



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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

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In view to the meeting of the Working Party on 21 April 2009, delegations will find at Annex the following proposals:

- proposal by Finland, Lithuania and Slovenia for deletion of Articles 2.5 and 2.6.;
- proposal by Denmark, Estonia and the Netherlands for amendment to Article 3(a).

15 April 2009

**Proposal by Finland, Lithuania and Slovenia****Articles 2.5 and 2.6**

~~5. This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.~~

~~6. Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.~~

*Justification*

*Access to documents held by the EU institutions should not be more limited than it is under the current Regulation. By way of a general remark, the proposal of the Commission is not acceptable since it goes against two of the core principles of the Regulation. First, the proposal creates block exceptions of different kinds. We believe that even in future, all requests for access to documents should be assessed on a case by case basis and documents should be handed out unless one of the secrecy exceptions in Article 4 applies. Second, the proposal makes access dependent on the source of a document instead of its content.*

*Regulation No 1049/2001 covers all documents held by the three institutions. It is a basic principle of the Regulation, repeatedly confirmed by the Court of Justice, that requests to documents should be assessed on a case by case basis, assessing the actual harm that might be caused by their release to the interests specifically protected by the exceptions established by Article 4 of the Regulation. This follows from the aim of the Regulation “to ensure the widest possible access to documents”. The proposal of the Commission is incompatible with this aim in excluding whole categories of documents outside the scope of the Regulation irrespective of the harm that their release might or*

*might not cause. As a result, citizens would automatically be denied the possibility of requesting access to documents that are under the present system not covered by exceptions, since the harm that their release might cause would never be assessed.*

*The CFI established in its API ruling (T-36/04) that an approach where entire files of documents would be exempted from the scope of public access is “contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers” (para 140).*

*The objective of our proposal is not to widen access to cover new documents but to ensure that access is considered and given when possible. Moreover, it ought to be pointed out that only a concrete, individual examination enables the institution to make full use of the possibility of granting partial access under Article 4(6) and to consider the requirement in Article 4(7) of the exceptions only being applied while this can be justified on the basis of the content of the document.*

*As regards Article 2(5), the Commission has justified its proposal with reference to the Statute of the Court of Justice, which only contains rules on communicating written submissions to the other parties and the institutions whose decisions are in dispute, and to the instructions to the registrar of the CFI, which establishes that access to documents in a case file may be granted to a third party on duly substantiated grounds. From this follows, the Commission argues, that if the Commission were to disclose submissions to the Courts, it would circumvent the Court's own rules. However, as the Commission itself has demonstrated, the said provisions lay down no rules on public access that could be circumvented. The lack of such rules in no way dictates that such rules could not be implemented on all documents held by the other institutions, as has been the case so far. It is true that Regulation 1049/2001 only covers the Council, the Commission and the EP. However, it does cover all documents held by these institutions irrespective of their origin or subject matter, and thus also access to court submissions held by the three institutions is assessed on the basis of the current Regulation.*

*As the CFI clearly stated in its API ruling (referred to above), “the Community legislature did not intend to exclude the institutions’ litigious activities from the public’s rights of access, but that it provided, in that regard, that the institutions are to refuse to disclose documents relating to court*

*proceedings where such disclosure would undermine the proceedings to which those documents relate” (para 59). The CFI has accepted that a higher degree of confidentiality applies until the hearing stage; however, after that the duty of concrete assessment of each requested document applies (para 82 of the ruling). The Commission has in no way demonstrated that the current level of protection would be unsatisfactory.*

*As regards Article 2(6), the Commission has justified its proposal with reference to the workload that is caused by the handling of requests. For the Commission, the institution should focus on its “priority tasks [...] without being disturbed by the obligation to deal with access to documents”. The Regulation already includes exceptions relating to the commercial interests of a natural or legal person, and for the purpose of inspections, investigations and audits. Moreover, the “space to think” exception in Article 4(3) clearly protects matters in which no final decision has been taken and the release of a document would seriously undermine the institution’s decision-making process. The proposal by the Commission would create both temporary and permanent exclusions for documents depending on their source. As such, the proposal is contrary to one of the core principles of the current Regulation, establishing that the crucial factor in considering access is its content, not its source.*

*It is to be pointed out that the Commission has never argued that the current exceptions in this area would not give adequate protection to the relevant interests. Its only aim seems to be releasing its officials from the duty to handle requests with the justification that the process would not in any case “lead to disclosure of documents with a significant interest for transparency”. This explanation is hardly satisfactory if granting widest possible openness is seen as a value in itself. It is also hardly compatible with the Commission’s own Plan-D for Democracy, Dialogue and Debate, aimed at improving citizen participation and building trust in EU bureaucracy. If the current rules on procedures are not satisfactory in responding to the requests by the citizens, they could be developed further by allocating more resources to the process, developing the public registers of the institutions so as to make them more user-friendly, and strengthening the co-operation between the applicant and the institution.*

**16 April 2009**

**Proposal by Denmark, Estonia and the Netherlands**

**Article 3(a)**

«document» means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ~~drawn up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution;~~ data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system.

*Justification*

*The wide definition of a document is one of the cornerstones of the current Regulation and it ought to be touched upon only for a particularly weighing reason. In the public consultation following the Green Paper it emerged that the current definition enjoys wide support. The Commission has not demonstrated why the current definition ought to be amended. If necessary, more detailed guidelines for officials on what information is covered by the definition can be provided in the institutions' internal rules.*

*In this proposal, the requirement for a document to be transmitted or registered proposed by the Commission is deleted as it would allow for arbitrary limitation of the right to access. We, however, welcome the transfer of the reference to “concerning a matter relating to the policies, activities and decisions falling the institutions' sphere of responsibility” to Article 2 and the Commission proposal to clarify that data contained in electronic storage, processing and retrieval systems are covered by the access rules.*