgment of 29 June 2010, the Court of Justice clarified the relationship between Regulation (EC) No 1049/2001 and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data³⁰. In particular, it found that where a request based on Regulation (EC) No 1049/2001 seeks to obtain access to documents including personal data, the institutions are required to apply the provisions of Regulation 45/2001 in their entirety.

³⁰ OJ L 8 of 12.1.2001, p. 1.

VI. FINAL REMARKS

The Council's experience in implementing Regulation (EC) No 1049/2001 in 2010 highlights the importance of its public register as a search tool for members of the public seeking to exercise their right to access to documents.

As stated in the first part of this report, visits in 2010 totalled 1 411 312, while total consultations (in numbers of screens viewed) reached 17 110 172.

As of 31 December 2010, the register listed 1 545 754 documents (all languages taken together), of which 1 163 489 (75,3 % of those registered) were public and available in downloadable format (documents in PDF or HTML format). This represented an increase of 12,7 % on the number of documents appearing in the register in 2009 (1 545 754 at the end of 2010 against 1 371 608 at the end of December 2009) and an increase of 11,8 % in the number of documents directly accessible via the register (1 163 489 by the end of 2010 against 1 039 973 at the end of 2009). It should also be noted that 75,5 % of the Council documents produced in 2010 – i.e. 131 204 of the 173 856 documents listed in the register during the year – were made directly accessible to the public upon circulation.

Despite the growing number of documents made directly accessible to the public via the register as soon as they were circulated, there was an increase over the reference period in the number of requests (up by 3,6 %). Requests for public access mainly related to documents listed in the register.

As confirmed by the statistical data provided in the annex to this report, around 28 % of the requests for public access to Council documents which were submitted in 2010 refer to the areas of freedom, security and justice, external relations and CFSP. There is also a clearly growing interest in Council documents concerning the areas of environment and economic and monetary policy (15,1 % of the requests).

A total of 617 of the documents considered (representing roughly 7 % of the documents requested in 2010) were classified (41 as CONFIDENTIEL UE and 576 as RESTREINT UE). The often highly complex process of examining such documents is undertaken by the Council staff dealing with the requests as soon as they are received, as well as by officials in the various departments which produced the documents, who, within the framework of the internal consultation procedures between the "Transparency" Service and the originating services, are regularly called upon to examine the requested documents on the basis of the provisions of Regulation (EC) No 1049/2001.

In this regard, the contribution made by the Working Party on Information to the processing of confirmatory applications and the examination of complaints to the Ombudsman should also be recalled. The Working Party met on 12 occasions in 2010. Its main tasks include examining documents in respect of which a confirmatory application has been made, and examining and finalising the Council's draft replies to such applications, which in a number of cases deal with complex issues relating to public safety, defence and military affairs, or international relations.

In 2010, the General Secretariat of the Council had recourse to the possibility of extending the time-limit for examining initial applications in 28 % of the cases. Processing time averaged 17 working days in 2010 (against 14 days in 2009). For confirmatory applications, which are examined by the Working Party on Information before referral to Coreper and the Council for approval of a the Council's confirmatory reply, the average time was 28 working days in 2010 against 26 working days in 2009.

Thorough examination of initial applications has during the previous years enabled the number of confirmatory applications to be reduced from a peak of 2.4 % in 2005 to roughly 1 % of the number of initial applications during recent years. In 2010, there were 28 confirmatory requests which correspond to 1 % of initial applications.

The analysis of the processing of requests for public access and the use by members of the public of the arrangements made for them to exercise their right of public access suggest that the aims set by the Treaties and by Regulation (EC) No 1049/2001 continued to be achieved in 2010.

STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS

Situation on 31/12/2010

1. Number of applications pursuant to Regulation No 1049/2001

2006	2007	2008	2009	2010
2.224	1.964	2.238	2.666	2.764

2. Number of documents requested by initial applications

2006	2007	2008	2009	2010
11.353	7.809	10.732	8.444	9.184

3. Documents released by the General Secretariat of the Council at the initial stage

2006	2007	2008	2009	2010
9.606	6.123	9.215 ³¹	6.453 ³²	7.844 ³³
partially/entirely 1.155 8.451	partially/entirely 945 5.178	partially/entirely 1.540 7.675	partially/entirely 1.117 5.336	partially/entirely 1.369 6.475

4. Number of confirmatory applications (confirmatory applications may be made if initial application is refused)

2006	2007	2008	2009	2010
40	18	24	33	28

5. Number of documents considered by the Council following confirmatory applications + number of documents released

2006	2007	2008	2009	2010
142	30	74	351	181
99 partially/entirely 53 46	15 partially/entirely 9 6	43 partially/entirely 19 24	88 partially/entirely 27 61	118 partially/entirely 80 38

6. Rate of document released for the procedure as a whole ³⁴

2006		2007		2008		2009		2010	
76,8%	87,7%	66,7%	78,9%	71,8%	86,4%	63,9%	77,5%	70,9%	86,7%

7. Number of documents referred to in the public Register + number of public/downloadable documents

2006		2007		2008		2009		2010	
727.685	483.577 (66,4%)	1.010.217	724.338 (71,7%)	1.195.509	883.748 (73,9%)	1.371.608	1.039.973 (75,8%)	1.545.754	1.163.489 (75,3%)

³¹ Based on 10.719 documents considered.

³² Based on 8.444 documents considered.

³³ Based on 9.184 documents considered.

³⁴ Based on documents released entirely (left column) or entirely + partially (right column).

8. Professional profile of the applicants (initial applications)

		2006		2007		2008		2009		2010			
Civil society	Environmental Lobbies	17,6%		14,2%		18,3%		17,2%		18,3%		1%	0,8%
	Other groups of interests											3,8%	4,6%
	Industrial/ Commercial Sector											10,8%	11,1%
	NGOs											1,6%	1,8%
Journalists		2,3%		2,9%		2,8%		2,7%		2,6%			
Lawyers		9,1%		8,8%		9,5%		11,4%		10,1%			
Academic world	University Research	32,2%	34,5%	38,2%	40%	32,6%	33,7%	32,7%	33,7%	32,5%	33,7%		
	Library	2,3%		1,8%		1,1%		1%		1,2%			
Public authorities (non-EU institutions, third-country representatives, etc.)		6,9%		6,1%		7,6%		4,1%		5,6%			
Members of the European Parliament and their assistants		1,5%		1,3%		1,8%		1,4%		1,1%			
Others		14,5%		13,3%		14,7%		15,9%		14,6%			
Undeclared professional origin		13,6%		13,2%		10,9%		12,6%		13,4%			

9. Professional profile of the applicants (confirmatory applications)

		2006		2007		2008		2009		2010	
Civil society	Environmental Lobbies	8,6%		0%		21%		0%	15,6%	0%	23,1%
	Other groups of interests							6,2%		19,2%	
	Industrial/ Commercial Sector							0%		0%	
	NGOs							9,4%		3,9%	
Journalists		5,7%		18,7%		10,5%		6,2%		7,7%	
Lawyers		11,4%		12,5%		10,5%		18,8%		11,5%	
Academic world	University Research	51,4%	54,3%	50%	56,2%	31,6%	31,6%	46,9%	46,9%	42,3%	42,3%
	Library	2,9%		6,2%		0%		0%		0%	
Public authorities (non-EU institutions, third-country representatives, etc.)		0%		6,3%		0%		0%		0%	
Members of the European Parliament and their assistants		0%		0%		5,3%		3,1%		0%	
Others		11,4%		6,3%		5,3%		3,1%		7,7%	
Undeclared professional origin		8,6%		0%		15,8%		6,3%		7,7%	

10. Geographical spread of the applicants (initial applications)

		2006	2007	2008	2009	2010
Belgium		26,2%	26,4%	31%	28,3%	29,3%
Bulgaria		0,6%	0,1%	0,2%	0,3%	0,2%
Czech Republic		1%	1,4%	0,9%	1,2%	1,1%
Denmark		1,3%	1,1%	1,2%	1%	1,6%
Germany		15,5%	16%	14,5%	14,8%	13,9%
Estonia		0,4%	0%	0%	0,1%	0,1%
Greece		1,3%	1,3%	0,7%	0,8%	0,8%
Spain		5,7%	5%	6,4%	5,9%	5,5%
France		8,1%	7,1%	7%	8%	7,5%
Ireland		0,9%	0,6%	0,6%	0,9%	0,4%
Italy		6,6%	6%	5,9%	4,7%	5,4%
Cyprus		0,3%	0,3%	0,2%	0,2%	0%
Latvia		0,2%	0%	0,2%	0,2%	0,1%
Lithuania		0,4%	0,1%	0,1%	0,2%	0,3%
Luxembourg		0,7%	1%	1,5%	1,8%	1,3%
Hungary		0,5%	0,7%	0,9%	1%	0,7%
Malta		0,2%	0,3%	0,2%	0,3%	0,4%
Netherlands		6%	5,8%	5,7%	5,7%	4,8%
Austria		1,6%	1,7%	1,3%	1,9%	2,1%
Poland		1,5%	1,5%	1,5%	1,4%	2,4%
Portugal		1,2%	0,9%	0,9%	0,8%	1,2%
Romania		0,7%	1,1%	0,6%	1,2%	1%
Slovenia		0,4%	0,4%	0,2%	0,4%	0,3%
Slovakia		0,3%	0,3%	0,3%	0,6%	0,7%
Finland		0,5%	0,8%	0,7%	0,2%	0,5%
Sweden		1,6%	1,8%	1,8%	1,8%	2%
United Kingdom		7,9%	9,5%	7,4%	8,7%	9%
Third countries	Candidate countries	1,7%	1%	0,4%	0,3%	0,3%
	Others	6,8%	7%	7,3%	6,5%	6,5%
Non specified		1,8%	0,8%	0,4%	0,8%	0,6%

11. Geographical spread of the applicants (confirmatory applications)

		2006	2007	2008	2009	2010
Belgium		17,1%	37,5%	30%	22,6%	28%
Bulgaria		0%	0%	0%	0%	0%
Czech Republic		0%	6,3%	5%	0%	4%
Denmark		0%	0%	0%	0%	0%
Germany		22,8%	6,2%	20%	25,8%	20%
Estonia		0%	0%	0%	0%	0%
Greece		0%	0%	0%	0%	0%
Spain		0%	0%	5%	9,7%	4%
France		5,7%	6,2%	5%	6,4%	4%
Ireland		0%	0%	0%	0%	0%
Italy		8,6%	6,2%	5%	6,4%	4%
Cyprus		0%	0%	0%	0%	0%
Latvia		0%	0%	0%	0%	0%
Lithuania		0%	0%	0%	0%	0%
Luxembourg		0%	0%	0%	3,2%	0%
Hungary		2,9%	0%	0%	0%	0%
Malta		0%	0%	0%	0%	0%
Netherlands		8,6%	6,3%	10%	6,5%	4%
Austria		0%	0%	0%	0%	0%
Poland		2,9%	0%	0%	0%	4%
Portugal		0%	0%	5%	0%	0%
Romania		0%	0%	0%	0%	0%
Slovenia		0%	0%	0%	0%	0%
Slovakia		0%	6,3%	0%	0%	0%
Finland		0%	0%	0%	0%	0%
Sweden		2,8%	0%	0%	0%	8%
United Kingdom		22,9%	25%	5%	9,7%	16%
Third countries	Candidate countries	0%	0%	0%	0%	4%
	Others	5,7%	0%	0%	9,7%	0%
Non specified		0%	0%	10%	0%	0%

12. Sector

	2006	2007	2008	2009	2010
Agriculture, Fisheries	5,9%	6,8%	5,7%	7,3%	3,9%
Internal Market	4,6%	2,9%	3,4%	7,7%	7,9%
Research	0,6%	0,4%	0,1%	0,5%	0,5%
Culture	1,1%	0,5%	0,3%	0,3%	0,2%
Education/Youth	1,2%	1,1%	0,5%	0,6%	1,1%
Industry	0,3%	0,3%	0,7%	0,6%	0,1%
Competitiveness	5,8%	1,1%	2,6%	1,9%	1,5%
Energy	1,1%	2,1%	2%	3,5%	0,9%
Transport	3,8%	3%	2,5%	1,9%	2,5%
Environment	6,6%	8,2%	10%	8,6%	10,7%
Health and Consumer	2,3%	2,1%	1,9%	8,1%	5,6%
Economic and Monetary Policy	2,6%	2,2%	2,6%	2,6%	4,4%
Tax Questions – Fiscal Issues	2,5%	2,4%	6,3%	7,6%	7,5%
External Relations – CFSP	14,3%	18,1%	16,2%	12,2%	14,4%
Civilian Protection	0,1%	0,6%	0,2%	0,2%	0,1%
Enlargement	1,8%	1%	0,7%	1,4%	0,8%
Defence and Military matters	2,4%	6%	3,4%	4,6%	4%
Assistance for Development	0,7%	0,2%	0,1%	0,3%	0,2%
Regional Policy and Economical/Social Cohesion	1,2%	0,1%	0%	0%	0%
Social Policy	2,9%	1,9%	3%	3,4%	4%
Area of Freedom, Security and Justice	24,5%	26,7%	25,4%	15,3%	14%
Legal questions	3,8%	3,5%	3,5%	2,7%	2,6%
Functioning of the institutions	1,7%	1,1%	0,9%	0,8%	2,1%
Financing of the Union (Budget, Statute)	0,6%	0,2%	0,1%	0,2%	0,1%
Transparency	0,6%	0,3%	0,1%	0,3%	0,3%
General policy questions	1%	0,4%	0,6%	0,5%	1%
Parliamentary Questions	5,5%	5,4%	4,4%	4,1%	5,3%
Various	0,4%	0,4%	0,7%	0,5%	0,6%

13. Reasons for refusal of access (replies provided by the General Secretariat of the Council at the initial stage)

	2006		2007		2008		2009		2010	
	#	%	#	%	#	%	#	%	#	%
Protection of public interest as regards public security	253	17,1 %	219	13,3 %	92	6,4%	109	5,6%	92	7%
Protection of public interest as regards defence and military matters	67	4,5%	38	2,3%	35	2,4%	67	3,5%	25	1,9%
Protection of public interest as regards international relations	182	12,3 %	249	15,1 %	401	27,7%	442	22,9 %	319	24,3%
Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State	1	0,1%	0	0%	0	0%	0	0%	6	0,5%
Protection of privacy and the integrity of the individual (protection of personal data)	5	0,3%	4	0,2%	7	0,5%	5	0,3%	5	0,4%
Protection of commercial interests of a natural or legal person, including intellectual property	0	0%	1	0,1%	0	0%	1	0%	0	0%
Protection of court proceedings and legal advice	29	2%	14	0,8%	22	1,5%	8	0,4%	11	0,8%
Protection of the purpose of inspections, investigations and audits	4	0,3%	0	0%	2	0,1%	1	0,1%	4	0,3%
Protection of the Institution's decision-making process	637	43,2 %	627	38%	519	35,9%	757	39,1 %	434	33%
Several reasons together or other reasons	298	20,2 %	498	30,2 %	367	25,4%	544	28,1 %	417	31,7%
Document not held by the Council/Other author	0	0%	0	0%	1	0,1%	0	0%	1	0,1%

14. Reasons for refusal of access (replies provided by the General Secretariat of the Council following confirmatory applications)

	2006		2007		2008		2009		2010	
	#	%	#	%	#	%	#	%	#	%
Protection of public interest as regards public security	16	37,2%	1	6,7%	5	16,1%	20	7,6%	24	38,1%
Protection of public interest as regards defence and military matters	7	16,3%	0	0%	0	0%	0	0%	0	0%
Protection of public interest as regards international relations	6	14%	3	20%	24	77,4%	38	14,5%	35	55,5%
Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of privacy and the integrity of the individual (protection of personal data)	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of commercial interests of a natural or legal person, including intellectual property	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of court proceedings and legal advice	2	4,6%	0	0%	0	0%	0	0%	0	0%
Protection of the purpose of inspections, investigations and audits	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of Institution's decision-making process	3	7%	0	0%	2	6,5%	0	0%	1	1,6%
Several reasons together or other reasons	9	20,9%	11	73,3%	0	0%	205	77,9%	3	4,8%
Document not held by the Council/other author	0	0%	0	0%	0	0%	0	0%	0	0%

15. Average number of working days to reply to an application or to a complaint made to the European Ombudsman

	2006	2007	2008	2009	2010
For the initial applications	14 (2224 closed appl.)	13 (1964 closed appl.)	16 (2238 closed appl.)	14 (2666 closed appl.)	17 (2764 closed appl.)
For the confirmatory applications ³⁵	24 (40 closed appl.)	28 (18 closed appl.)	25 (25 closed appl.)	26 (33 closed appl.)	28(28 closed appl.)
Ponderated average (initial + confirmatory)	14,17	13,14	16,1	14,15	17,11
Ombudsman ⁵	57	-	44	50	-

16. Number of applications with prolonged deadline in conformity with Art. 7(3) and 8(2) of Regulation (EC) No 1049/2001

	2006	2007	2008	2009	2010
Initial applications	414 of 2224, being 18,6% of the applications	386 of 1964, being 19,7% of the applications	497 of 2238, being 22,2% of the applications	536 of 2666, being 20,1% of the applications	773 of 2764, being 28% of the applications
Confirmatory applications ⁵	32 [of 40]	14 [of 18]	20 [of 24]	32 [of 33]	26 [of 28]

³⁵ Confirmatory applications and complaints to the European Ombudsman are examined by the Council's Working Party on Information and by the Permanent Representatives Committee (Part 2). Replies to the applicants and to the European Ombudsman are adopted by the Council.