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COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**on the application in 2007 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 2007, was drawn up pursuant to Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.¹

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 The statistics refer only to access applications to unpublished documents and do not cover orders for published documents or requests for information.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

The Commission organised a public consultation on the revision of the legislation on public access to documents following the publication, on 18 April 2007, of a Green Paper on that subject.³

2. Internet Registers and Sites

2.1. At the end of 2007, the register of Commission documents recorded 86 887 documents (see annexed table).

2.2. Article 9(3) of the Regulation states that documents defined as “sensitive”⁴ may be recorded in the register only with the consent of the originator. In 2007 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
Total	39 013	53 848	65 156
Monthly	3 251	4 487	5 430

¹ OJ L 145, 31.5.2001, p. 43.

² For further information on transparency policy, see the General Report on the Activities of the European Union for 2007 at: <http://europa.eu/generalreport/en/2007/rg10.htm>.

³ COM(2007) 185, 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)).

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3. Cooperation with the other institutions and the Member States

In accordance with the rotation rule, the European Parliament called a meeting, on 2 October 2007, of the **Interinstitutional Committee** provided for in Article 15(2) of the Regulation.

In addition, the departments of the three institutions responsible for implementing the Regulation continued their forum for discussing legal issues concerning application of the Regulation in 2007.

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 2007, when 4196 initial applications were registered by departments, 355 more than in 2006.

4.2. The number of **confirmatory applications** virtually doubled; 273 such applications were registered in 2007 as against 140 in 2006.

4.3. With regard to the **breakdown of applications by area of interest**, cooperation in judicial matters, transport and energy, competition, the internal market, 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, France, Italy, Spain, the United Kingdom and the Netherlands, which together accounted for almost half the applications (49.18%). 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 remained roughly the same as the previous year.

In 72.71% of cases (compared with 73.83% in 2006) the documents were disclosed in full, while in 3.88% of cases (compared with 2.94% in 2006) partial access was granted.

5.2. The percentage of decisions confirming the initial decision decreased slightly (66.30% of cases compared with 69.29% in 2006).

The percentage of cases in which applications were granted in full after initial refusal virtually doubled (15.38 % as against 8.57 % in 2006). The percentage of cases in

which partial access was granted after initial refusal, on the other hand, fell slightly (18.32 %, as against 22.14 % in 2006).

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

- protecting the purpose of inspections, investigations and audits (third indent of Article 4(2)), although this was down on 2006 (23.48% of refusals, as against 30.72% in 2006);
- protecting the Commission's decision-making process (Article 4(3)), with a percentage of 19.29% for cases concerning opinions for internal use and 12.02% for those where the decision had still to be taken, totalling 31.31% of refusals.

Protection of international relations and protection of commercial interests were cited in 10.98% (against 7.06% in 2006) and 10.79% (against 8.94% in 2006) of refusals respectively, a marked increase.

5.4. The main grounds for confirming refusal of access were protection of commercial interests (cited in 25.25% of refusals, against just 16.5% in 2006) and protection of the purpose of inspections (24.75%, against 27.18% in 2006).

Opposition by Member States to disclosure of documents originating from them ranked third, accounting for 19.1% of refusals (against just 10.19% in 2006).

6. Complaints to the European Ombudsman

6.1. In 2007 the Ombudsman closed the following sixteen complaints against the Commission for refusing to disclose documents:⁵

Three cases closed without a finding of maladministration			
2290/2004/IP	260/2006/BU ⁶	723/2006/WP	
Nine cases closed with a critical remark			
1434/2004/PB	144/2005/PB	1693/2005/PB	
1844/2005/GG	3002/2005/PB	3193/2005/TN	
2196/2006/SAB	3697/2006/PB	668/2007/MHZ	
Four cases closed without further action			
3269/2005/TN	2654/2006/PB ⁷	3678/2006/JMA ⁸	349/2007/PB ⁹

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

⁶ Listed by error in the previous report.

⁷ Ditto.

⁸ An action has also been brought in the Court of First Instance in this case.

⁹ Ditto.

6.2. In the course of 2007 the Ombudsman received thirteen complaints concerning refusal to disclose documents.

7. Court action

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

7.1.1. Court judgment of 12 September 2007 in case T-36/04 Association de la Presse Internationale A.S.B.L. ("API") v Commission

The Court of First Instance annulled in part the Commission decision refusing access to pleadings lodged by it in various sets of proceedings before the Court of Justice and the Court of First Instance. The Court ruled that, in cases where the hearing had not yet taken place, the “court proceedings” exception applied without the institution having to carry out a concrete examination of each document concerned. On the other hand, after the hearing had been held, the Commission was under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it could be disclosed or whether its disclosure would undermine the court proceedings to which it related. If access were refused, a specific statement of reasons demonstrating the risk should be provided.

The Court also took the view that, in connected cases, the mere fact of their being connected was not of itself sufficient justification for refusing access.

As regards infringement proceedings, the Court of First Instance took the view that the objective of reaching an amicable settlement continued to justify a refusal even after the hearing and until such time as the Court issued a judgment. The Commission, Sweden and API have each lodged an appeal with the Court of Justice against this judgment.

7.1.2. Court judgment of 8 November 2007 in case T-194/04 The Bavarian Lager Company Limited v Commission

The Court of First Instance annulled a Commission decision to refuse access to the names of certain outside persons who had attended a meeting, stating that access to documents containing personal data fell solely within the application of Regulation No 1049/2001. Having analysed the interaction between Regulations Nos 1049/2001 and 45/2001¹⁰, the Court stated that the exception under Article 4(1)(b) of Regulation No 1049/2001 concerned only personal data that were capable of actually and specifically undermining the protection of privacy and the integrity of the individual.

The Court ruled that the institution had to demonstrate to a sufficient legal standard that disclosure of the document in question would actually and specifically undermine protection of the purposes of investigations.

¹⁰ Regulation (EC) No 45/2001 of 18 December 2000 concerning 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 data, OJ L 8 of 12.01.2001, p. 1.

The Commission has also lodged an appeal with the Court of Justice against this judgment with a view to having the Court clarify the interaction between the two Regulations.

- 7.2. In addition, the Court of Justice annulled a Court of First Instance judgment¹¹ and the relevant Commission decision refusing access to certain documents originating from a Member State under Regulation 1049/2001. This was the Court judgment of 18 December 2007 in Case C-64/05P *Sweden v Commission*.

The Court ruled that Article 4(5) of the Regulation does not confer on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it. On the contrary, the Member State is required to state the reasons for its objection with reference to the exceptions provided for in the Regulation. The Court ruled that, where no such reasons were provided, the institution must, if for its part it considered that none of those exceptions applied, give access to the document that had been asked for.

- 7.3. Fifteen new actions, including six appeals, against Commission decisions under Regulation 1049/2001 were submitted in 2007¹²:

Case C-514/07P, <i>Sweden/API and Commission</i>	Case C-528/07P, <i>API/ Commission</i>	Case C-532/07P, <i>Commission/ API</i>
Case C-139/07P, <i>Commission/ Technische Glaswerke Ilmenau GmbH</i>	Case C-122/07P, <i>Eurostrategies SPRL/ Commission</i>	Case C-107/07P, <i>Friedrich Weber/ Commission</i>
Case T-480/07, <i>SIMSA/ Commission</i>	Case T-479/07, <i>Nuova Agricast srl/ Commission</i>	Case T-477/07, <i>Cofra srl/ Commission</i>
Case T-478/07, <i>Cofra srl/ Commission</i>	Case T-417/07, <i>Lodato Gennaro & C. Spa/ Commission</i>	Case T-399/07, <i>Basel Polyolefine GmbH/ Commission</i>
Case T-392/07, <i>Guido Strack/ Commission</i>	Case T-111/07, <i>Agrofert Holding a.s./ Commission</i>	Case T-68/07, <i>Landtag Schleswig-Holstein/ 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,

¹¹ Judgment of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135.

¹² See <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> for details.

for example, an alleged infringement of Community law or an administrative or judicial action. These applications generally relate to large volumes of documents, analysis of which gives rise to a substantial administrative burden.

It should 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, which have shown a marked increase, 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 has clarified a number of points:

- in cases where the hearing has not yet taken place, the “court proceedings” exception applies without the institution having to carry out a concrete examination of each document concerned;
- the “investigation” exception in respect of infringements of Community law applies even after the hearing and until the judgment is handed down. As a rule, once the Court has handed down its judgment, this reason no longer applies;
- access to documents containing personal data falls within the scope of Regulation No 1049/2001. The exception under Article 4(1)(b) concerns only personal data that are capable of actually and specifically undermining the protection of privacy and the integrity of the individual.

In addition, the Court of Justice has overturned the Court of First Instance's interpretation as regards the right of a Member State to oppose the disclosure of documents originating from it, in that the Member State is required to state the reasons for its objection with reference to the exceptions provided for in the Regulation.

The Commission's proposed amendments to the Regulation take account of developments in case-law.

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
Total	15 753	46 762	790	1 597	21 985	86 887

INITIAL REQUESTS

2. NUMBER OF APPLICATIONS

2005 ⁽¹⁾	2006	2007
3 396	3 841	4 196

3. ANSWERS

	2005 ⁽¹⁾		2006		2007	
	nbr	%	nbr	%	nbr	%
Positive	2 188	64.43	2 836	73.83	3 051	72.71
Refusal	1 084	31.92	892	23.22	982	23.40
Partial access	124	3.65	113	2.94	163	3.88
<i>total</i>	3 396	100.00	3 841	100.00	4 196	100.00

CONFIRMATORY REQUESTS

4. NUMBER OF APPLICATIONS

2005 ⁽¹⁾	2006	2007
233	140	273

5. ANSWERS

	2005 ⁽¹⁾		2006		2007	
	nbr	%	nbr	%	nbr	%
Confirmation	159	68.24	97	69.29	181	66.30
Partial revision	57	24.46	31	22.14	50	18.32
Full revision	17	7.30	12	8.57	42	15.38
<i>total</i>	233	100.00	140	100.00	273	100.00

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

BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

6. INITIAL REQUESTS

	2005	2006	2007
4.1.a Protection of the public interest – 1st indent – public security	0.28	1.53	1.19
4.1.a Protection of the public interest – 2nd indent - defence and military matters	0.21	0.60	2.23
4.1.a Protection of the public interest – 3rd indent - international relations	4.17	7.06	10.98
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	2.55	1.19	1.26
4.1.b. Protection of the privacy and the integrity of the individual	3.68	4.85	5.04
4.2. 1st indent - Protection of commercial interests	7.78	8.94	10.79
4.2. 2nd indent - Protection of court proceedings and legal advice	8.63	7.49	6.08
4.2. 3rd indent - Protection of inspections, investigations and audits	41.80	30.72	23.48

4.3 1st indent – Decision-making process, no decision yet taken	12.73	14.30	12.02
4.3. 2nd indent - Decision making process, decision already taken: Opinions for internal use as part of deliberations and preliminary consultations	14.36	19.06	19.29
4.5. Refusal by Member State	3.82	4.26	7.64
total	100.00	100.00	100.00

7. CONFIRMATORY REQUESTS

	2005	2006	2007
4.1.a Protection of the public interest – 1st indent – public security	0.00	0.00	0.9
4.1.a Protection of the public interest – 2nd indent - defence and military matters	0.00	0.49	0.4
4.1.a Protection of the public interest – 3rd indent - international relations	5.31	3.40	2.2
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	0.53	0.97	0.4
4.1.b. Protection of the privacy and the integrity of the individual	10.61	13.59	4.8
4.2. 1st indent - Protection of commercial interests	14.32	16.50	25.25
4.2. 2nd indent - Protection of court proceedings and legal advice	10.88	10.19	4.8
4.2. 3rd indent - Protection of inspections, investigations and audits	28.38	27.18	24.75
4.3 1st indent – Decision-making process, no decision yet taken	7.96	7.77	5.7
4.3. 2nd indent - Decision making process, decision already taken: Opinions for internal use as part of deliberations and preliminary consultations	12.47	9.71	11.7
4.5. Refusal by Member State	9.55	10.19	19.1
total	100.00	100.00	100.00

BREAKDOWN OF REQUESTS

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

	2005	2006	2007
Academics	10.49	32.08	31.85
Civil society (interest groups, industry, NGOs, etc.)	29.44	17.27	17.77
Members of the public whose profile was not indicated	31.89	16.55	15.33
Public authorities (other than the EU institutions)	12.32	15.67	15.69
Lawyers	11.00	10.43	9.69
Other EU institutions	3.78	06.85	6.75
Journalists	1.07	01.14	2.90

9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)

	2005	2006	2007
Belgium	22.63	20.26	19.86
Germany	13.24	18.67	15.58
France	9.71	9.31	9.32
Italy	9.77	8.41	8.18
United Kingdom	6.62	5.73	5.76
Netherlands	5.29	5.35	4.42
Spain	5.52	5.33	5.92
Austria	1.92	3.18	2.71
Poland	1.48	2.61	2.41
Luxembourg	0.66	2.15	2.80
Not specified	7.44	1.64	1.16
Denmark	2.14	1.55	1.23
Portugal	1.54	1.31	1.18
Sweden	1.10	1.24	1.46
Lithuania	0.28	1.21	0.55
Greece	1.92	1.20	1.50
Ireland	1.70	1.15	0.82
Czech Republic	0.63	1.08	0.89
Hungary	0.60	0.95	0.86

United States	0.69	0.89	0.61
Finland	0.88	0.78	1.43
Switzerland	0.85	0.77	0.82
Other		0.63	1.76
Norway	0.44	0.51	0.32
Malta	0.35	0.49	0.45
Slovakia	0.38	0.37	0.59
Estonia	0.13	0.37	0.29
Slovenia	0.19	0.31	1.80
Cyprus	0.16	0.26	0.25
Bulgaria	0.25	0.25	0.94
Turkey	0.09	0.22	0.12
Croatia	0.09	0.22	0.43
Latvia	0.28	0.20	0.14
Romania	0.16	0.20	0.96
Japan	0.03	0.18	0.20
Canada	0.16	0.15	0.25
Australia		0.15	0.07
Ukraine	0.03	0.14	0.04
Liechtenstein	0.09	0.12	0.45
Russia	0.06	0.11	0.05
Israel	0.06	0.09	0.12
China (incl. Hong Kong)	0.06	0.08	1.01
FYROM ¹³	0.03	0.08	0.04
Albania	0.03	0.05	0.02
Brazil	0.03	0.05	0.04
Iceland	0.06	0.03	0.02
Mexico	0.03	0.02	0.05
Egypt	0.06		0.14
India	0.03		
Taiwan	0.03		

	2005	2006	2007
EU countries	89.13	93.93	92.28
Candidate countries	0.54	0.22	0.12
Other	3.34	3.49	4.55
Not-specified	7.50	2.37	3.05

¹³ Former Yugoslav Republic of Macedonia.

10. ACCORDING TO AREAS OF INTEREST (%)

Directorate-General / Service	2007
SG – Secretariat-General	10.19%
JLS - Justice, Freedom and Security	8.45%
TREN - Energy and Transport	7.54%
COMP – Competition	7.32%
MARKT - Internal market	6.46%
ENV – Environment	6.11%
ENTR – Enterprise	5.48%
TAXUD - Taxation and Customs Union	4.82%
SANCO – Health and Consumer Protection	4.27%
AGRI — Agriculture	4.11%
RELEX - External Relations	4.09%
REGIO - Regional Policy	3.69%
ELARG – Enlargement	3.18%
EMPL — Employment and Social Affairs	3.10%
TRADE – Trade	2.48%
ADMIN - Personnel and Administration	2.34%
INFSO - Information Society	2.21%
DEV – Development	2.12%
RTD – Research	1.64%
EAC - Education and Culture	1.58%
SJ – Legal Service	1.34%
BUDG – Budget	1.31%
AIDCO - EuropeAid Cooperation Office	1.27%
ECFIN - Economic and Financial Affairs	1.07%
FISH – Fisheries	0.95%
COMM – Communication	0.73%
OLAF - European Anti-fraud Office	0.45%
DGT - Directorate-General for Translation	0.40%
ESTAT – Eurostat	0.24%
ADMIN (OIB)	0.22%
ECHO - Humanitarian Office	0.21%
CAB - Commissioners' private offices	0.16%
PMO – Office for Administration and Payment of Individual Entitlements	0.13%
IAS - Internal audit unit	0.10%
EPSO - Recruitment Office	0.08%

BEPA - Bureau of European Policy Advisers	0.06%
DIGIT	0.03%
OPOCE – Publications Office	0.03%
FC - Financial Control	0.02%
JRC - Joint Research Centre	0.02%
SCIC - Joint Interpreting and Conference Service	0.02%
Total:	100.00%