



Statewatch

FOI in the EU: When is a “document” not a “document”?

by Tony Bunyan

The European Commission has put forward a number of changes to the Regulation on access to EU documents adopted in 2001. Controversially it proposes to change the definition of a "document" which in turn affect which would or would not be listed on its public register of documents. Does this have anything to do with the fact that the European Ombudsman has just ruled that the Commission must abide by the existing definition of a "document" in the Regulation and that it must list all the documents it holds on its public register?

When the Council and European Parliament discussed the Regulation on access (1049/2001) under co-decision in 1999 and 2000 there were many issues where civil society was critical but the definition of a document was not one of them. The definition was fine.

This was quite simply because it was the same as that which had been in force since 20 December 1993 under the Code of access to EU documents adopted by the Council of the European union (the governments) and the European Commission. The 1993 Code said:

“Document” means any written text, whatever its medium, which contains existing data and is held by the Commission and the Council.”

The 2001 Regulation says:

“document” shall mean any content whatever its medium (written on paper or stored in electronic format or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility. (Article 3.a).”

The 1993 definition and that of 2001 are in practice the same - the 2001 definition was "modernised" to take into account new forms of recording and transmitting documents such as e-mails and electronic documents.

So this definition of a "document" has been in place since 1993, some 15 years. When the Commission launched its public consultation on the Regulation in April 2007 it might have been thought that one of the questions would have concerned the definition in Article 3.a. but it did not. A question was asked about extending the definition of a "document" to include those held on databases - a move widely backed in the consultation and included in the Commission proposal.

The Commission's report on the consultation process, published in January 2008, noted that:

"The concept of "document": As regards the concept of "document", the general feeling is that the current wide definition should be maintained."

The proposal circulated to the full Commissioners meeting on 30 April 2008 contained the following definition of a "document":

" "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drafted or received by an institution and transmitted to one or more recipients or circulated within the institution or otherwise recorded" (emphasis in bold added)

So it was proposed that a "document" was not a "document" unless it was transmitted to one or more recipients or circulated or "otherwise recorded."

However, a further change was made at the Commissioners' meeting so that its proposal now reads:

" "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution;" (emphasis added)

Unless a document is "formally" transmitted it is not a document. This strongly suggests to everyone with any experience of applying for documents that only the final, transmitted, version will be listed on the public register of documents and *not* all the documents (sometimes referred to as "preparatory documents") that lead to the final version will be made public.

Indeed the proposed definition of a "document" in Article 3.a. would appear to be in contradiction to Article 2.2 (unchanged and renumbered from Article 2.3 in the Regulation) on "Beneficiaries and Scope" which says:

"This Regulation shall apply to all documents held by an institution, that is to say namely, documents drawn up or received by it and in its possession concerning a matter relating to the policies, activities and decisions falling within its sphere of responsibility ., in all areas of activity of the European Union." (emphasis added).

Does this mean to “all” documents” or just to “all documents” defined as “documents” in the new Article 3.2?

Commissioner Wallstrom’s intervention

On 2 June 2008 there was a hearing in the European Parliament on the Commission's proposals which were presented by Commissioner Wallstrom (from Sweden). Wallstrom sought to defend the proposed definition of a "document". This brought stinging criticisms from Steve Peers and Ann Singleton who represented *Statewatch* at the hearing (see below), other NGOs and the European Ombudsman (see box).

The website "wobbling" in a report by Staffan Dallborg reported that at a seminar in Stockholm on 10 June 2008 Commissioner Wallstrom said of critics:

“They can’t have read the text.”

Extraordinarily Wallstrom also said, in defence of the proposal:

“All the documents available today will be available with our new proposal”

The idea that we will get “all the documents available today” is a joke as so few are available and access to the full-text of these is highly limited.

As the Commission does not agree with the definition of a "document" in the Regulation it does not list most documents on its public register - as required under Article 11. We estimate that no more than 10% of the documents that the Commission produces or hold are listed on the public register - a statement the European Ombudsman highlighted in our complaint (see below) who noted that the Commission did not refute in the voluminous correspondence. As so few documents are currently listed on the public register Wallstrom by saying that "all the documents available today will be available" is simply confirming our worst fears.

Redefining a "document" as the Commission proposes has a knock-on effect on how many documents are listed in the Commission's public register of documents under Article 11 of the Regulation. If most are not defined as "documents" they do *not* have to be listed.

But why is the Commission suggesting that the definition of a document be changed? It has been in place for 15 years and it was not raised in its own public consultation document, could it be that the Commission wants to circumvent the European Ombudsman's Recommendation on the content of its public register following the *Statewatch* complaint?

***Statewatch’s* complaint to the European Ombudsman**

In October 2006 *Statewatch* registered a complaint with the European Ombudsman against the European Commission in that it had failed to list all the documents it produced or received on its public register of documents as required under Article 11 of the Regulation (1049/2001):

“Article 11 Registers:

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.”

Four years had passed since the deadline set for instituting a public register based on Article 11, yet the Commission still maintained in its annual reports that it would “gradually” increase the number of documents listed.

Statewatch maintained that only a fraction of the documents produced and received by the Commission were listed on its public register. In response to the complaint the Commission said:

Article 11 did not stipulate that the register should include references to all documents. On the other hand, Article 3(a) gave a very wide definition of the term “document.”

Statewatch responded with the following observations to the Ombudsman:

“Regulation 1049/2001 did not refer to “registers” in the plural, that is, that the documents could be listed in a series of “registers”.

Article 11 was unambiguous in its reference to “a” register of documents.

Article 11 was unambiguous and clearly referred to all documents.

Since Regulation 1049/2001 contained a number of express exceptions to its rules, it followed that if the drafters had wanted Article 11 to apply to some documents only, they would have specified this expressly.

Quite extraordinarily, the Commission seeks to question the definition of “document”. However, Article 3(a) of Regulation 1049/2001 set out the definition of the term “document”. Article 11 combined with Article 3(a) was perfectly clear: the register had to contain a reference to all documents as defined in Article 3(a).”

In addition *Statewatch* said that the Commission could not “blatantly” ignore the provisions of the Regulation. Moreover:

“Its response was even more worrying as the Commission had an obligation, as guardian of the Treaty, to ensure the proper implementation of regulations.”

On 5 July 2007 the Ombudsman wrote a detailed letter to the Commission with a number of issues and questions. The Commission replied and only hardened its position:

“Article 11 did not oblige the institutions to list all their documents. Furthermore, it was impossible to set up a fully comprehensive register, given the wide definition of the term “document” in Article 3(a) of Regulation 1049/2001.

And that it intended “gradually”, in its own time extend the scope of its registers. It had a public register (Article 11), a Comitology register, a register of the President of the Commission’s correspondence and each of the 25-plus DGs had their own “internal administrative” registers and:

“The data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register.”

The Ombudsman’s Decision made the following points:

“Article 11 can hardly be interpreted otherwise than as meaning that all documents within the meaning of Article 3(a) are meant to be covered by this provision.”

“it is abundantly clear that the registers currently maintained by the Commission do not provide reference to many documents that concern the Commission’s activities and are in the Commission’s possession. It should be noted in this context that the Commission has not disputed the complainant’s statement that only a “fraction” of the Commission’s documents is listed on its registers.”

The Ombudsman notes that the Commission also argued that it was impossible to set up a fully comprehensive register, given the wide definition of the term “document” in Article 3(a) of Regulation 1049/2001. The Ombudsman is not convinced that it would be impossible to set up a fully comprehensive register of the documents drawn up or received by the Commission. As the Commission has acknowledged, each of its Directorates-General or administrative units has its own internal register of documents. The Ombudsman therefore finds it difficult to see why it should be impossible for the Commission to draw up a comprehensive register of documents on the basis of the existing internal registers.

In view of the above, the Ombudsman arrives at the conclusion that the Commission has indeed failed to comply with Article 11 of Regulation by omitting to include all relevant documents in its register of documents. A draft recommendation will therefore be made.

The Ombudsman also noted that the Commission had had more than six years to comply with the Regulation.

On 7 April 2008 the European Ombudsman made a draft recommendation to the Commission:

“The Commission should, as soon as possible, include references to all the documents within the meaning of Article 3(a) that are in its possession in

the register foreseen by Article 11 of this regulation, to the extent that this has not yet been done.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 15 July 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation."

The Ombudsman, in effect, told the Commission that it has to put on its public register all documents "in its possession" - not just new documents but all those produced and received since December 2001.

Just 21 days later, on 30 April 2008, the Commission put forward proposals to change the definition of a "document" and therefore highly restrict the number of documents that have to be put on the register.

So it has to be asked: Is there any connection between its refusal to implement the Ombudsman's recommendation and its proposals to subvert it?

Tony Bunyan, September 2008¹

Documentation

1. All the background and documentation on the current discussions to amend Regulation 1049.2001 is available on: Observatory on access to EU documents 2008-9:

<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>

2. All documentation on access to documents in the EU since 1993: FOI in the EU:

<http://www.statewatch.org/foi/foi.htm>

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¹ This analysis first appeared in *Statewatch Journal*, Vol 18 no 2.