



HOUSE OF LORDS

European Union Committee

15th Report of Session 2008–09

Access to EU Documents

Report with Evidence

Ordered to be printed 9 June 2009 and published 18 June 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 108

The European Union Committee

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NOTE: References in the text of the report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of written evidence

SUMMARY

Openness is an important principle on which the European Union is founded. Article 1 of the Treaty on European Union envisages a European Union in which “decisions are taken as openly as possible...”. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents sets out a code for access to documents held by these institutions. It is the EU equivalent of the freedom of information regimes found in the UK and other states. The European Commission has proposed a revision of this Regulation. This report is part of our ongoing scrutiny of the proposal.

We highlight the extent to which the proposal would preclude disclosure both of documents submitted to courts in the course of litigation and documents arising in the course of investigations, even in the face of a strong public interest in disclosure. We conclude that such an exclusion is, in principle, justified in respect of court documents where the court itself can make provision for disclosure, and recognise the Government’s concern that information provided by third parties in the framework of an investigation should remain confidential.

A particularly controversial issue is how far confidentiality is required for formulating policy (particularly to ensure that policy makers receive frank and open advice) and for negotiating legislation. We look at the relevant provisions of the proposal, particularly in the light of recent judgments by the European Court of Justice, and highlight the differences in the approaches of the European Parliament and the Government. We recommend that these documents should not be given absolute immunity from disclosure but should be protected subject to any overriding public interest.

We assess the effect of the proposal to amend the rules on disclosure by the institutions of documents which they hold but which originate from Member States and conclude that it would significantly reduce the existing right of access.

Access to EU Documents

Introduction

1. Article 255 of the Treaty Establishing the European Community (TEC) gives a right of access to documents held by the European Parliament, the Council and the Commission (referred to in this report as “the institutions”). This right is given to any citizen of the European Union, any person residing in a Member State and any company with a registered office in a Member State. It is subject to general principles and limits on the grounds of public or private interest laid down in a separate legislative instrument. Currently this is Regulation 1049/2001.¹
2. As part of its “European Transparency Initiative” of November 2005 the Commission launched a review of Regulation 1049/2001. In April 2008 it published its proposal for a new Regulation.² This takes into account the views of the European Parliament expressed in its resolution of April 2006,³ the outcome of a public consultation exercise launched by a Commission Green Paper⁴ to which this Committee responded,⁵ and the case-law of the Court of First Instance (the CFI) and the European Court of Justice (the ECJ) interpreting Regulation 1049/2001. The substantive proposed changes to the Regulation are set out in the box below.

BOX

Substantive changes to Regulation 1049/2001 proposed by the Commission

Article 2(1): The right of access would be extended to any individual or company without limit.

Article 2(5): Documents submitted to courts by parties other than the institutions would be excluded from the scope of the Regulation altogether, leaving access to be governed by the rules of the courts themselves.

Article 2(6): There would be no right of access at all to documents forming part of the administrative file of an investigation, or of proceedings concerning an act of individual scope, until the investigation is closed or the act has become definitive. Documents containing information obtained from third parties in the course of an investigation would be protected from disclosure even after the investigation is closed.

Article 3: The definition of a document accessible to the public would expressly cover retrievable information held in a database; but would otherwise be limited to documents “drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution”.

¹ OJ L 145, 31.5.2001, p43.

² COM(2008)229.

³ P6_A(2006) 052.

⁴ The Green Paper is document COM(2007) 185; the outcome of consultation is Commission Staff Working Document SEC(2008) 29 available on <http://ec.europa.eu/transparency/regdoc/rep/2/2008/EN/2-2008-29-EN-1-0.Pdf>

⁵ http://ec.europa.eu/transparency/revision/docs/contributions/25_C1_UK_National_Parliament_House_of_lords.pdf

Article 4(1) and (4): A new exception from disclosure protecting the public interest in the environment would be introduced and the disclosure of information concerning emissions into the environment would be deemed to be an overriding public interest. These changes would align the Regulation with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Article 4(2): A new exception to disclosure, intended to apply to recruitment and public procurement, would be introduced to protect the objectivity and impartiality of selection procedures.

Article 4(5): The rules applying to access to documents containing personal data would be linked more firmly to the EC personal data legislation by providing a general rule that personal data should be disclosed in accordance with the conditions regarding lawful processing of such data found in that legislation⁶, subject to a presumption that the names, titles and functions of public office holders, civil servants and interest representatives would be disclosed insofar as they were acting in their professional capacity.

Article 5(2): The rules applying to access to a document originating from a Member State would be revised by requiring the Member State to justify protection of the document from disclosure, either for reasons based on the exceptions provided by the Regulation or on the basis of specific provisions of its national legislation. In the former case the institution would “appreciate the adequacy of the reasons given”.⁷

Articles 6 and 8: Extended time limits would be introduced for dealing with requests requiring clarification and for dealing with confirmatory requests following an initial refusal to disclose.

Article 10: Clarification would be given that specific procedures set out in EU or national laws apply, particularly as regards payment of a fee.

Article 12: Disclosable documents relating to EU legislative acts and non-legislative acts of general application would have to be made directly accessible to the public (thus removing the need to make a request for disclosure). Previously institutions were required to do this “as far as possible”.⁸

3. The codecision procedure applies to the adoption of this proposal by the Council and the European Parliament. On 11 March 2009 the European Parliament adopted its amendments to the proposal.⁹ These aim to provide much greater transparency than the Commission proposal—in particular in relation to the law-making process—by making publicly accessible “preparatory documents and all related information, including legal opinions and the inter-institutional procedure”.¹⁰

⁶ Particularly Regulation 45/2001 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 data.

⁷ The amendment to Regulation 1049/2001 would largely follow the interpretation of this Regulation by the ECJ in its decision in the case of *Sweden v Commission*, Case C-64/05P, although the possibility of a Member State justifying protection from disclosure on the basis of its national legislation would be new.

⁸ Article 12 of Regulation 1049/2001.

⁹ T6-0114/2009.

¹⁰ European Parliament’s amendment to Recital (12) and its suggested new Article 5a.

4. The proposal has not yet reached the first reading stage in the codecision procedure.
5. Sub-Committee E, a list of whose members is at Appendix 1, has conducted a brief inquiry into the proposal. We heard evidence from the then Minister for Europe, though we did not issue a call for evidence. We are grateful to her for her assistance. The correspondence between this Committee and the Government on the proposal is at Appendix 2.
6. This report focuses on the issues raised by the Commission's proposal which pose particular legal or policy difficulties. It analyses these in terms of Regulation 1049/2001 and the analogous provisions of the United Kingdom Freedom of Information Act 2000 which applies to requests for information held by United Kingdom public authorities. It deals with these issues in the order they appear in the proposal. The final section deals, more briefly, with the other proposed changes.
7. The proposal is subject to the scrutiny reserve according to which the Government may not give their agreement in the Council to the proposal until the Committee has finished its consideration and cleared it from scrutiny.
8. Providing public access to documents is a key element in securing the accountability of the European institutions to its citizens and thereby increasing their engagement. This proposal would introduce significant changes to the existing regime. There are considerable differences of opinion between the institutions and, it appears, between Member States. The proposal is liable to further substantial change through negotiations within and between the institutions. **We have therefore decided to retain the matter under scrutiny in order to consider the further evolution of this proposal.**
9. **We make this report to the House for debate.**

Court Documents

10. Article 2(5) of the proposal would introduce a blanket exclusion from the scope of the Regulation of "documents submitted to courts by parties other than the institutions." This means that an application for access to such a document would have to be made to the relevant court and the terms of access would be governed by the rules of court, albeit that the document was in possession of an institution. At present, under Article 4(2) of Regulation 1049/2001 it is possible to obtain access to such a document from the institution holding it unless "disclosure would undermine the protection of ... court proceedings". This exception is subject to there being no overriding public interest in favour of disclosure. To the extent that the rules of the relevant court are more restrictive than this, the existing right of access would be diminished.
11. Mr Gerry Regan, First Secretary at the UK Permanent Representation to the EU, indicated that the Commission justified the proposed new blanket exclusion as removing a potential conflict between the legislation on access to documents and the rules of court governing access to pleadings (Q 14). The Minister expressed concern that UK pleadings to the ECJ or the CFI should remain confidential, in order to avoid external pressure or criticism (Q 17).
12. This aspect of the proposal raises a number of questions.

13. First, it is not clear which courts would benefit from this provision. The Government's understanding is that the exclusion should only apply to documents submitted to the ECJ or the CFI (Q 15). Both permit third parties who demonstrate a legitimate interest to have access to documents submitted to the court.¹¹ However, it is not clear from the present drafting that the exclusion is limited to documents submitted to these courts. On its face it may cover any court anywhere in the world. If so there could be a significant reduction in the right of access. While many courts will have rules enabling third parties to obtain access to court-held documents when necessary, this cannot be predicated as automatic. In her letter of 6 April,¹² the Minister acknowledged the need for clarification and indicated that the Government would be seeking this.
14. Second, it is not clear how documents submitted to courts by the institutions should be treated. It would appear that they would be disclosable unless they fell within the exception in Article 4(2) which applies to documents which would "undermine the protection of ... court proceedings". We find the scope of this exception (which appears in the existing Regulation) a little obscure, but it is subject to there being no overriding public interest in disclosure.
15. Third, it is not clear why the pleadings of the institutions should be treated differently from those of other parties in the possession of one of the institutions. A particular issue arising from this difference was brought out by the Minister, who pointed out the danger of indirect disclosure of UK pleadings through reference to them in the disclosable pleadings of the institutions (Q 17).
16. In the United Kingdom, the Freedom of Information Act 2000 contains an exemption from disclosure of information contained in court records, which is not subject to any overriding public interest in disclosure.¹³ This leaves it to the courts themselves to make provision for the public to obtain access, where necessary, to documents filed as part of their proceedings: under the Rules of the Supreme Court of Judicature of England and Wales, claim forms are available to third parties, unless the court otherwise orders, and the court has power to give third parties permission to obtain other documents from the court records.¹⁴
17. **We consider it appropriate, in principle, for the question of disclosure of documents submitted to courts to be regulated by the courts themselves, where such courts have, or are likely to have, and operate appropriate mechanisms enabling third parties to apply for and obtain access where necessary.**
18. **The Commission proposal should clarify the extent of the exclusion from the Regulation of documents submitted to courts, and in particular should identify the courts to which this is intended to apply.**
19. **Clear justification is needed to treat the pleadings of the institutions differently from others.**

¹¹ ECJ Rules of Procedure, Article 16.5, and CFI Rules of Procedure Article 24.5 and Article 5 of the Instructions to the Registrar.

¹² Appendix 2.

¹³ Sections 2 and 32.

¹⁴ Civil Procedure Rules 5.4C.

Investigation Documents

20. Article 2(6) of the proposal would remove the right of access to “Documents forming 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.” The right would also be removed, even after this point in time, in respect of “Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of ... investigations”.
21. At present, Article 4(2) of Regulation 1049/2001 provides an exception from disclosure in respect of documents where “disclosure would undermine the protection of ... the purpose of inspections, investigations and audits”, subject to there being no overriding public interest in disclosure. This provision is carried forward to the proposal, although the proposed new Article 2(6) would make a considerable inroad into it. Where the proposed new Article 2(6) would apply, the document would be protected from disclosure without it being necessary for the institution to demonstrate that disclosure would “undermine the purpose” of the inspection, investigation or audit, and this protection would not be subject to any overriding public interest in disclosure.
22. The equivalent provisions of the Freedom of Information Act 2000 which apply to disclosure of information in the context of investigations, proceedings and law enforcement are subject to there being an overriding public interest in disclosure.¹⁵ An exemption from disclosure of information, where disclosure would constitute an actionable breach of confidence, is, however, absolute.¹⁶
23. In her evidence, Alison Rose, Head of the Europe Communications, Institutions, Treaty and Iberia Group, FCO, stressed the wish of third parties to be absolutely sure that information they give to the Commission would remain confidential (Q 21). **We recognise this as a legitimate concern.**

Policy Formulation and Negotiation of Legislation

24. The need for a decision maker to be able to undertake preliminary discussions, and to receive advice before undertaking public consultation or reaching a decision, including a decision to adopt legislation, without the process being compromised by the possibility of disclosure, is acknowledged in both Regulation 1049/2001 and the Freedom of Information Act 2000; the need to be able to receive legal advice also receives particular mention. In both cases, the aim is to preserve a space for policy formulation.
25. Both Regulation 1049/2001 and the proposal concern access to documents by the general public. There is, however, an impact on Parliamentary scrutiny of EU legislation because the level of disclosure to the general public of internal discussions and advice leading to the adoption of legislation establishes a minimum level of disclosure by the Government to Parliament for the purposes of scrutiny. The question of the appropriate level of disclosure for the purposes of scrutiny is being considered as part of our inquiry on the implications of the codecision procedure for national parliamentary scrutiny.

¹⁵ Sections 30 and 31, read with section 2(1) and (2).

¹⁶ Section 41, read with section 2(3).

26. It is relevant to consider how the provisions of the current Regulation are understood and applied in practice, as well as the proposals for their reform.

Internal discussions and advice

27. Article 4(3) of Regulation 1049/2001 provides that disclosure of “a document drawn up for internal use or received by an institution” shall, pending the making of a decision, be refused if disclosure would seriously undermine an institution’s decision-making process. Once the decision has been made, the protection from disclosure is limited to those documents containing opinions for internal use as part of the deliberations and preliminary consultations within the institution concerned (Article 4(4)). In either case the document must be disclosed if there is an overriding public interest in disclosure. These provisions apply to the negotiating positions of the Member States and the Council in relation to legislative proposals.
28. By way of comparison, the Freedom of Information Act 2000 contains exceptions to protect the formulation of Government policy,¹⁷ and to protect information whose disclosure would prejudice effective conduct of public affairs,¹⁸ subject in each case to the existence of any overriding public interest in disclosure.
29. In practice, the United Kingdom and other governments take the view that it would seriously undermine their decision-making process in the Council of Ministers if there were public disclosure of positions taken, discussions or working papers (“non-papers”, as they are sometimes known) passing between them or the Commission in relation to European legislative proposals. The Minister said that “Inadvertently, it [the possibility of disclosure] would lead to something that would not be very satisfactory and people would possibly find other ways of having these conversations and talks. It would not allow the candour that is necessary in these discussions and negotiations” (QQ 4–5). The same attitude is taken by the Council when regularly ensuring that such documents are marked ‘*LIMITÉ*’, to restrict their distribution to Community institutions and national administrations (which may include national parliaments).¹⁹ How far a blanket restriction of this nature fits with a proper interpretation of Regulation 1049/2001 is open to doubt: see further paragraph 34.
30. We noted that such documents still sometimes reached the public domain, and pointed to the publication by Statewatch of a working document relating to the very proposal currently under scrutiny, containing notes regarding the stances taken by individual Member States.²⁰ We asked whether the Minister regarded this as helpful or unhelpful. Her reply was that “in the context of trying to develop policy it does not necessarily provide the coherence of these negotiations”, and that “to take such discussions and the stances of individual Member States out of context” was unhelpful in relation to a negotiation where the United Kingdom was working with other countries (Q 6). The Government sought blanket, permanent protection from disclosure to anyone

¹⁷ Section 35.

¹⁸ Section 36.

¹⁹ Our inquiry on codecision (see paragraph 25) will consider the use and effect of the ‘*LIMITÉ*’ marking, in the context of UK parliamentary scrutiny of European legislative proposals.

²⁰ 5671/09 Rev 1, ‘*LIMITÉ*’ published by Statewatch at <http://www.statewatch.org/news/2009/mar/eu-access-reg-council-4-march-5671-rev1-09.pdf>

of their own negotiating positions (Q 33). Mr Regan and Ms Rose said however that the role of the Commission was, in the Government's view, a different one, and the same blanket protection for opinions exchanged within it for internal use would not be justified (QQ 24, 29, 30).

31. The proposal would limit the disclosure that could be required of internal negotiating documents in a significant respect. Article 3, by its definition of what is to be treated as a "document" for the purposes of the Regulation, would exclude from disclosure any document which is not "drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution ...". Both the aim and the effect of this exclusion are unclear. It may have been conceived as a means of addressing the problem of vexatious or excessive requests, in an era when documents are easily and frequently copied to numerous recipients. But the reference to documents "formally" transmitted is capable of being interpreted in such a way as to give the exception a much wider impact. For example, if "documents formally transmitted" excludes the sending of an email from one official in an institution to another in the same institution or the copying of a draft document to recipients within or outside the institution, this would significantly limit the documents disclosable. In any event there are likely to be documents which, although not transmitted to anyone, should nonetheless be disclosable.
32. We do not therefore regard the exclusion of documents on a basis related to the "formality" of their transmission (whatever that may mean) as a suitable way of creating a space for policy formulation. It makes disclosure dependent on the nature or means of transmission. This is not an appropriate way to balance the competing interests in protection and disclosure.
33. In other respects, the proposal makes no substantive change in relation to internal negotiating documents. However, Articles 4(3) and (4) are reformulated and there is an addition stating that an overriding public interest shall be "deemed to exist where the information requested relates to emissions into the environment".
34. Under both the existing Regulation and the proposal, legal advice is ostensibly given a higher level of protection than internal negotiating documents. Yet the ECJ's decision in the joined cases of *Sweden and Turco v Council*²¹ (discussed more fully below) indicates that the interests of transparency are strong pointers towards disclosure even in relation to legal advice. However, no ECJ decision has as yet directly addressed the extent or weight of those interests in relation to internal negotiating documents and, in the absence of such guidance, Member States' interpretation of Articles 4(3) and (4) is, and is likely to remain, that they justify extensive protection at least of Member State exchanges and documents in the course of the legislative process. The European Parliament's stance, on the other hand, is that all such legislative material and exchanges should become generally open to public scrutiny and that the proposal should put this beyond doubt.
35. The Government's desire for greater protection of negotiating positions of Member States and the Council than for the decision-making process in the Commission is not reflected in either Regulation 1049/2001 or the present proposal.

²¹ Joined cases C-39/05P and C-52/05P.

36. **We agree that the Government should continue to seek proper justification for the proposal to define “documents” in Article 3 to the effect that a document which has not been “formally” transmitted is withheld from disclosure. It would not be justifiable to use the definition of a document in this way to preserve a space for policy formulation. If this provision is to be retained in the proposal for other reasons there should be clarification as to its purpose and as to what constitutes formal transmission.**
37. **We see the force of the argument that it is generally in the public interest that decision-makers within an institution should be able to receive advice and undertake preliminary internal discussions in confidence. We therefore agree that documents relating to these internal discussions should be protected from disclosure subject to any overriding public interest in disclosure. There are, however, special considerations applicable to the legislative process, which are being considered as part of our inquiry on the implications of the codecision procedure for national parliamentary scrutiny. We see the force of the Minister’s view that Member States would simply refrain from recording such positions in writing and find other ways of exchanging them; there may also be tactical aspects about positions taken, which could lead to misunderstandings if they were public. On the other hand Member States act as legislators when negotiating in the Council, and legislators normally act publicly. The same considerations apply to the institutions when negotiating legislation between themselves.**
38. **The Government appear to be seeking a particularly high level of protection for negotiating positions during the legislative process, and this is not reflected in the current wording of the proposal. In the view of the Committee the current and proposed Regulation are right to retain the qualification that disclosure may be required by reason of an overriding public interest.**

Legal advice

39. Article 4(2) of Regulation 1049/2001 provides that a document should not be disclosed if to do so would undermine the protection of legal advice, unless there is an overriding public interest in disclosure. By way of comparison, the Freedom of Information Act 2000 protects from disclosure information which is covered by legal professional privilege subject to any overriding public interest in disclosure.²²
40. In the joined cases of *Sweden and Turco v Council*, the ECJ ordered disclosure of a Council legal service opinion on the Community’s competence to regulate by Council Directive access to the labour market by third-country nationals. The request was made immediately after a Council meeting, where one of the documents on the agenda had been the opinion on competence. The Court said that “wider access to documents” (a phrase used in recital (6) of the current Regulation, and retained in recital (12) of the proposal) must be given precisely in cases where an institution was acting in its legislative capacity, since “openness in that respect contributes to

²² Section 42 read with section 2.

strengthening democracy”.²³ It held, first, that there was no general need for confidentiality in respect of such legal advice, and that the institution seeking to resist disclosure must assess in each individual case whether any of the exceptions in Article 4 applied; and, second, that the principles of transparency and openness and the democratic right of scrutiny underlying the Regulation could constitute an “overriding public interest” requiring disclosure.²⁴ However it did not rule out refusal to disclose a specific legal opinion if it were of a particularly sensitive nature or if it were particularly wide in scope, going beyond the context of the legislative process in question.²⁵

41. The current proposal would maintain, in substance, the same provision regarding disclosure of legal advice as Regulation 1049/2001.²⁶ This will very likely be interpreted by the ECJ in the same manner as it has interpreted that Regulation in *Sweden and Turco v Council*. The United Kingdom argued against the conclusion reached by the ECJ and the Government continue to think that the judgment does not strike the right balance. They are arguing for greater protection of legal advice (QQ 3, 25–26).
42. **We support the principle that legal advice in respect of proposed legislation should be given frankly. We have some sympathy with the Government’s view that some of the language used by the ECJ in the joined cases of *Sweden and Turco v Council* goes further than the wording of the current Regulation would appear to justify. On the other hand, there is force in the view that the Council and the Commission should be required to disclose publicly any opinion on the fundamental and essentially legal issue of competence, the existence of which is a pre-condition to the making and scope of any legislation. The decision in *Sweden and Turco v Council* does not, we think, lead to a conclusion that all legal advice will always be disclosable when given in the context of a legislative proposal.**
43. **The proposal would need to be amended to achieve, as the Government is seeking, a higher level of protection for legal advice than afforded by the present Regulation as interpreted by the ECJ in the *Sweden and Turco* cases. We would not support such an amendment.**

Member States’ Documents

44. Articles 4(4) and 4(5) of Regulation 1049/2001 apply to non-sensitive documents originating from respectively a third party and a Member State. It is however important to note that documents submitted by a Member State to the Council in the performance of the Member State’s role as a member of the Council are not considered as third party documents or documents originating from the Member State, but rather as documents of the Council (Q 32). They therefore fall outside the scope of these provisions.
45. These provisions require, in the case of a third party document, for consultation with the third party before disclosure (unless it is obvious that

²³ Paragraphs 46 and 59.

²⁴ Paragraphs 57, 67 and 78.

²⁵ Paragraph 69.

²⁶ Article 4(2) of each.

the document should, or should not, be disclosed); and, in the case of a document originating from a Member State, for the Member State to request the institution not to disclose a document originating from it without its prior agreement.

46. Article 4(4) clearly requires no more than consultation, and leaves the judgment regarding disclosure to the institution; on the other hand Article 4(5) had been interpreted (amongst others by the United Kingdom and the Commission) as giving a Member State a veto over disclosure by an institution of a document originating from the Member State (Q 36).
47. However, in another case brought by Sweden, *Sweden v Commission*,²⁷ the ECJ decided that this provision does not give a Member State an unconditional right of veto,²⁸ rather it entitles a Member State to object to the disclosure of documents originating from it only if it gives proper reasons which must be based on the exceptions set out in the Regulation. The institution and Member State must then engage in a dialogue with a view to reaching agreement on the question whether or not any of such reasons applies.²⁹ Failing such agreement, the institution requested to disclose the document must itself determine whether those reasons exist and, if it concludes that they do, refer to them in its decision to refuse access.³⁰
48. This judgment does not affect sensitive documents which may only be disclosed with the consent of their originator, whether a Member State or otherwise. The proposal would not alter this.
49. Article 5(2) of the proposal would make it clear that no special treatment is intended for a non-sensitive document originating from a Member State which is transmitted “in the framework of procedures leading to a legislative act or a non-legislative act of general application.” This reflects the view (which the Government accept) that a document sent by a Member State to the Council in this context falls to be treated as if it were a document of the Council (QQ 31–32). An example would be a Member State comment on a European legislative proposal.
50. Article 5(2) of the proposal would retain the requirement for consultation with the Member State before disclosure of other, non-legislative and non-sensitive, documents. Mr Regan gave as examples of the documents in question applications for clearance under the state aid rules and documents provided by a Member State concerning its implementation of Community law (Q 35). In respect of these documents a Member State would have to provide reasons based on the exceptions provided in the proposal itself or “based on specific provisions of its own legislation ...” if it opposed disclosure. The institution concerned would then have to “appreciate” the validity of the reasons for non-disclosure given by a Member State insofar as they are based on the exceptions laid down in the proposal.

²⁷ Case C-64/05 P. The case concerned documents received by the Commission from the Federal Republic of Germany, its Chancellor and the City of Hamburg in connection with the Commission’s examination of a project to enlarge a Daimler Chrysler Aerospace factory and reclaim part of the Elbe Estuary to extend its runway, in respect of which project the Commission gave a favourable opinion under the Habitats Directive 92/43/EEC of 21 May 1992.

²⁸ Paragraph 98.

²⁹ Paragraphs 85–86 and 99.

³⁰ Paragraph 99.

51. The Government's position is that the institution undertaking the appreciation should not be able to look behind the reasons given by the Member State. A disappointed applicant would be able to challenge those in the CFI (Q 39) or, if the reason not to disclose was based on national law, through the domestic courts (Q 40).
52. The Government's approach appears to interpret the power of an institution to appreciate the reason given by a Member State as limited to ensuring that the reason fell, linguistically and technically, within the terms of the exceptions set out in Article 4.
53. The wider the interpretation given to the word "appreciate", the greater the scope of the institution's power to filter out and reject unmeritorious objections to disclosure, particularly as an examination of the merits of an objection will include, in most cases, assessment of the countervailing public interest in disclosure. Scrutiny by the institution would promote consistency in the application of the Union rules on disclosure. A Member State which disagreed with the institution's view in an individual case would be able to challenge it in the CFI.
54. If a Member State objecting to the disclosure of a document were to rely solely on Article 4 grounds, the scope of the "appreciation" by an institution of the reasons given by a Member State for opposing disclosure of a document would be important to the assessment of the practical application of the proposal. If this includes consideration of the substantive merits and the balance between competing interests in protection and disclosure, the institution concerned could effectively be determining the question. The proposal would need to be amended if there is to be the more limited role for the institution concerned that the Government are seeking. However it seems to us unlikely that a Member State would, in practice, object only under Article 4.
55. The possibility of a Member State also objecting to disclosure of a document on the basis of its national legislation is new and, in comparison with the present position established by the decision in *Sweden v Commission*, may be seen as reducing the current level of transparency. On the other hand, the Minister considered that the appropriate balance between the interests of the Member State and the interests of the Union could be achieved if a relevant national law were to determine the question of disclosure; and that this would also be consistent with the principle of subsidiarity and avoid any conflict between the national regime and that of the Union (QQ 36–38).
56. It seems that a Member State could, on this basis, rely on its own national law if it contained exceptions going beyond those contained in Article 4. But a Member State's objection to disclosure could well be based on identical or overlapping exceptions in the Regulation and in its own national law. The proposal does not address the consequences.
57. **The proposal that a Member State should be able to object to disclosure of documents for reasons based on its own legislation would significantly reduce the right of access. The effect of this proposal also needs clarification in respect of documents which come within the scope of both exceptions to disclosure set out in the Regulation and exceptions based on national law.**

Other issues

The Scope of the Right of Access

58. Article 255 TEC gives a power for the Council and the European Parliament to adopt legislation determining the general principles governing the right of access to documents and determining the limits to that right on the grounds of public and private interests. This is the stated legal basis for the proposal. But the right itself is only conferred by this Treaty Article on “Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State ...” whereas Article 2(1) of the proposal, which would be subordinate to the Treaty, seeks to extend the right to “Any natural or legal person ...”
59. Regulation 1049/2001 only gives rights to the persons mentioned in Article 255, but gives the institutions an option to grant access to documents to anyone else. This option is, in fact, taken up through the rules of procedure of the institutions, which have different legal bases. The Freedom of Information Act 2000 places no restriction on who may request information from a public authority.³¹
60. In her evidence the Minister indicated that it would be difficult in practice to administer any distinction and supported a universal right of access (Q 41). But it was accepted by Mr Regan that this went beyond the power to legislate found in Article 255. The point has been raised with the Commission (Q 42).
61. **The Committee sympathises with the policy objective that any person or company should be able to seek access to documents. But it seems clear that there is no legal basis for an extension of the right of access to documents to those who are not given that right by Article 255 itself. Further, we have seen no evidence that the current legislation does not, in practice, give sufficiently wide access.**

Application to databases

62. Information which may be in the public interest to disclose is frequently held on databases. Article 3 of the proposal would make clear that the definition of a document accessible to the public includes information on a database which is retrievable. We supported this in our response to the Commission’s Green paper.
63. **We welcome the extension of the right of access to information which is retrievable from a database.**

Environmental information

64. Article 4(1) and (4) of the proposal would ensure coherence of the proposal with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and the Community legislation implementing it.³²
65. Coherence of legislation is welcome in principle. In our response to the Commission’s Green paper we supported a single set of rules governing

³¹ Section 1.

³² Regulation 1367/2006.

access to EU documents. However it is understandable that the Commission has not adopted this approach as the Aarhus Convention and its implementing legislation form a single environmental code covering other matters in addition to access to documents.

66. **We welcome the Commission proposal to align the access to documents regime with the legislation implementing the Aarhus Convention.**

Selection procedures

67. Article 4(2) of the proposal would introduce a new exception from disclosure where this is needed to protect the objectivity and impartiality of selection procedures. This exception is intended to apply to recruitment and public procurement. The Commission envisages³³ that this will be used to protect the proper functioning of selection boards and evaluation committees, but there is no justification for this change in the proposed recitals.
68. Other exceptions to disclosure, for example those relating to personal data and commercial interest, also apply to recruitment and public procurement, and it is not clear to us that a separate ground for protection from disclosure for this reason is justified. **We consider that further justification is required for the specific protection from disclosure for the purpose of protecting the objectivity and impartiality of selection procedures.**

Personal data

69. Article 4(5) of the proposal makes clearer the relationship between the regime for access to documents and the regime for the protection of personal data. The general rule would be that personal data should only be disclosed in accordance with the conditions regarding lawful processing of such data in EC legislation. But one exception would be introduced: there would be a presumption that the names, titles and functions of public office holders, civil servants and interest representatives would be disclosed insofar as they are acting in their professional capacity. This exception reflects a judgment of the CFI in the *Bavarian Lager* case³⁴ which annulled a decision of the Commission to refuse disclosure of the names of officials and industry representatives attending a meeting with the Commission in the absence of their consent. The CFI considered that disclosure of the names would not compromise the protection of the privacy and integrity of the persons concerned. The Commission has appealed against this decision to the ECJ and its judgment is awaited.³⁵
70. In her letter of 11 December 2008³⁶, the Minister indicated that, where access is requested to a document containing personal data, there should be a presumption in favour of privacy for all personal data, with exceptions considered on a case by case basis consistent with the Data Protection Regulation.³⁷

³³ COM(2008) 229 at page 8.

³⁴ Case C-194/04.

³⁵ Case C-28/08 P.

³⁶ Appendix 2.

³⁷ Regulation 45/2001 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 data.

71. **We agree with the Government that it is important to protect personal data. However we do not consider that this protection need extend to the blanket protection of the names, titles and functions of public office holders, civil servants and interest representatives insofar as they are acting in their professional capacity.**

Time limits and the application of national procedural rules

72. Under the proposal, the time limit for dealing with an initial application for access to documents would remain 15 working days, extendable in exceptional cases by another 15 working days.³⁸ The time limit for dealing with a confirmatory request following an initial refusal of access would be extended from 15 working days (extendable in exceptional cases by another 15 working days) to 30 working days (extendable in exceptional cases by another 15 working days).³⁹ Under Article 6 of the proposal these time limits would not start to run, in the case of unclear applications, until any requested clarification is provided by the applicant. In our response to the Commission's Green Paper we supported the flexible extension of deadlines and measures to prevent abuse.
73. **The Committee supports the administrative changes to the handling of applications on the grounds of practical administration of the disclosure regime and the prevention of abuse.**

Direct Access

74. Article 12 of the proposal would introduce a requirement that documents relating to EU legislative acts and non-legislative acts of general application would have to be made directly available to the public. In Regulation 1049/2001 there is only an obligation for an institution to do this "as far as possible". This obligation for active disclosure would remain subject to the exceptions and administrative procedures otherwise found in the Regulation.
75. The obligation to make other documents, such as those relating to the development of policy or strategy, directly available would remain limited to where that is possible.
76. In our response to the Commission's Green Paper we supported more active dissemination of information including by subscriber services.
77. **We support a firmer obligation on institutions to establish direct access to the public of their documents and believe that there is scope for more proactive dissemination of information—for example through a subscription email service.**

³⁸ Article 7 of both Regulation 1049/2001 and the proposal.

³⁹ Article 8 of both Regulation 1049/2001 and the proposal.

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee are:

Lord Blackwell
Lord Bowness
Lord Burnett
Lord Kerr of Kinlochard
Lord Maclennan of Rogart
Lord Mance (Chairman)
Lord Norton of Louth
Baroness O’Cathain
Lord Rosser
Lord Tomlinson
Lord Wright of Richmond

Declarations of Interests

A full list of Members’ interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Members have drawn particular attention to the following interests relevant to this inquiry:

Lord Blackwell
Office-holder in voluntary organisations
Chairman of Global Vision (independent research and campaign group)
(3 February 2009)

APPENDIX 2: CORRESPONDENCE

Letter of 18 June 2008 from Lord Grenfell, Chairman of the European Union Committee, to Jim Murphy MP, Minister for Europe

This proposal was considered by Sub-Committee E (Law and Institutions) at its meeting of 18 June 2008.

Like the Government, we welcome efforts to enhance transparency and access to documents at EU level. However, we are aware that concerns have been raised as regards the present proposal, and in particular the definition of “documents”, which appears to limit the documents which fall within the scope of the Regulation.

We note that the Government are considering their position and look forward to hearing your views on each of the proposed amendments shortly to allow us to commence detailed scrutiny of the proposal.

We have decided to retain the proposal under scrutiny.

Letter of 11 December 2008 from the Rt Hon Caroline Flint MP, Minister for Europe, to Lord Roper, Chairman of the European Union Committee

I am writing in response to Lord Grenfell’s letter of 18 June, to my predecessor, Jim Murphy. You sought the Government’s views on the proposed amendments to this Regulation.

With regard to extending the scope of beneficiaries (amended article 2) of the Regulation, the government believes that this change would reflect the current *de facto* position. At present, the Regulation states that only applications from EU citizens, or those resident with the EU, should be considered. However, in reality it is very difficult for the institutions to verify that an applicant meets these current criteria before considering an application. The Government will therefore support the objective of this amendment as proposed provided this can be achieved within the provisions of the Treaty.

The Government supports the Commission’s proposal to exclude court documents (i.e. those documents taken into account by the court, though those originating from the institutions would remain disclosable) from the scope of the Regulation as proposed in Article 2(5), as this is a matter governed by the statute of the European Court of Justice.

The Government also supports the proposals contained in Article 2(6) to exclude from the scope of the Regulation documents relating to live investigations, and documents seized in the course of an investigation.

With regard to the definition of “documents” (revised Article 3a), excluding draft documents would go beyond the UK’s own Freedom of Information legislation. The Commission has stated that this is intended to reduce the burden on the institutions by limiting the number of ‘documents’ which must be considered when responding to a request. However, I do not find this to be a compelling justification, and on the basis of the arguments advanced by the Commission to date, the UK does not intend to support the Commission amendment as currently proposed.

The Government does, however, support the other proposed change to Article 3(a) to include data held electronically within the definition of a ‘document’, and

therefore within the scope of the Regulation, insofar as this does not involve the creation of new information through research.

The change proposed by the Commission in Article 3(a) to exclude draft documents from the scope of the Regulation only concerns documents originating from an EU institution, it does not affect the position of documents provided by Member States. The current Regulation applies to documents in the possession of the EU institutions, irrespective of their origin. This position will not be changed by the proposed amendments to the Regulation.

The Government also has concerns on the issue of the interaction between the Access to Documents Regulation and the Data Protection legislation raised in Article 4(5) of the recast proposal. The Commission's proposal would potentially result in the disclosure of names and details of civil servants attending meetings with an EU institution. Where a request made under the Access to Documents Regulation includes personal data, the Government believes that the Data Protection Regulation should take primacy. We believe there should be a presumption in favour of privacy for all personal data, with exemptions considered on a case-by-case basis consistent with the Data Protection Regulation. Such an approach would be consistent with the UK's approach under its FOI legislation and the Data Protection Act.

The Government will also be seeking to ensure adequate protection for legal advice (amended Article 4(2)).

On Member States' right to veto the disclosure of documents that they have provided to an institution (amended Article 5(2)), the Government's concern is to ensure that documents originating from the UK are only disclosed with the agreement of the UK. It is in the national public interest that Member States be able to protect their positions in negotiations, as well as ensuring that information is handled in a way that would not be discordant with domestic approaches. Therefore, the Government's position is that, in any given case, the institution in question should be required to accept Member States' objections, provided that reasons have been given. At the very least, the right of the institution to assess the adequacy of the reasons given by the Member State should be limited to establishing that they fall within one of the grounds specified in the Regulation, but not to assess the weight of the objection.

Finally, on the issues of 'bulk' requests (Article 6(2)) and time limits for replying to confirmatory applications (Article 8), the Government proposes to support the Commission's proposals.

I hope that this answers the outstanding concerns held by the Committee.

Letter of 30 January 2009 from Lord Roper, Chairman of the European Union Committee, to the Rt Hon Caroline Flint MP, Minister for Europe

Thank you for your letter of 11 December. It was considered by Sub-Committee E (Law and Institutions) at its meetings of 14 and 28 January. We are grateful for the helpful outline of the Government's position on the substantive changes incorporated in the proposal. We decided to retain this matter under scrutiny and invite you to assist the scrutiny of this matter as soon as a mutually convenient date can be arranged.

This letter sets out our comments and the matters we would like to discuss with you in the order in which they appear in the proposal.

Article 2

The Committee sympathises with the practical reasons why you can support the extension of the category of those entitled to seek access to documents, but would be grateful for your view on whether this can be done in an instrument with a legal basis of Article 255.

The Committee notes that you support the exclusion from the scope of the Regulation of court documents and documents seized in the course of an investigation. However we should be grateful for clarification on the following:

It appears to us that the court document exclusion is not limited to the documents of the European Court of Justice and the Court of First Instance. If so do you support such wider exclusion (which corresponds to that provided by the present Regulation)?

In respect of the exclusion relating to investigations in Article 2(6), we would be interested in your views on the automatic long term exclusion of any document containing information gathered or obtained from third parties in the course of an investigation, including when there has been no compulsion exercised?

Do you support the removal of the public interest test in respect of these matters?

Article 3

The Committee supports the clear extension of the right of access to electronic documents and information contained in databases.

It notes that you do not consider the justification provided by the Commission for excluding draft documents from disclosure compelling. We would be interested in your view of the precise effect of Article 3(a) and would like to discuss the merits of this exclusion.

Article 4

The Committee notes that you will be seeking to ensure adequate protection for legal advice, and looks forward to discussing this issue with you.

It supports the maintenance of legal professional privilege as found in domestic law in respect of documents arising in the course of litigation. However we are inclined to support the principle set out by the ECJ in the joined cases of *Turco and Sweden* (C-39/05P and C-52/05P) that there are different considerations when legal advice is provided in the course of the legislative process. As the Court has indicated, openness in this context is important in strengthening democracy by facilitating proper scrutiny of legislation. This points to the disclosure of legal advice in respect of legislation unless there is a genuine threat, considered on a case by case basis, that disclosure would undermine the institution's public interest in receiving frank, objective and comprehensive legal advice.

The Committee notes that the existing exception in Article 4(3) for documents whose disclosure would seriously undermine the institutions' decision making process is carried forward to the proposal without substantive change. As the Commission itself remarked in its 2004 review of the Regulation this test can be difficult to apply. More recently, in its report on the application in 2007 of Regulation 1049/2001, it asserts that it is making more and more documents in the legislative field available to the public directly without waiting for access applications. The European Parliament has called for greater openness in relation to legislative decision making. We would like to discuss whether there should be

greater openness in the legislative process (including disclosure of Council Working Group papers) by ensuring that Article 4(3) is restricted to genuine cases where non-disclosure is justified.

Article 5

The Committee shares your concerns on the interaction of this proposal and the Data Protection legislation. It considers that primacy should be given to the Data Protection Regulation in resolving the tension that can arise between disclosure of documents and protection of the privacy of personal data.

On the question of the disclosure of non-sensitive documents originating from Member States we would be grateful if you could clarify the circumstances when documents will be regarded as originating from a Member State and be subject to this provision and when documents, although authored by the Member State, will be regarded as outside of this provision because they were generated by the Member State in its role as a Member of the Council. Do you consider that the proposal should include express provision to make the distinction clearer?

The Committee notes that your position with regard to Member States' documents would result in less transparency than under the existing Regulation as interpreted by the ECJ in the *Sweden v Commission* case (C-64/05P) and could affect Parliamentary scrutiny. It also notes that the Commission's proposal could decrease transparency by allowing a Member State to invoke specific provisions of its own legislation preventing disclosure. We are not at present inclined to agree that the present position is inappropriate but would like to discuss this further with you.

Articles 6, 7 and 8

The Committee supports the changes proposed for Articles 6, 7 and 8 with a view to handling bulk applications and slightly relaxing the deadlines for handling applications for disclosure.

Finally the Committee would like your view on whether the proposal should contain measures to deal with abusive applications.

Letter of 6 April 2009 from the Rt Hon Caroline Flint MP, Minister for Europe, to Lord Mance, Chairman of Sub-Committee E (Law and Institutions) of the European Union Committee

At the recent evidence session I attended on the recast of the Access to Documents Regulation, I agreed to write on a couple of outstanding issues.

Firstly, Lord Tomlinson raised the report of Robert Galvin, internal auditor of the European Parliament (EP), and asked whether the Government had encouraged the EP to publish the report. Although we have not raised this report in particular with the EP, the Government has consistently pushed the EP to ensure full transparency on questions of MEP expenses, including from its internal audit reports. We therefore welcome the fact that the EP has now passed this report to the European Anti-Fraud Office (OLAF).

The Government has also pushed hard for reform of MEPs' staff allowances (to be implemented following the June elections), and a new system of control which will regulate the paying of these allowances. These new rules are an important step forward. They will ensure that MEPs will only be able to claim for actual travel expenses and staff allowances based on receipts.

Lord Blackwell also asked the Government's view as to the grounds that the European Parliament might seek to apply should it wish to withhold this document from disclosure. However I think this would be more a matter for the EP, should they in fact wish to withhold it, and I do not think that it would be appropriate for me to speculate on this point.

Secondly, you raised the point that Article 2(5) of the Commission's proposal may be read as applying not only to European Community courts, but to pleadings which are held by an institution from any court. You were right to query it: we continue to seek clarification from the Commission on the intended scope of this proposal, and will revert to the Committee when we have the Commission's response.

APPENDIX 3: RECENT REPORTS

Previous Reports from the Select Committee

Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report, Session 2008–09, HL Paper 76)

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister for Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: Evidence from the Minister for Europe and the Slovenian Ambassador (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62–I: Report, HL Paper 62–II: Evidence)

Previous Reports from Sub-Committee E

European Contract Law: the Draft Common Frame of Reference (12th Report, Session 2008–09, HL Paper 95)

Procedural rights in EU criminal proceedings—an update (9th Report, Session 2008–09, HL Paper 84)

Initiation of EU Legislation (22nd Report, Session 2007–08, HL Paper 150)

Green Paper on Succession and Wills (2nd Report, Session 2007–08, HL Paper 12)

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 18 MARCH 2009

Present	Blackwell, L	Norton of Louth, L
	Bowness, L	O’Cathain, B
	Burnett, L	Tomlinson, L
	Kerr of Kinlochard, L	Wright of Richmond, L
	Mance, L (Chairman)	

Examination of Witnesses

Witnesses: THE RT HON CAROLINE FLINT, a Member of the House of Commons, Minister for Europe; MS ALISON ROSE, Head of the Europe Communications, Institutions, Treaty and Iberia (CITI) Group, Foreign and Commonwealth Office; and MR GERRY REGAN, First Secretary, Legal, UK Permanent Representation to the EU, gave evidence.

Q1 Chairman: Thank you very much, Minister, for coming before the Committee with your two advisers. We are obviously on air. There will be a transcript which will be made available in case there are any errors. As regards declarations of interest, I believe the public have a document which indicates them and, in so far as any of them is relevant, I would ask Members of the Committee to declare it when they ask a question. I do not think I have any relevant declaration myself. The matter that we are dealing with is the access proposal. Do you want to introduce those who are with you?

Caroline Flint: Yes. This is Gerry Regan. He is the First Secretary, Legal, at UKREP and he is leading the working group negotiations for the UK in relation to these changes to the regulation. This is Alison Rose, who is head of our Europe section. They have been very much involved in this for some time and I am sure they will be ably assisting me on this occasion.

Q2 Chairman: We want to start with question nine, which is on the list which I know has been supplied. Does the Government support the European Parliament’s longstanding and quite vocal calls for greater transparency and openness in practice in the decision making process in Council?

Caroline Flint: Yes, we do. The fact that the Government has introduced its own freedom of information legislation in recent times is an indication of our efforts to open up opportunities for people to have access to information in terms of our Government. We believe that whilst you should enable transparency and openness in the Council we also need to be mindful about how this has to be balanced with the need for legislation to work but also understanding that Member States are involved

in quite long negotiations and are concerned, if there is any concern, that we do not get the balance right and in some way, in seeking transparency and balance, create a situation whereby negotiations cannot work as well as they might be. You create a situation inadvertently where people look for other ways to have those negotiations outside of the frameworks that we currently have. We do want to avoid displacing of meaningful discussion and debate from the formal arena but at the same time there is much we can agree with the changes that have been suggested to the regulations. We are still I think, at this point, in a position of negotiation, working through the detail.

Q3 Chairman: Can I follow up what you said about balance? The present balance, leaving aside the specific subject of legal advice, is stated broadly in Article 4. Is there any objection in principle to the present provisions of Article 4.3 and 4.4 whereby access may be refused if disclosure would seriously undermine the institution’s decision making process but may have to be given if there is an overriding public interest in disclosure? Does that in your judgment and experience properly balance the requirements of transparency and on the record decision making with the need for some degree of privacy in policy formulation and negotiation?

Caroline Flint: Our view is the application of provisions in both Article 4.3 and 4.4 by the Council to date has not caused any problems. The Commission’s proposals to amend these articles we do not think make particularly substantive changes. We agree with this principle because we think it is important to strike the right balance between transparency and privacy in policy formulation and negotiation. The judgment of the ECJ in the *Turco*

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case has caused the UK some concern and that is why we think it is important in the recast to make sure that some of those protections are still maintained in Article 4.

Q4 Chairman: Let me ask about the actual attitude to the application of those provisions. Is it right that it is the Government's present attitude that it does almost always seriously undermine the institution's decision making process to make public disclosure of any working papers or non papers, as I think they are also described, texts or other documents which are created or exchanged during the decision making process, other than formal Commission or Member State proposals?

Caroline Flint: What we and other Member States need to consider is what in practice any more changes, particularly from the European Parliament, might mean in relation to how we do formulate policy and also how that does affect our negotiating position in the Council. Our initial view is that these papers are helpful in providing space to think, reflect and negotiate. I am not clear about how that will be helped by a disclosure. I think in this debate that we need to be mindful about the difference in terms of the role and responsibilities of the Council and the ministers who are represented in those forums and the difference between the accountability of those individuals to their Member States in these negotiations and those of MEPs, who I think have an important role but a slightly different role and a slightly different level in terms of the engagement on these issues.

Q5 Chairman: Is the broad answer to the question I put that the Government does think it would seriously undermine the decision making process to make any sort of public disclosure of negotiating documents?

Caroline Flint: I think it could contribute to that, yes. Inadvertently, it would lead to something that would not be very satisfactory and people would possibly find other ways to have these conversations and talks. It would not allow the candour that is necessary in these discussions and negotiations. I do not think that in itself would be helpful in terms of policy making.

Q6 Chairman: Just to take a specific example, we have referred elsewhere to the publication on Statewatch of one of the Presidency's working documents, of the type which this Committee rarely but occasionally sees, and the commentary by Professor Steve Peers. Do you regard that as helpful or unhelpful to the progression of such matters?

Caroline Flint: I do not think it is very helpful. I was talking to my colleague here about this yesterday who sits in some of these meetings where this happens. He

said to me that these are a bit of a précis or summary of what goes on and they do not necessarily completely reflect all the tone of the debate. That is part of the problem. Clearly, the Committee has had access to this particular document. It is not something provided by us. It is a snapshot and in the context of trying to develop policy it does not necessarily provide the coherence of these negotiations which, from my experience in this job but also previously when I was the Home Office Minister, can take some time to pursue—if not months, years—and therefore to take these discussions and the stances of Member States out of context I am not sure adds to helpfulness. It could add up to a distraction. The problem as well is just how candid or open would Member States be if they thought that at any one time their thoughts on this might be published. Given that this is a negotiation where we work with other countries and work to seek outcomes on points, I am afraid these do not always present the clarity and the totality of the discussion. To that end, I do not think they are helpful.

Mr Regan: I would echo the point that at the moment there is not a transcript taken of these meetings and they are not recorded. The understanding within the meetings and by those taking the notes, as far as I am aware, is that they are an unofficial *aide-mémoire* for the discussion and provide something of a snapshot but are not intended to be a comprehensive record.

Q7 Chairman: Is there not a legitimate feeling that this is a legislative process? Legislative processes here and elsewhere are normally in public. Would not greater transparency in the Council's legislative process, particularly in its dealings with other institutions, not only enhance its general accountability and enhance the image of Europe in the public eye but also benefit the process of scrutiny by national parliaments such as we undertake here?

Caroline Flint: We do endeavour to share information. That is part of the role of national parliaments in terms of our scrutiny function in committees. Certainly in my role as Minister for Europe I have had some discussion particularly with colleagues in the House of Commons about how I can better keep them informed of some of the developments that are happening. That is something we are happy to work towards. We also should be mindful that the European Parliament is also part of the codecision making and also they are partners to the negotiations. It is the Council negotiating often with the Parliament. We might have some rather different views about how we want to see the end result to a legislative proposal. Sometimes a parliament, because of the very nature of MEPs and how they work, is not necessarily answerable to a Member State or a government as such. It is much more led by protecting personal interests and what

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have you. I think it is a very different context in which ministers and heads of state represent their respective countries in the Council. Therefore, at the point at which, particularly on codecision making, the Council and the Parliament come together we should remind ourselves it is a negotiating process as well with them.

Q8 Chairman: That is pretty open.

Caroline Flint: It can be pretty open at an early stage before the Council has come to its decision. Would you really want to completely show your hand in terms of where you are? Part of the Council's work is to try and find amongst 27 Member States a coherent proposal for a way forward to negotiate with the Parliament.

Q9 Lord Blackwell: Does the Government's attitude towards this balance between transparency and protection of working processes in the European Union mirror the attitude that the Government would take domestically under the Freedom of Information Act, on the balance between release of Cabinet papers and other Government papers? Is it exactly the same set of principles or is there a difference in the way you view papers in the European context?

Mr Regan: I think the principles are broadly the same but inevitably there are some differences because the Community legislation reflects the traditions of the 27 Member States which are quite disparate on the question of transparency. It also reflects, as the Minister has said, the rather different constitutional and administrative arrangements that exist within the European Union and the fact that there is the codecision process. The Council has a role both at the stage of negotiating internally the legislation and then negotiating and agreeing the legislation with the European Parliament. I do not think we can draw exact parallels but the broad principles, as the Minister has said, of achieving a balance between as much transparency as possible whilst also allowing space to think and to negotiate without inadvertently driving debate and discussion off line, out of the Council, away from the institutions, into the corridors and the cafes of Brussels which are full enough already, if I may say so, my Lord, without needing to have any more custom directed towards them by those who are discussing and formulating policy.

Q10 Lord Tomlinson: Minister, I understand your enthusiasm for transparency and also the caveats. The drive is coming from the European Parliament in the name of transparency. Does the British Government have any view at all? Are they encouraging the European Parliament to demonstrate their commitment to transparency by

for example publishing the report by Mr Robert Galvin, the internal auditor of the European Parliament, a report which is coming out in dribs and drabs by leaks, which seems to be making all sorts of allegations? It is obviously critical of some Members but is condemning the reputation of the overwhelming majority because of the secrecy surrounding the report of the internal auditors. Is the Government pressing for this report to be published, because it is tarnishing the reputation of the institution and of the institutions?

Caroline Flint: I have not personally been given a Government position on that particular auditor's report.

Q11 Chairman: Would you like to take it under advisement?

Caroline Flint: Yes. I am happy to look into that. We do recognise that there is a need for a chance to look at the transparency that is needed to make sure people feel that access to documents, understanding of the processes by which decisions are being made is understood and valued. That is why we are engaging with this. For the most part, a number of the proposals made by the Commission in terms of some of the areas we agree with. We also would agree that outside of the regulation itself there is a number of actions that the Commission and other institutions could take to make access to information more generally easier to find. I think your Committee mentioned about the websites, about the registering of documents, the updating of documents, in response to the Green Paper. Again, from what I understand, those are very important in this debate as well. We do just need to be mindful in all of this. We are still negotiating. We are still working this through and I hope we can come to a point where all parties, the Parliament, the Council, the Commission and individual Member States, can feel that we have done as much as we can to make sure we can be as open as possible. I understand what you say about things coming out in dribs and drabs and people putting things in the public domain but, to a certain extent, no government or institution has absolute control if someone wants to put something on the net or something else. That is something we just live with. I would not want to overturn the whole process of making reasonable decisions about what is appropriate to put in the public domain at a given time based on the fact that people can just put documents out there and there is not a lot we can do about that.

Lord Burnett: Lord Tomlinson's question is a very popular one, which we discussed before you came in. Perhaps you would consider raising this matter on a government to government basis. It would be rather less hypocritical if the European Parliament were to

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demonstrate its *bona fides* by making disclosure of certain things that affect its own internal dealings.

Chairman: I think it comes back to the basic point about confidence in Europe which I think the Parliament itself and certainly the Court has emphasised derives to some extent from transparency.

Q12 Lord Blackwell: If the Minister is prepared to come back to the Committee on this point, I wonder if you could also indicate if they are able to withhold it where under this regulation they would find the grounds on withholding?

Caroline Flint: We will do some research on that and get back to you as soon as possible.

Q13 Chairman: Can we go to the first question? This is related to two categories of documents which would be covered under regulation four relating to court proceedings and investigations but specifically now it is proposed to be covered on a blanket exclusionary basis under Article 2. The exclusions would mean less transparency than at present because there would be no over-arching condition requiring disclosure where the public interest so demands. Why does the Government support those changes to introduce blanket exclusions?

Caroline Flint: On court documents, our understanding is that exemption on this issue already exists in the regulation and therefore the Commission proposal merely provides some legal certainty. In terms of transparency, this will exclude court documents from the regulation but the Court would argue that it does in any case.

Q14 Chairman: The essential difference is that the present Article 4 excludes court documents unless there is an overriding public interest in disclosure. The regulation will now have a blanket exclusion of documents submitted to courts. There will not be any qualification. That is the difference.

Mr Regan: It is. The explanation given by the Commission for this is that the Court of First Instance and the European Court of Justice have their own rules of procedure and statutes of the court for access to pleadings. Those rules are part of the Treaty and therefore there is a potential conflict at the moment between the rules of the courts for access to pleadings and the provisions of the access to documents regulation. Our initial analysis of that explanation is that that appears to be correct. We therefore think it is appropriate to avoid potential legal uncertainty in not having two sets of rules in place. We also note that it is in line with our own freedom of information legislation that court pleadings are normally confidential between the court and the parties. Whilst there would be some reduction in transparency for the reasons that the

Commission has given and indeed for the reasons of consistency with our legislation, we do think at the moment that that is justified.

Q15 Chairman: Is not the present draft too broad because it does not confine itself to the European Court? It applies to all courts. It would apply to domestic courts anywhere in the world if the institutions happened to have what might be extremely relevant documents which had been sent to them even voluntarily.

Mr Regan: The intention is to apply to the pleadings before the court of first instance and the Court of Justice. That has been my understanding.

Q16 Chairman: Maybe it is a drafting point but can we just ask you to take it into account? If it is intended to be confined to those courts, one understands it because they are European courts within the European sphere and a request can be made to them but, on the face of it, it applies to any court.

Caroline Flint: We will do.

Q17 Chairman: Can I move on to the second question? You said that court documents originating from the institutions themselves would remain disclosable in your letter of 11 December to Lord Roper. We understand that to mean disclosable where an overriding public interest requires under the present Article 4.2. The Statewatch website document, the Council's secretariat paper, reports that you argued against that. What is the Government's attitude?

Caroline Flint: Negotiations are still at a pretty early stage. We have yet to get into the detail. The point was made in the context of concerns that the content of a third party pleading could often be obtained by the contents of the institution's pleadings. We are keen to protect the content of our own pleadings. The issue here is what becomes the ownership of the institution, the Commission and the Council. We believe access to those third party pleadings should be governed by the rules of the Court of Justice and the court of first instance. Again, our own pleadings should remain confidential so that they do not result in external pressure or criticism. The issue is about what becomes the ownership of the institution and moves out of Member States' domain. Clearly, there are sensitivities there about what might be disclosed and what authority we would have as a Member State, I understand, in terms of having a view as to whether they should be disclosed or not. That is part of the worry in terms of what is the property of the Commission or the Council and what is the property of the Member State.

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Mr Regan: The report contained in the Council secretariat paper is not entirely on all fours with my recollection of the working group, but it was a preliminary discussion regarding these issues, certainly not Member States setting out their final positions. The point was raised, as the Minister has said, during those discussions that the institution's pleadings themselves could contain details of third party pleadings. In the context of a discussion, I indicated that I could see the force of that point and thought in broad terms it should be something that should be considered and looked to address. We have not started the meaningful negotiations in the Council on this proposal yet. That pleasure awaits us. The intention was always to have a first read through of the proposal, initial comments, thoughts, discussions, positions, and then return to an Article by Article negotiation. This is very much in the nature of a preliminary position.

Q18 Chairman: Your basic position remains as in the letter, does it, that court documents originating from the institutions would remain disclosable?

Caroline Flint: I think it is where there are third party pleadings that form the basis of those institution documents where we then would lose potentially some rights in terms of their disclosure.

Q19 Baroness O'Cathain: I would like to get some simplicity into this, if there is a hope of getting simplicity in something like this. Is there an area where working papers in which we all try and press the boundaries and working papers where you come up with the blue skies thinking? Normally, in anything we are preparing, certainly for this House, we would not necessarily want anybody else to see it if it is only in between people of your own party or whatever. We are not asking about that sort of disclosure. Once things get into a more fluid state, where the positions are taken and the argument goes on, is it not in the interest of getting greater support for the European Union as a whole that there is not all this obfuscation because it really looks like a dog's dinner to somebody like me? I just feel that, on the basis that an awful lot of people operate—not in government; I am talking about business now—on the basis that knowledge is power so they keep all the knowledge to themselves and they only give out bits of it and it does not actually help the general public have any great confidence in the organisation as a whole.

Caroline Flint: There are matters about whether a proposal is put up and there are draft working documents. Yes, in many circumstances I think some of those can be shared and provided. The European Union, as they have done with this, produce Green Papers. There is consultation and we have our scrutiny opportunities here as well and then there are

other forums outside of Parliament into development and policy. There is information there that gives a sense of what are the ideas, what is the problem that the Commission and others are trying to resolve. When it gets into the negotiations, that is where there is the sensitivity about how that will develop. The other side of it is where there are particular actions that the Commission is taking, for example, to see whether there has been an infraction or where they are investigating a particular situation, where there may be other third parties who may wish to give information to the Commission and may be less likely to come forward if, at the start of the proceedings—

Q20 Baroness O'Cathain: They do not want to be named.

Caroline Flint: If it was in court, if they are a supplier to a major company that they believe has broken some rule or whatever, so I think there are different types of tasks that the Commission has for formulating policy with the Council and the Parliament. Then there is the enforcement and implementation policy. In some of those areas that is where it does become a little more difficult about commercial confidence, although recently they did change the regulation to take account of where documents would be disclosed if the paramount interest was a threat to the environment and emissions. In other circumstances, I think it is also about creating a space, not just for politicians and heads of state to discuss policy, but for others to come forward with information in a way that they feel they could be protected to expose something that needs to be investigated and dealt with, whether it is a company or maybe even a Member State, not working in line with what they have signed up to or what the rules are that govern their practices.

Chairman: The question is why a blanket ban. Article 2.5 and 2.6 introduced for the first time blanket exceptions and there is no let out in cases of overriding public interest or environmental cases or anything like that. That is talking about third party documents, the last sentence of Article 2.6.

Q21 Baroness O'Cathain: It does mean that some things are put into the all too difficult basket and, if there was greater transparency, there might be greater clarity on the decision in the end and it would be for the benefit of the Union as a whole.

Ms Rose: On question three, it goes back to what the Minister said. If third parties are going to give information to the Commission they want to be absolutely sure that it is not going to come out. That is really important. The Commission does have these legal powers.¹ To go back to Council negotiations, I

¹ *Note by witness:* I'm referring here to the Commission's legal powers of investigation.

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want to differentiate between what is the UK's overall negotiating objective, which of course we share with you in scrutiny, and the tactics by which we deliver those negotiations. If you take a snapshot at every stage and say, "Why are you doing that?" there is a tactical element. In the Council it is a negotiation in its own right and therefore, within the negotiations, yes, you have the right to know where we are going, but it is not helpful to the UK achieving its position if we reveal the tactics, the how we are getting there.

Caroline Flint: Sometimes it might be other allies who support us and so it might be the best Member State to articulate that at any one time. We might be better holding our fire for something else. That is common sense.

Q22 Lord Bowness: You have just been talking about discussions, negotiations and implementations and that is where the true difficulty starts but is there not also a difficulty right at the very beginning? I think Baroness O'Cathain talked about blue skies thinking. If there was a problem, unspecified, and the commissioner responsible asks various experts to produce papers perhaps in response to an idea of his, some of which will go absolutely nowhere because other people have said, "Frankly, Commissioner, this is the daftest idea I have ever heard of", we are not really suggesting, are we, unless it does actually go somewhere, that all that preliminary thinking and advice should somehow be capable of being exposed?

Mr Regan: The regulation as currently drafted does include all documents held by the institutions. At the moment the preliminary thoughts of the Commission and that kind of blue skies thinking is within the regulation. If an application is made for disclosure, the burden is on the institution—in this case it would be the Commission—to demonstrate to quite a high standard that not disclosing those documents would be justified. The basic premise of the regulation at the moment and of the position of the Parliament is that all documents held by the institutions should be within the scope of the regulation.

Q23 Lord Bowness: What is our position? If the idea goes forward, that is one thing. If it is abandoned and another line of thinking altogether is pursued, if you are going to enforce that in the open, are you not in fact going to stop people in a way having original thought and, worse, you are going to stop somebody giving frank advice to whoever is the high profile figure who has had the original thought. If he does give advice, he will do it over a cup of coffee and nobody will ever know anything about it at all.

Caroline Flint: We are trying in this discussion to find the space for people to have original thought and to say sometimes things that might sound off the wall in order to have that debate. Again, it is about how you

create that space to allow people to come forward with ideas without necessarily having that space spoiled by a blow by blow development of thinking in certain areas. On a lot of consultations that come out of the European Union from what I have seen, they do often cover up a whole number of things that probably are not going to see the light of day, but they put it in there. If I look at consultations we have in this country, not just by Government but by other agencies as well, they often put everything in the consultation for people to think about. That is just the way it is but we end up with a lot of newspapers picking on the one thing in the consultation that probably is not going to see the light of day, saying, "My goodness, this is not going to happen, is it?" I think there is quite a lot of that sort of discussion. Are you saying would it serve things well, as a policy is developed, for people to know what ideas were not taken forward?

Lord Bowness: With respect, once something gets into a consultation paper, okay, it may not turn into legislation but it has gone into the public domain and what is behind what is in the consultation paper is fair game. What I am talking about are people attempting to have original thoughts to take advice on original thoughts and they have to dump something without it going any further. I am talking about stuff that goes no further and I understand Mr Regan was saying, as the regulation is currently drawn, in theory everything that I am talking about would be there. Do we think that is a very good idea?

Q24 Chairman: Can you tie the answer into questions four, five and six which deal with the scope of the documents? I am not quite sure what the Government's attitude is now. In your letter you told us that you were concerned about the limitation, because the limitation is a document formally transmitted by an institution to one or more recipients or otherwise registered or received by an institution. Are you still concerned about that limitation? Are you going to support in Council a wider definition which might embrace some of the documents Lord Bowness has been asking about?

Mr Regan: Our position is that we have not supported the Commission's proposal to take out of the scope of the regulation draft documents. I think inevitably the result of the Commission's proposal, if it was to go forward, would be along the lines of what Lord Bowness has suggested. There would be a number of documents and they probably would be that type of document, initial thoughts, early drafts, internal emails between Commission officials. I think these are the types of documents which on a number of occasions would be taken out of the scope of this regulation. At the moment, we have not been persuaded by the Commission's arguments on those points. Their suggestion would not be on all fours

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with our domestic legislation which does not include a blanket exemption for draft documents. We think the role of the Commission is a different one to the role of the Council and, as things stand, the suggestion to narrow the scope of the regulation in this area is not one that we are persuaded by. I think Lord Bowness has gone to the heart of the issue, which is the balance to be struck between the principle of transparency and at the same time the good functioning of the administrations and the legislature. That is the balance that we are trying to strike in our negotiations.

Q25 Chairman: Can I move on to another area where the same balance is being struck? That is specifically in relation to legal advice. Are we correct to understand from the Council secretariat paper that, when you said in your letter to Lord Roper that you would be seeking an adequate level of protection for legal advice, what you are in fact seeking is permanent, blanket protection for legal advice? Are you not in that respect seeking to reverse the *Turco* and *Sweden* cases?

Caroline Flint: We did argue before the ECJ that this would be detrimental to the effective functioning of the Council and we do not think the ECJ judgment strikes the right balance. That is our view today. We believe that the Council needs to receive frank and open advice in order to make an informed decision. I think that requires a high level of confidentiality for legal advice. We are happy to look at any proposed amendments in the regulations which would achieve this objective, but we do think legal advice and being able to receive it in a confidential way is vitally improvement.

Q26 Chairman: Is it not the same question? Why blanket protection? Why not the present exception which permits non-disclosure if the overriding public interest requires?

Mr Regan: The way in which the Court of Justice has interpreted those exemptions in the *Turco* case in our view gives an insufficient level of protection to legal advice. The result, as I am sure you know, is that there is now a presumption that legal advice will be disclosable unless the Council can show on an individual basis that it is justified not to. The Court has set that standard higher than we expected, I think, if I can be frank about it. The current position following the Court of Justice's judgment in *Turco* is not one we feel that provides sufficient protection for legal advice. Our concern is that if legal advice is not to be protected that could have a detrimental impact upon the advice that is given and whether it is given at all. We do not think that is in the interests of the Council or indeed of transparency.

Q27 Lord Wright of Richmond: I am encouraged as a result of Mr Regan's last two interventions to revert to Lord Blackwell's question. To what extent is it fair to say that your negotiating position is to produce a result which is as near as possible to British domestic legislation?

Caroline Flint: We have pretty good domestic legislation in this area but we are also mindful of the European Union and its institutions are somewhat different. We also have to be mindful that in the Council there are 27 of us trying to reach a way forward. Clearly, within the Council there are different groups of countries who have come to this with a slightly different attitude and culture. Then we have the Parliament as well, working with them too. We are trying to find a way forward that we feel protects what we think is right but at the same time recognises that the institutions are somewhat different. Again, we need to be clear about the sort of information that the institutions of Europe have responsibility for that does not touch on where we have our own documentation and our own access but also privacy in that respect. Part of this is how we protect that. Part of this debate for us has been very much hinged around when does something for a Member State become the property of the Commission or the Council and therefore they have power to decide how they want to deal with that. This is at the heart of some of this debate, I believe.

Q28 Lord Kerr of Kinlochard: Can I come to Article 3 for a second? I heard a distinction being drawn between the Council, because it is a negotiating body, and the Commission, the internal emails and discussions in the Council perhaps deserving more protection than those inside the Commission. If that is the distinction, it is not one I really understand. I was Secretary-General of a very small institution that had a short life. I drafted various treaty articles and they were ruthlessly demolished by my staff and a far better product was submitted to the Convention. I would have hated it if my first drafts had been disclosable to the outside world. It seems to me that that is true even of a big, powerful institution like the Commission, and should be true of it. I do not understand why we, if that is indeed our position, think that their internal emails, their notes to each other, should all be disclosable whereas Council documents or non-documents and non-papers should not be.

Ms Rose: I would distinguish in the Commission, where people are expressing their own personal opinion, from the Council—

Q29 Lord Kerr of Kinlochard: I do not buy that. The Commission's view is as a result of debate between people who feel very strongly about their views and how they personally think the law should be applied.

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Ms Rose: The second point is that the Commission are allowed to apply the exemption where a document contains opinions for internal use as part of deliberations and preliminary consultations, if they think that disclosure would seriously undermine the decision making process of the Commission.

Q30 Lord Kerr of Kinlochard: I thought you were saying that they should not have that protection?

Ms Rose: No. What we are saying is it should not be excluded from scope altogether. It should be within scope but then they have the right to apply the exemption. What the Commission is saying is that they should not even be considered.

Caroline Flint: That is how it works here as well. What we are advocating is the UK system in this particular matter.

Q31 Chairman: Can we move on to questions 12 onwards? Can I start with the two preliminary legal questions? Would it be right in the light of the proposed Article 5.2 to understand the concept of third party in Article 5.1 as entirely excluding any Member State, despite the contrary definition of third party in Article 3(b)? It is certainly at least a drafting point here but can you give us a substantive answer? What does Article 5.1 embrace?

Mr Regan: I think the question is correct. Member States are excluded in Article 5.1 entirely from the definition of third party because the practice of the Council is that, once a document has been formally sent to it by a Member State in the course of the legislative procedure, that document becomes the sole property of the Council. It is for the Council to then decide as a body whether access should be granted or not. The criteria that are applied are the Article 4 criteria.

Q32 Chairman: That may answer the next question which is: what is the point of the distinction in the proposed Article 5.2 between (a) documents transmitted by a Member State in the framework of procedures leading to a legislative act or a non-legislative act of general application and (b) other documents? Do I understand that (a)—in other words, documents transmitted by a Member State in the framework of procedures leading to a legislative or non-legislative act, become documents of the Council and are therefore dealt with solely in the Council's discretion under Article 4?

Caroline Flint: Yes.

Q33 Chairman: I think the answer to question 14 is clear from your previous answers, is it not? The Government wishes to achieve a situation where there is in fact blanket, permanent protection from disclosure to anyone of its own statements of position

during negotiations, so it would wish the Council to apply a very stringent test to disclosure.

Caroline Flint: Yes.

Q34 Chairman: As to 15, going to other documents, perhaps you can help us as to what sort of documents we are going to be talking about primarily. The second sentence of the proposed Article 5.2 enables the institution to appreciate the adequacy of a Member State's objection to disclosure only in so far as it is based on exceptions laid down in the regulation. Can you help us as to what that means? Does it mean that it is only possible to review such an objection if it falls within Article 4 and not if it is an objection under domestic legislation?

Mr Regan: That is our interpretation, yes. To go back to your question on what type of document is within the remit of Article 5.2, these are the documents originating from the Member State which are provided to the institutions when the Member State is not acting as a part of the Council in its legislative capacity, so documents provided by the Member State in its other capacity or capacities within the European Union.

Q35 Chairman: Can you give an example?

Mr Regan: An application for clearance under the state aid rules would be one. As I am sure you know, the Member States frequently cooperate with each other within the Council or within the Commission regarding the application of Community law. In those circumstances where a Member State may provide a document—a purely hypothetical example might be the area of aviation security and the types of procedures that a Member State is implementing in its domestic airports—those would be the types of document that we would consider as falling within this category of documents originating from a Member State but not when it is acting in its legislative role as part of the Council.

Q36 Chairman: Are you not in your attitude here—it is not actually the regulation in its terms—seeking again to alter the current European Court of Justice jurisprudence in another Sweden case? In other words, there will no longer be an overriding possibility of disclosure under Article 4 if, under the domestic legislation of a state, there is some specific reason why this should be treated as confidential. That will be binding. Is that not what you are aiming at?

Mr Regan: That is the Commission's proposal. It does not reverse the ruling in Sweden because, if the only grounds that the Member State advances for not disclosing are those which fall under Article 4 of the access to documents regulation, those reasons must be provided by the Member State. The position that the United Kingdom and the Commission had

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thought existed, which is that we believed that there was a veto for the Member State as to whether our documents should be disclosed or not, was overturned in the Sweden case and that position would not be reinstated. Where however the Member State national law covers the issue, it would be a matter for Member State national law to determine the matter. That we feel strikes an appropriate balance between the interests of the Member State and the interests of the Union. We also think it is consistent with the principle of subsidiarity and avoids again the risk that there are parallel systems in place where a person might apply for access under the domestic legislation, not be successful and then seek to apply under the access to documents legislation and have a different set of criteria apply. The possibility of a Member State's national legislation being taken into consideration as a factor was specifically discussed by the Court of Justice in the judgment at paragraph 84, where the Court indicated that it would be possible for the regulation in the future to include a Member State's national law if it was thought appropriate.

Q37 Chairman: Does it not lead to the slightly odd situation where Member States could in fact enact national law saying, "All our communications to the institutions are confidential" and thereby give themselves blanket immunity? Perhaps you say that is unrealistic.

Mr Regan: I suppose the lawyer's answer is that is not legally clear at the moment. There are two factors that, having seen the question, I have taken into consideration. The first is that recital 15 of the current regulation indicates that, "even though it is neither the object nor the effect of this legislation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between institutions and the Member States, Member States should take care not to hamper the proper application of the regulation and should respect the security rules of the institutions". Your Lordship will be aware of the over-arching obligation in Article 10 of the Treaty of the duty of loyal cooperation. This is only a personal and provisional view but I think it is highly debatable whether, if a Member State initiated domestic legislation with the sole purpose of avoiding the provisions of the access to documents regulation, the Court of Justice would consider that that was in fact a legitimate objective and way of acting.

Q38 Chairman: Can we just look at your alternative approach, question 16? This would be that if there is some overriding test of compliance with Article 4 before a Member State can claim to withhold or that such a document should be withheld, it should be sufficient simply for the Member State to give the

reason falling within Article 4 and then there would be no opportunity for the institution, the Court or anyone to assess the weight of the objection. Would that not be a bit of a farce and rather bad for the image of Europe, to have someone making an assertion which could not be tested for its weight by anyone?

Caroline Flint: The regulations are designed to provide access to the institution's own information and promote greater transparency. Member States' own freedom of information legislation should govern access to Member State documents. Anyone wanting a document that has originated in the UK should be able to apply to see it under our own FOI legislation. We think that is right in terms of where applicants should seek to find information from. Those permissions that we have in our own law would apply.

Lord Kerr of Kinlochard: I strongly agree with the Minister. Would it not be worse for the image of Europe if there was an institution in Brussels which set itself up to appreciate whether the reasons given by a Member State under its own law for not providing a document were or were not acceptable and reasonable? It seems to me that all the arguments of subsidiarity go with the Minister.

Q39 Chairman: Point noted.

Mr Regan: Although our position is that the institution should not look behind the reasons given by the Member State, those reasons would remain challengeable by the applicant in front of the Court of First Instance or the European Court of Justice. It would not be the case that the Member State could simply give its reasons to the institution and the matter would stop there. The institution would then communicate those reasons to the applicant and the applicant would then have the choice whether to bring a legal challenge against those reasons given by the Member State.

Q40 Chairman: The challenge under the proposed Article is only in so far as the reasons given by the Member State are based on the exceptions laid down in the regulation. In other words, on Article 4, not on domestic law.

Mr Regan: That is correct. The challenge before the European Court would be on the basis of the exceptions in the regulation. Of course, if an applicant wanted to bring a challenge against reasons given by a Member State under national law, certainly as far as the United Kingdom's legislation is concerned, there would be a domestic route available.

Q41 Chairman: This Committee is always interested in *vires* and Article 255 of the Treaty gives a citizen of the Union and any natural or legal person residing or having their registered office in a Member State a

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right of access to documents; and yet the proposal is to give anyone a right. That sounds very transparent but is the *vires*?

Caroline Flint: My understanding is that the existing regulation distinguishes between requests from those in the EU and those who have right of access to certain documents as opposed to those from outside. In practice, it is proving very difficult to administer this in any fruitful way. Rather like our own arrangement, which is that it is open to anyone to seek information under our own legislation, we are supporting the same in the EU. The alternative is possibly an even larger bureaucracy or administration to follow up who is applying and where.

Q42 Chairman: We understand that point. You are conferring by this proposal a positive right of access. The present position is that they are given it as a matter of grace. Is there any power in the Treaty, bearing in mind Article 255, to give everyone in the world a right of access?

Mr Regan: Our legal view is that there is not power under Article 255 to give a right of legal access to those who are not EU nationals or not resident in the EU. We have supported the objective but we have pointed out that, as a matter of competence, we do not think the *vires* exists. We have made that point to the Commission. That is our view, yes.

Lord Kerr of Kinlochard: You could not take away anything for a non-EU citizen. It seems to me that if you are conferring something extra it is unlikely that that is going to be challenged in any court.

Lord Blackwell: Listening to this, I have a lot of sympathy with the Government's position on the need for balance. We are saying in some cases that in principle we are in favour of lots of access but in the particular we are not. I wonder whether it would not be more transparent to turn this the other way round and say that in principle we are in favour of protection of working papers for these reasons and here are the specific instances where we would allow

access. It seems to me a slightly Alice in Wonderland world.

Q43 Baroness O'Cathain: Blue skies.

Caroline Flint: We are where we are. In preparation for today, I did have a look at where this conversation started, which was before discussions about the intergovernmental conference on the Constitution, I understand, so it has had quite a long journey. We are open to looking at better ways to do things. Under our presidency for example, for what it is worth, we did get agreement, when it came to a decision in the Council, to that being done in an open way and also when proposals are put forward which in the past was just not the case at all. Nobody could see anything that was happening in the Council. We are going to have to think about this area because there are going to be some changes potentially. I say "potentially" if Lisbon is ratified in terms of national parliaments and their role and their greater say in the process. I think it is fair enough to review these situations. Obviously factors in terms of technology and how it advances also have to be factored into this. As an MP, I can tell you that ten years ago I did not have any emails but we have them today and we have to learn to live with them, I suppose. Those factors have changed and the codecision making is much more part of the process of making legislation. That requires us to give some thought. Having said that, having given some of these areas some thought, it is also an opportunity to restate the case as to why it is important to ensure proper policy is developed. Sometimes we do have to hold on to some of those protections to allow debate to take place and also to have a conversation maybe about the context of what negotiation is all about and what the Parliament's role and the Council's role is in relation to that. We are negotiating with each other so we have different roles in all this. If as part of this process that gets more of an airing and more of a debate, I think in itself that is no bad thing.

Chairman: We are encouraged by your earlier reference to the role of this Parliament in this. Thank you very much indeed, Minister.