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Contribution of the European Ombudsman, P. Nikiforos Diamandouros, to the public hearing on the Revision of Regulation 1049/2001 on public access to documents

European Parliament - Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2 June 2008

I welcome the decision of the LIBE committee to organise a public hearing on this important subject. Transparency is an essential aspect of pluralist democracy. It ensures that citizens can have the information they need to participate effectively in the political process and to call public authorities to account both at elections and between elections.

The right of access to documents empowers citizens in relation to the flow of information. It enables them to take the initiative to obtain information, in its original context, that has not yet been put into the public domain.

The recent adoption by the Council of Europe of a Draft Convention on Access to Official Documents is the latest development of a general trend in favour of the public right of access to official documents. In the European Union, transparency in general, and public access to documents in particular, are central to the Union's aspirations to legitimacy and democracy. Access to documents held by the European institutions is a fundamental right of the citizenship of the Union⁽¹⁾.

The adoption of Regulation 1049/2001 in 2001 was a real step forward for transparency, which aimed to ensure "the widest possible access to documents"⁽²⁾. This was due in large part to the European Parliament, which took a very active role as co-legislator.

The European Parliament has continued to be active in this field and adopted a Resolution on 4 April 2006⁽³⁾, calling on the Commission to submit a legislative proposal and setting out detailed recommendations designed to improve and strengthen Community legislation on transparency.

Positive elements of the Commission's proposals

The proposal which the Commission has put forward, after a public consultation⁽⁴⁾, contains some very positive elements.

First, the Commission proposes that all natural and legal persons should have the right of access, rather than only those persons who reside, or have a registered office in, a Member State. The proposal is in line with the Draft Convention of the Council of Europe on Access to Official Documents, which provides for everyone to have access, without discrimination. I therefore very much hope that an adequate legal basis for it can be found.

Second, the inclusion of a new exception for the protection of “*the environment, such as breeding sites of rare species*”⁽⁵⁾ is fully justified. It is also in line with both the Council of Europe’s Draft Convention and the Åarhus Convention.

Third, the Commission proposes a new obligation on the Institutions to define in their rules of procedure which categories of documents are directly accessible to the public⁽⁶⁾. Documents that are directly accessible are made available to the public proactively, without the need to use the application procedure laid down in the Regulation. The new requirement could thus help to ensure more rapid public access to certain documents.

However, although I welcome the above proposals, it should be noted that they would not result in more documents being made accessible than under the present Regulation, as it has been interpreted by the Community Courts to date.

The Commission’s proposal would mean access to fewer, not more, documents

In fact, I have been unable to identify any of the Commission’s proposals that would result in more documents being accessible than at present. I would be delighted if the Commission could show that I have overlooked or misunderstood one or more of its proposals in this regard.

On the other hand, many of the Commission’s proposals would make fewer documents accessible. Some of these proposals are based on contestable understandings of the case law of the Community courts. Others are new ideas, which are difficult to reconcile with a genuine commitment to ensuring the widest possible access to documents and to making the right of access effective.

I will examine the most important of these proposals, which I believe raise fundamental issues of principle about the European Union’s commitment to openness and transparency.

Proposals to narrow the right of access as regards the policy-making process

The Commission has put forward three separate proposals, each of which would increase its discretionary power to control the flow of information during the policy-making process.

The most far-reaching of these proposals is to change the definition of “document”. The proposed change would mean that no application for access to a document drawn up by an institution could be made unless that document had been “*formally transmitted to one or more recipients or otherwise registered*”⁽⁷⁾.

The Commission does not propose any change to Article 11 of the Regulation which requires, among other things, that documents be registered “without delay”. However, the Commission’s proposal would mean that a document that has not been formally transmitted outside the Institution would not even be a “document” for purposes of the Regulation unless it had been registered. The Commission’s proposal would therefore give it, in practice, wide discretion to decide which documents would be covered by the Regulation.

In response to the Commission's Green paper, I wrote that "... *the broad definition of "document" should be retained, since to narrow it would represent a step backwards for transparency. The worst option of all would be to tell citizens "you cannot even apply for access unless the document appears on a register"*".

Unfortunately, the Commission seems to have chosen precisely that option.

The second proposal would prevent any possibility of public access to documents that form part of the administrative file of an investigation, or of proceedings concerning an act of individual scope, until the investigation has been closed or the act has become definitive. In addition, the Commission proposes that documents containing information gathered or obtained from natural or legal persons in the framework of such investigations should be permanently excluded from the scope of the Regulation(8).

Under the current Regulation, most of the documents concerned would probably be covered by one or more of the existing exceptions(9). However, disclosure might still be required if there were an overriding public interest. The Commission's proposal would remove that possibility, as well as relieving it of the obligation to show concretely that harm to the protected interest would occur as a result of disclosure.

Furthermore, the proposal would mean that documents containing information gathered or obtained from natural or legal persons would remain permanently inaccessible to the public, even if the passage of time meant that harm would no longer be caused by disclosure. For example, information that was commercially sensitive when gathered might have lost all commercial significance five or ten years later. The Commission's proposal would mean that public access would never be given to such documents. Moreover, on a literal reading of the Commission's proposal, a whole document would be permanently excluded from access, even if the relevant information were contained only in a footnote.

The third proposal is to broaden the exception for protection of the decision-making process in the period before a decision is made(10). In the present Regulation, this exception applies only to documents drawn up for internal use or received by an institution. The Commission's proposal would extend this to all documents. That would allow the Commission, for example, to claim exemption for a document drawn up for purposes of external consultation with a limited circle of people.

In any event, if the Commission's proposal to narrow the definition were accepted, such a document would be excluded from the scope of the Regulation entirely unless it were formally transmitted to a recipient or "otherwise registered".

The overall effect of the proposed revisions would thus be to give the Commission discretion to share documents informally with a limited number of favoured external recipients of its choice, without the risk that those excluded from the process might be able to apply for public access to those documents.

The Commission's proposals to increase its discretionary power to control the flow of information during the policy-making process not only ignore the lessons of the past, as set out in the first report of the *Committee of Independent Experts on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission*(11), but also the new promises made to citizens, civil society and representative associations in the Treaty of Lisbon. These promises emphasise public debate, open dialogue and broad consultation(12).

Contestable understanding of the case law

The Commission's Green Paper mentioned that the incorporation of established case law would provide more legal clarity for citizens and better guidance for the institutions when handling access requests. These are indeed desirable objectives. However, at least two of the Commission's proposals seem to be based on a contestable understanding of the relevant case law.

As regards Member States' documents held by the Institutions, the Commission proposes to amend Article 4 (5) of the current Regulation so as to provide that "[t]he 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" (emphasis added). The use of the conjunction "or" implies that a Member State may rely on its own legislation instead of the exceptions laid down in Article 4 of the Regulation. It is true that the Court of Justice has pointed out that "*there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by (the) regulation*". However, the Court also specifically stated that Article 4 (5) "*requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) of the regulation*"[\(13\)](#). The Commission's proposal, which would allow Member States to rely on their own legislation as an alternative to the exceptions laid down in Article 4(1) to (3) of the Regulation, thus distorts the case law, rather than incorporating it.

As regards the relationship between the right of access and rights to privacy and data protection, the Commission refers to the judgment of the Court of First Instance in the *Bavarian Lager* case[\(14\)](#) to justify a new basic rule that: "... *personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data*". The Commission's idea seems to be that, if a document contains personal data, Regulation 1049/2001 should cease to apply and Regulation 45/2001 should apply instead. That is the opposite of what the Court of First Instance decided in the *Bavarian Lager* case[\(15\)](#). It is also contrary to the views expressed by the European Data Protection Supervisor[\(16\)](#) and conflicts with the Draft Convention of the Council of Europe on Access to Official Documents[\(17\)](#).

The role of the European Parliament

I have not aimed to provide an exhaustive account of how the Commission's proposals would narrow the right of access. To take another example, the Commission also proposes to broaden the exception for the protection of court proceedings to include "arbitration and dispute settlement proceedings"[\(18\)](#). However, it should be clear from the foregoing that the Commission's proposals raise fundamental issues of principle about the European Union's commitment to openness and transparency.

I therefore very much hope that the European Parliament will play as active a role in the revision of Regulation 1049/2001 as it did during the original adoption of the Regulation.

I and my services are at the disposal of the European Parliament and its Committees to provide information and to assist in any other way that may be useful. For example, I recently launched a consultation process within the European Network of Ombudsmen on how the issue of access to information in databases is dealt with in their respective countries. I will be happy to make the results available to Parliament when the consultation has been completed.

Furthermore, I am ready to discuss ways in which the Ombudsman could contribute to improving the practical operation of the Regulation.

For example, applicants for access face great difficulty in (i) contesting the likelihood that disclosure of a document will cause harm to a protected interest and (ii) showing that there is an overriding public interest in disclosure. That difficulty arises from the fact that applicants must necessarily make their arguments in ignorance of what the document in question contains. In fact, I am not aware that any document has ever been released on the basis that there is an overriding public interest in its disclosure.

I believe that the Ombudsman could have a role to play in relation to these two matters that would be helpful both to applicants and to the Institutions. For example, if an applicant whose initial application was refused wanted to question the reality of harm to the affected interest and/or to argue that there is an overriding public interest in disclosure, he or she could be given an additional possibility of turning to the Ombudsman at that stage. The Ombudsman could inspect the document, take an independent view on the question of harm and/or overriding public interest and report to the Institution and the applicant (without, of course disclosing the document or its contents to the applicant). The applicant could then make a confirmatory application, if he or she so wished.

That would not in any way diminish the applicant's legal rights of access, but could offer practical help to the Institution before it becomes committed to the view that it has a legal obligation to refuse access. It could also increase applicants' trust that, when an application is rejected, the likelihood of harm is real and the possibility of an overriding public interest in disclosure has been seriously and objectively examined.

In conclusion, I would like to recall that the European Parliament is the only Institution of the Union to enjoy direct democratic legitimacy. Citizens will therefore be looking to Parliament to ensure that the current procedure demonstrates the Union's continued commitment to the principle of transparency and to ensuring the widest possible public access to documents. I am prepared to work with Parliament to ensure that these important goals are achieved.

Strasbourg, 26 May 2008

P. Nikiforos Diamandouros

(1) Article 42 of the Charter of Fundamental Rights.

(2) See Article 1 (a) of the Regulation.

(3) P6_TA(2006)0122, A6-0052/2006.

(4) The Ombudsman's response to the consultation is available at:

(5) Article 4 (1) (e).

(6) Article 12 (4).

(7) Article 3 (a).

(8) Article 2 (6).

(9) In particular, Article 4 (1) (b), (2) (a) or (2) (d).

(10) Article 3.

(11) The report, dated 15 March 1999, is available on the website of the European Parliament: <http://www.europarl.europa.eu/experts/pdf/reporten.pdf>. See in particular paragraph 9.3.3: “(...) *Openness and transparency imply that the decision-making process, at all levels, is as accessible and accountable as possible to the general public. It means that the reasons for decisions taken, or not taken, are known and that those taking decisions assume responsibility for them and are ready to accept the personal consequences when such decisions are subsequently shown to have been wrong. (...).*”

(12) See the new Article 11 of the Treaty on European Union.

(13) Case C-64/05 P, *Sweden (IFAW) v Commission*, judgment of 18 December 2007, paragraphs 83-84. Paragraphs 86 and 88 also emphasise that access may be refused only on the basis of the exceptions laid down in Article 4(1) to (3) of Regulation 1049/2001.

(14) Case T-194/04, *Bavarian Lager v Commission*, judgment of 8 November 2007.

(15) See especially paragraphs 98-100 of the judgment. Furthermore paragraph 117 emphasises that the exception under Regulation 1049/2001 does not apply to all personal data, but only to data that are “capable of actually and specifically undermining the protection of privacy and the integrity of the individual”.

(16) See *Public access to documents and data protection*, Background paper No 1. July 2005, available on the website of the EDPS at <http://www.edps.europa.eu/EDPSWEB/Jahia/lang/en/pid/21>. It should also be noted that the EDPS intervened in the *Bavarian Lager* case against the position of the Commission.

(17) See point 19 of the explanations of Article 1 of the draft Convention and Article 3 (1) (f), which provides for an exception to protect “privacy and other legitimate private interests”.

(18) Article 4 (2) (c). One notable effect of this change would be to restrict access to information about WTO dispute settlement proceedings.



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