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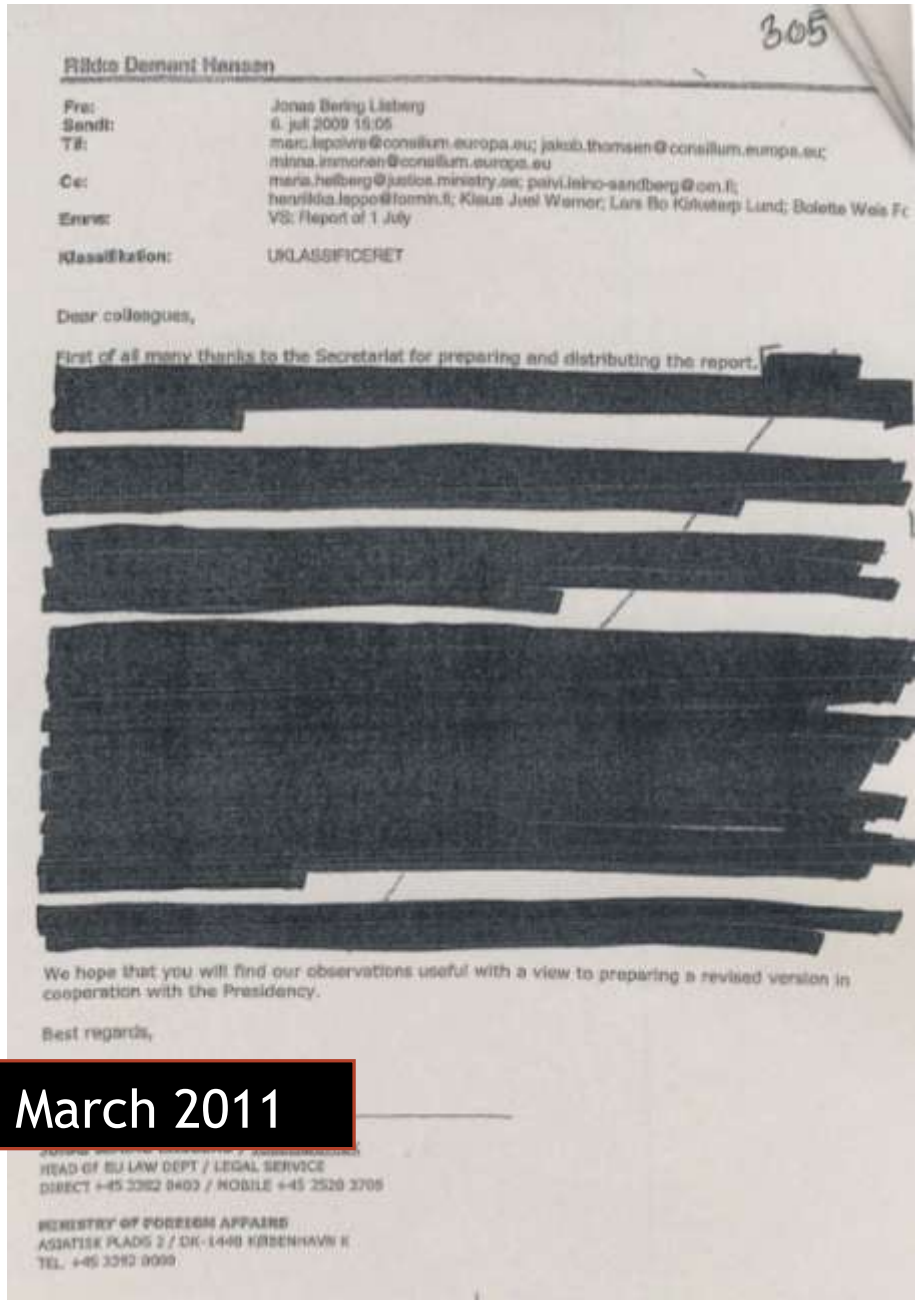
The Secret State of EU Transparency Reforms



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Emne: VS: Report of 1 July
Klassifikation: UKLASSIFICERET

Dear colleagues,

First of all many thanks to the Secretariat for preparing and distributing the report.

[redacted]

We hope that you will find our observations useful with a view to preparing a revised version in cooperation with the Presidency.

Best regards,

[redacted]

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21 March 2011

Acknowledgements

This report was researched, written and edited by [redacted], Pamela Bartlett Quintanilla and Helen Darbishire of Access Info Europe. Thanks to Lydia Medland, Victoria Anderica, and David Pardo of Access Info Europe for their comments and contributions.

Access Info Europe thanks Roger Vleugels and Nataša Pirc Musar for advice received during the research phase. We would also like to thank [redacted] and [redacted] for all their [redacted].

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The Secret State of EU Transparency Reforms

Executive Summary

This report recounts Access Info Europe's attempts to find out the positions being taken by the 27 Member States in the negotiation at the Council of the European Union on the reform of the EU's access to documents rules (Regulation 1049/2001).

In 2008, the European Commission published proposed amendments to Regulation 1049/2001. As an organisation dedicated to promoting the openness of national and supranational bodies, Access Info Europe had a particular interest in these reforms and wanted to know what position EU Member States were taking.

In the context of a court case against the Council for refusing full access to the documents relating to the reform of Regulation 1049/2001, Access Info Europe submitted requests to all 27 EU Member States in March and April 2010.

As of March 2011, after eleven months and with an appeal still underway in the UK, **16 Member States had provided no information** at all about their positions or any other documents relating to their role in the reform of Regulation 1049/2001 in the Council. Of these seven countries refused to release information, and four failed to answer.

Access Info Europe was **referred back to the Council by five countries** and others made reference to the use of Regulation 1049/2001 to obtain more information.

The remaining **eleven countries provided some (partial) information** but only part of what had been asked for, with at least some information being withheld on the basis of a range of exceptions which include protection of ongoing negotiations and international relations.

The **Netherlands** and the **UK** only released partial information after successful appeals by Access Info Europe against the refusals.

What position are Member States taking on EU transparency reforms?

Access Info Europe asked each of the 27 countries.

16 countries provided no information at all. Of these seven refused to tell us, four didn't answer, and five told us to ask the Council.

The Council had already told us to ask the Member States.

11 countries gave us some information but all applied exceptions to part of it.

Conclusion: it's impossible to know who is for and who is against a more open EU.

Of the eleven countries that provided information, five provided an outline of their position and the UK provided a position and some redacted documents which contained minimal information, so in total six countries provided only positions. Of the remaining five, four released documents, the great majority of which contained some redactions (those that did not were usually already in the public domain) and **Lithuania** confirmed that the documents provided by **Finland** were all that it had, so in total five countries released additional information.

In addition, the **Council of the European Union** provided one document, once again with the names of the delegations blacked out. This was as a result of the request forwarded to them by **Estonia** (which did not release any documents itself, but which did concede to provide a statement of position after Access Info sent a follow up e-mail).

Table A: Provision and non-provision of information by EU 27 Countries

Information Received		No Information Received		
Partial release of documents	**Position (& minimal other info)**	**Referral to Council**	**Refusal to release information**	**No response**
Denmark Finland Sweden Lithuania Netherlands* + Council**	Austria Estonia** Latvia Malta Poland UK***	Greece Hungary Romania Slovakia Luxembourg	Belgium Czech Republic France Germany Ireland Slovenia Spain	Bulgaria Cyprus Italy Portugal
Total 5 countries	**Total 6 countries**	**Total 5 countries**	**Total 7 countries**	**Total 4 countries**

* Information provided only after an appeal

** Estonia forwarded the request to the Council but then gave us their position. The Council sent Access Info Europe one further document as a result.

*** Appealed and received position, but complaint to the Information Commissioner still pending

The results can be summarised as follows:

- **Documents were received from five countries**. Denmark, Finland and Sweden responded favourably to Access Info's request, providing documents exchanged with other Member States and the Council, but applying exceptions and blacking out at least some information from their answers. Lithuania referred us to documents jointly submitted to the Council with Finland, saying it had no problem sharing as long as Finland didn't mind (Finland had already sent us this document). The Netherlands provided 13 documents but only after Access Info launched a lengthy administrative appeal.

- **Six countries provided a statement of their position on the reform of Regulation 1049/2001** but did not release original documents submitted to the Council or their minutes of meetings, either because these were classified or did not exist according to the replies.[1] These were Austria, Estonia, Latvia, Malta, Poland, and the UK. The UK, after an administrative appeal, also released four heavily redacted documents (minutes taken by UK delegates); these redactions are subject to a further appeal to the Information Commissioner which is still under consideration (for details see Section 5.3).

- **Seven countries replied with a formal refusal.** These were Belgium, Czech Republic, France, Germany, Ireland, Slovenia and Spain. Of these, France rather unusually applied Regulation 1049/2001 as the legal basis justifying the refusal. In six cases, information continued to be denied after a follow-up e-mail asking for a statement of position and arguing for the public interest in this information. The other two countries were Spain and France which did not respond to Access Info's follow-up e-mail.

- **Five countries referred Access Info Europe back to the Council**. These were Greece, Hungary, Luxembourg, Romania and Slovakia. None of these countries answered Access Info's follow-up request for a statement of position and for access to any documents taken by national representatives present at the meeting. These referrals back to the Council indicate a lack of readiness to respond to the requests even though they made specific reference to the national access to information laws.

- **Four countries did not respond the requests**. There was complete administrative silence from Bulgaria, Cyprus, Italy and Portugal, even after requests were submitted twice.

As the report demonstrates, it is impossible to know either directly from the Council or from most of the Member States what their position on EU openness is. And this was not for want of trying: the request process was lengthy and arduous. In general, the time limits provided for by law were not respected and in many cases the requester either had to follow up or to appeal in order to get access to the information requested.

1 If a country replied saying they did not keep minutes of these meetings or that they had not submitted any proposals to the Council, we always accepted this as being true.

1. Conclusions and Recommendations

Having contacted all the 27 EU Member States, usually more than once, and having been referred back to the Council on a number of occasions (in effect going back to square one), Access Info Europe found that it is impossible to get a complete picture of the positions being taken by Member States in the Council on the reform of Regulation 1049/2001.

Much of the information obtained was only disclosed after follow-up letters and appeals. The ease with which public authorities applied exceptions to the information (even to non-existent documents such as the minutes of the Working Party on Information) shows a lack of readiness to be transparent about the EU's legislative process in ways that would be completely unacceptable at the national level.

Like the Council, Member States err on the side of caution when it comes to releasing what they know about the positions of otherStates. No matter how transparent a Member State is, it will be reluctant to provide information about the positions of other States.

In many cases Member States refused to release information on the grounds of international relations or protecting negotiations but do not seem to have taken the trouble to consult with other countries or the Council as to whether they could release the information. Notable exceptions here are Finland and Romania.

At play here is the traditional deference to the position of other States when it comes to the field of international relations, evidenced by the frequent invocation of this exception. Of concern here is that such deference results in less open Member States being able to keep EU policy making behind closed doors and out of reach of citizen participation and accountability.

If the pro-transparency countries are to have an impact on EU transparency in the long term, they will need to take a stand and be ready to expose the anti-openness positions of other Member States which currently have free rein to claim to be in favour of transparency at home and to lobby against it in Brussels.

Only two of the 27 countries, Malta and Poland, provided Access Info with position statements clearly in favour of reducing access to EU documents, while the UK and the Netherlands have somewhat ambiguous positions EU transparency, which were released after appeals.

For the 16 countries which refused to provide any information at all about the debates surrounding the reform of Regulation 1049/2001, there is no way of knowing what line they are taking on EU transparency because this information cannot be obtained either from the government itself or from other sources such as other Member States or the Council.

In conclusion, without greater transparency of the Council, it is impossible for EU citizens to identify the positions being taken by Member States in Brussels.

In effect, the refusal by the Council to release the names of the Member States means that it is acting as a shield for those arguing against transparency and blocking the public's participation in the EU openness debate.

Recommendations

- Access Info Europe recommends an urgent review of the current basis by which documents relating to legislative processes are withheld from the public. Such documents should be disclosed proactively and in full.
- Member States which are in favour of transparency could take the lead here by proposing to other Member States the criteria for deciding which documents will be made available proactively.
- There should be greater discussion between Member States about the mechanisms for making public the documents they generate related to EU policy and legislative processes.
- The consultation mechanisms between Member States should be made more efficient and effective so that a government receiving a request can release documents containing the names of other Member States significantly faster.
- The Council should review its practice of applying blanket exceptions to information, such as the current practice of automatically exempting all Member States' names. Information should only ever be withheld after a case-specific assessment of the necessity of doing so.
- Another recommendation which flows from the findings of this research is that detailed minutes should be made of Working Party on Information meetings and should be published proactively in order that the public can follow the WPI discussions.
- Similarly there should be lists of members of all the Working Parties. A good model for this type of transparency is the Council of Europe where minutes of meetings and lists of participants are made available on its website. The record of who participated in these meetings should not be destroyed after two years on data protection grounds as these are public servants acting in the public interest and an historical record should be kept.
- The veto on access to documents originating from a Member State should be withdrawn from the proposals for reforming Regulation 1049/2001. As this report demonstrates, Member States cannot be depended upon to release this information and hence the EU institutions should be empowered to ensure that information necessary for public participation enters the public domain.

- The EU Institutions should give greater primacy to the importance of public participation in decision making which should, in particular, prevail over other interests when the information relates to the legislative process.

Recommendations for national access to information laws:

- All Member States should set up a system for EU citizens to file requests in at least the most commonly spoken languages of the EU (English, French, German, Spanish)
- All Member States should ensure that acknowledgements are issued when access to information requests are received.
- Member States should ensure that the time frames established under national access to information laws for responding to requesters are respected.
- When Member States are specifically asked for information under their national access to information law, they should process the request under that law not refer back to the EU Institutions nor refuse the request under Regulation 1049/2001.
- Member States should ensure that all requests are answered and that requesters do not experience administrative silence. In particular, this means that public officials working at the level of the EU should be fully informed about their national access to information law.

2. Introduction

The European Union adopts many rules which become part of national law in the Member States or which govern the functioning of the EU itself.

If members of the public are to be able to engage in the EU's law-making processes, then information is needed about those process, including which Member State is taking which position.

The EU's equivalent of a constitution, the "Treaty on the Functioning of the European Union" (See Box A for details) requires at Article 15 openness around the legislative process.

One of the areas where the need for such transparency might be most evident is around the reform of the EU's own transparency rules "Regulation 1049/2001". These rules, first adopted in 2001,[2] are the supra-national body's equivalent of an access to information law.

In 2008, the European Commission published their proposed amendments to Regulation 1049/2001.

Concerned that some of the Commission's proposed changes would bring the Regulation 1049/2001 below prevailing European standards – particularly those of the Council of Europe's Convention on Access to Official Documents[3] – an Access Info team member submitted a request to the Council of the European Union for a document containing information on the Member States' reactions to the Commission's reform proposals.

The document requested was a note from the General Secretariat to the Working Party on Information, the body composed of Member State delegates which will define the Council's position on the reform of EU Regulation 1049/2001.

The request was submitted to the Council on the 3 December 2008 and answered on 17 December 2008. The Council granted partial access to the documents requested: Access Info Europe was provided with the summary of the discussions but **without the names of the countries** which were taking positions for and against the amendments.

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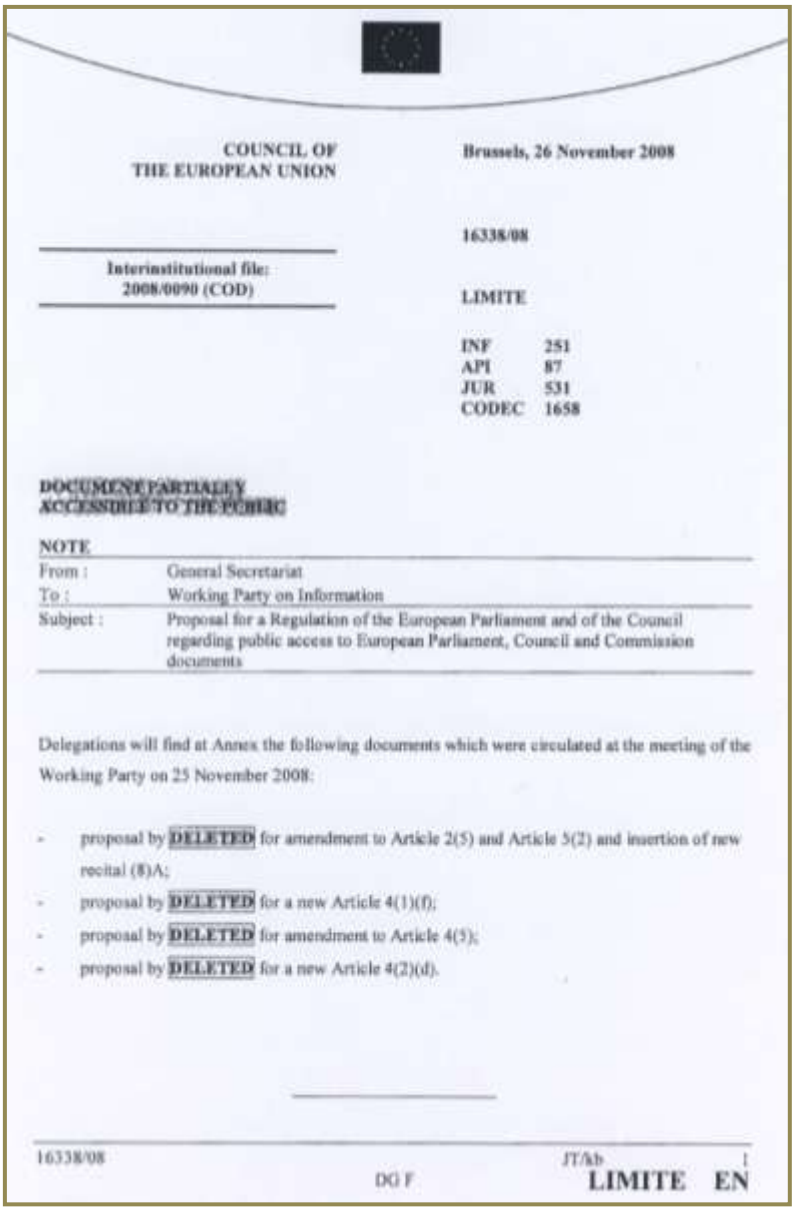
2 Full name: "Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents."

3 Council of Europe Convention on Access to Official Documents, Adopted by the Committee of Ministers on 27 November 2008, signed by 14 countries and ratified by Hungary, Norway and Sweden. Can be found at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1377737&Site=CM.

Figure 1: Redacted Document Released by the Council



COUNCIL OF
THE EUROPEAN UNION

Brussels, 26 November 2008

16338/08

Interinstitutional file:
2008/0090 (COD)

LIMITE

INF 251
API 87
JUR 531
CODEC 1658

DOCUMENT PARTIALLY
ACCESSIBLE TO THE PUBLIC

NOTE

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

Delegations will find at Annex the following documents which were circulated at the meeting of the Working Party on 25 November 2008:

- proposal by DELETED for amendment to Article 2(5) and Article 5(2) and insertion of new recital (8)A;
- proposal by DELETED for a new Article 4(1)(f);
- proposal by DELETED for amendment to Article 4(5);
- proposal by DELETED for a new Article 4(2)(d).

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In its letter, the General Secretariat of the Council argued that this partial access struck an appropriate balance between the public interest in transparency and the need to protect the effectiveness of the decision making within European Union institutions.

In practice, this partial disclosure means that it is possible to become acquainted with the arguments put forward in the course of the negotiations, but impossible to attribute these to any single Member State.

This prevents the European public from holding the 27 governments to account. It also means that citizens cannot engage in the decision-making process.

For Access Info Europe and other CSOs working on open government across the entire EU, it makes our work very difficult as it is impossible to know which governments might be allies in the EU transparency campaign and which should be challenged on their resistance to openness.

Box A – Access to Documents in the Treaty on the Functioning of the EU

Article 15 Treaty on the Functioning of the European Union

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

In addition to this right of access to European Union documents, Article 15 specifically requires EU bodies to "*conduct their work as openly as possible.*"

This is in order "*to promote good governance and ensure the participation of civil society.*" There is also specific language referring to legislative procedures that requires the Council (and the European Parliament) to "*meet in public … when considering and voting on a draft legislative act*" and to "*ensure publication of the documents relating to the legislative procedures.*"[1]

There will always be some limits on access to documents, for "grounds of public or private interest" but to be consistent with international standards on the right of access to information these must be balanced against the public interest in knowing the information.

2.1 Appeal against the Council's Refusal

Convinced that the public has a right to know the precise position that our governments are taking in Brussels, Access Info Europe appealed to the Council of the European Union (via an appeal mechanism known as a "confirmatory application") arguing, in line with European Court of Justice jurisprudence, that openness is particularly important when the Council is acting in its legislative capacity in order to have democratic oversight of law-making.

In Access Info's confirmatory application we asked *"(a) why disclosure of delegations' names in association with their proposals would seriously undermine the decision-making process and (b) why, according to the General Secretariat, there is not an overriding public interest that might nevertheless justify disclosure of the document concerned?"*[4]

The Council responded arguing that "*delegations would be induced to cease submitting their views in writing, and instead would limit themselves to oral exchanges of views in the Council and its preparatory bodies, which would not require the drawing up of documents. This would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be seriously prejudicial to the overall transparency of the Council's decision-making*."[5]

4 Confirmatory application 01/c/01/09 submitted by Access Info Europe, dated 15 January 2009, Ref. 08/2152-jt-cb

5 Reply adopted by the Council on 26 February 2009 to confirmatory application 01/c/01/09 made on 16 January 2009. Emphasis added.

In other words, according to the Council, greater transparency requirements would actually lead to less transparency because of the delegations' own reluctance to publish this information.

The Council also stated that the **public had no need to access preparatory documents** because they could read the final decision once it had been taken: "*the Council recalls that this document and any other legislative document relating to the proposed regulation will be made available to the public after the final adoption of the act*."

The Council went on to argue that deleting each Member State's name one by one following consultations with the Member State would be "arbitrary". In Access Info Europe's analysis, it is equally arbitrary to apply a blanket exception: this, in effect, serves as a shield for less transparent governments, allowing them to maintain their anonymity and possibly even to talk in public about the importance of transparency whilst working within the Council against it.

In response Access Info appealed to the next level, the European Court of Justice.

2.2 Access Info Europe v. Council of the European Union T-233/2009

In June 2009, Access Info Europe launched an appeal to the General Court of the European Union, the first instance of the European Court of Justice. Papers were exchanged, the UK and Greece joined the case on the side of the Council, and now, following a hearing on 6 October 2010, a ruling will be issued on 22 March 2011.

One of the Council's arguments during the Court case was that it believed that the duty to publish information on each Member State's position was "*a matter for the constitutional organisation and practice of each Member State*." [6] The Council also stated that it could not see "*how the issue of accountability of the governments towards their own citizens is linked to the openness of the Community institutions' decision-making*."[7] For more information on the Council's argumentation throughout the case, please see Annex A.

This assertion seemed to us to miss the fact that what is of interest to EU citizens is not only the position of the government of the country in which they were born, were educated, live, or pay taxes (which can all be different) but the positions of the governments of ***all*** the countries which make up the EU, because in the end Community law impacts on everyone across the EU.

So Access Info Europe set out to test the Council's suggestion and began asking each of the 27 Member States one by one.

What follows in this report is our account of what happened as we tried to get a glimpse inside the secret world of EU transparency reforms.

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6 Paragraph 46 of the Council's Statement of Defence (Reg. No 409765) in Case T-233/09 dated 13 October 2009

7 Paragraph 45 of the Council's Statement of Defence (Reg. No 409765) in Case T-233/09 dated 13 October 2009

3. What is your government's position on reform of Regulation 1049?

In order to find out the position of EU Member States on the transparency rules governing the European Union, Access Info Europe decided to ask each government directly using the national access to information laws.

Of the EU Member States, 24 have access to information laws; just Cyprus, Luxembourg, Malta and Spain do not. It was decided to ask all countries, making reference to the national access to information law wherever relevant.

The first challenge was to know where to submit the requests. We started with the Working Party on Information, the political body within the Council of the European Union where Member States discuss transparency reforms.

Attendees at Working Party on Information meetings are representatives of EU Member States and should therefore know what the position of their country is. In some cases they are also experts on the issue of access to information. Their proposals and opinions will ultimately define the final position that the Council takes on the Commission's reform of Regulation 1049/2001.

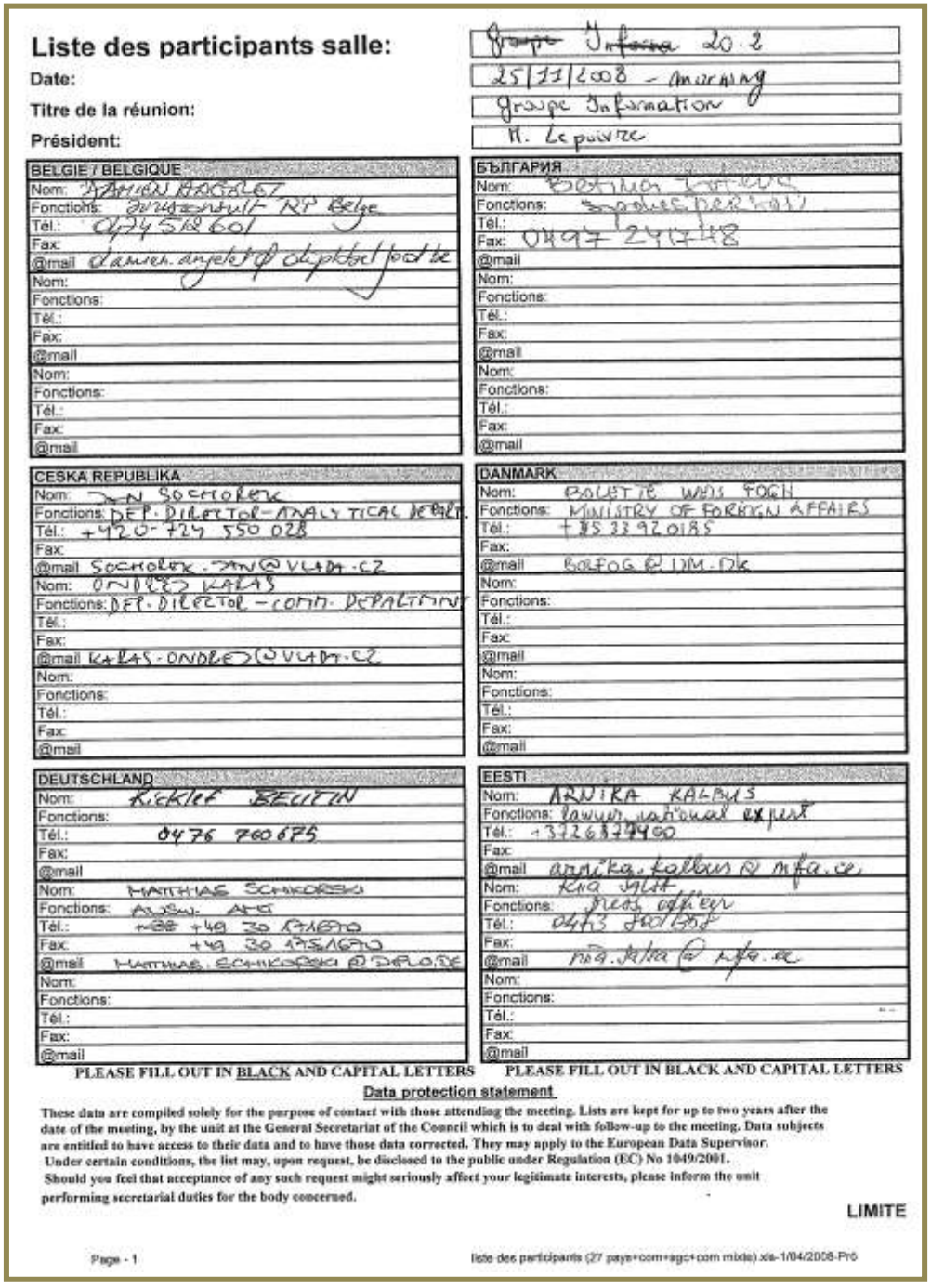
But there is a problem: The names of the members of the Working Party are not published on-line and the Council has told Access Info Europe that:

> *[L]ists of participants in Working Parties do not exist. As Member States are free to send the delegates they choose, the composition of those Working Parties may change from one meeting to another, or even during a meeting: it is not uncommon for delegates from Member States to attend only the part of the meeting that concerns the item they are interested in, after which their place is taken by other delegates from those Member States.*

So to find out who are the members of any Working Party, a member of the public has to submit a specific request for the attendee list of a particular meeting. In this case, Access Info had previously asked for a list of the delegates attending the 25 November 2008 meeting of the Working Party on Information. The Council provided a scanned PDF document full of handwritten names and institutions which was barely human-readable, let alone machine-readable.[8]

8 Access Info takes the position that information released under access to information laws should be both human- and machine-readable wherever feasible. See the "Beyond Access: Open Government Data and the Right to Reuse" report by Access Info for our position on the use and re-use of public sector information, open-source formats and copyright issues.

Figure 2: List of attendees of EU's Working Party on Information (Page 1 of 6)



Liste des participants salle: Groupe Information 20.2

Date: 25/11/2008 - morning

Titre de la réunion: Groupe Information

Président: M. Lepoivre

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Nom:	Kaia Sulg
Fonctions:	Press officer
Tél.:	0443 [illegible]
Fax:	
@mail	kaia.sulg@mfa.ee
Nom:	
Fonctions:	
Tél.:	
Fax:	
@mail	

PLEASE FILL OUT IN BLACK AND CAPITAL LETTERS

PLEASE FILL OUT IN BLACK AND CAPITAL LETTERS

Data protection statement

These data are compiled solely for the purpose of contact with those attending the meeting. Lists are kept for up to two years after the date of the meeting, by the unit at the General Secretariat of the Council which is to deal with follow-up to the meeting. Data subjects are entitled to have access to their data and to have those data corrected. They may apply to the European Data Supervisor. Under certain conditions, the list may, upon request, be disclosed to the public under Regulation (EC) No 1049/2001. Should you feel that acceptance of any such request might seriously affect your legitimate interests, please inform the unit performing secretarial duties for the body concerned.

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Page - 1

liste des participants (27 pays+com+sgc+com mbda).xls-1/04/2008-Pr6

Access Info team members deciphered the text as best they could to identify the names and contact information of the Member State delegates. In some cases the delegates came from permanent representations to the EU and in other cases from national ministries.

Using this contact information, Access Info Europe submitted a request to each of the 27 EU Member States asking for access to documents, minutes or papers related to the reform of Regulation 1049/2001.

The requests were sent between 25 March and 7 April 2010, by e-mail in both English and French by a team member using the Access Info Europe e-mail address. In some cases requests were sent to more than one institution. See Annex B for information on the institutions that Access Info contacted.

Box B: Request to national delegates to the EU's Working Party on Information

Dear Sir/Madam,

Under the access to information/documents [NAME] law of [COUNTRY], I am writing to request information about your government's official position on the reform of the European Union Regulation 1049/2001 on Access to Official Documents.

I hereby request access to the following documents:

(a) Copies of any documents which your government has submitted to the Council of the European Union's Working Party on Information for consideration at the following meetings and which relate to the reform of Regulation 1049/2001:

5 March 2009
2 April 2009
21 April 2009
14 May 2009
8 July 2009
10 September 2009
4 November 2009
14 January 2010

(b) Copies of the full minutes with annexes of the following meetings of the Council of the European Union's Working Party on Information as held by your government:

5 March 2009
2 April 2009
21 April 2009
14 May 2009
8 July 2009
10 September 2009
4 November 2009
14 January 2010

I would prefer for this information to be sent to me in electronic format, to the e-mail address provided below.

The submission of requests was **free of charge except in the case of Ireland** where the initial request was submitted to the Permanent Representation of Ireland to the EU by online form on 26th March. This went unanswered. A second attempt was sent to Ministry of Foreign Affairs by e-mail on 8th June, which they answered saying they had no record of our request and instructed Access Info Europe to send it by mail with the required payment of €15. This was done on 28 June 2010 by regular mail to the Ministry of Foreign Affairs with the money included as cash; it was acknowledged as received on 9 July 2010.

4. The Request Process - Acknowledgments and Time Frames

There were essentially four things that happened to requests before receiving a final answer either releasing information or refusing it:

- an acknowledgement was issued (which was or was not followed by information);
- the requester was referred elsewhere (usually to the Council);
- there was no response, in which case we submitted a second request;
- an extension was applied so that the authority had more time to reply.

This section examines each of those stages in the process and consider how long it took EU Member States to respond to the requests, which was an average of **49 calendar days** for receiving a response.

These findings are important because they indicate that for any civil society organisation or citizen wishing to participate in the debate about ongoing reforms, they need to have large reserves of persistence and patience: the process of getting information from the Member States was time-consuming and often frustrating.

This also means that information received could be well out of date by the time it is sent to the requester, and in some cases will only be sent to a requester after the decision has been taken.

4.1 Acknowledgements

Many access to information laws – and good administrative practice – require that when a request for information or other communication is received from a member of the public, it is acknowledged. Usually this acknowledgement should be sent within a few days of the request being received and should contain a reference number.

For the requester, an acknowledgement is essential to avoid the sensation that the request has gone off into the void: the requester can feel confident that his or her question is being dealt with and, importantly, can know the official date of submission in the event of launching an appeal against administrative silence (see Section 5.1).

Of the 27 EU Member States to which we wrote, **only nine countries issued an official acknowledgement** of receipt before providing an answer. These were the **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Ireland**, **Italy**, **Netherlands**, **Sweden** and the **UK**. **The Council** also provided an acknowledgement following their receipt of our request, which was forwarded to them by **Estonia**. This information is summarised in the table below.

TABLE A: Acknowledgements of receipt of Access Info's information request

Country	Date Request Sent	Date Acknowledged	Reference Number
Czech Republic	8 September	8 September	877A8F85982DDD81C1257798003AB753[9]
Denmark	25 March	28 March	None
EU Council	31 March	21 April	Ref. 10/0753-jt/cf/mi
Finland	6 April	7 April	None
Germany	25 March	6 April	20100326402323
Ireland	Sent 28 June by post, received 9 July	14 July	Foi/Req/2010/048
Italy	26 March Resent 9 June	17 June[10]	Foreign policy CRM:00090027
Netherlands	26 March	22 April[11]	3332-WOB
Sweden	7 April	16 April	ref 26 March 2010
UK	7 April	27 April	Ref: 0384-10

A good practice example is **Denmark** which on 28 March confirmed that "*[o]n March 25, 2010 the Ministry of Foreign Affairs of Denmark received your letter of March 24, 2010 concerning a request for information on the position of Denmark on the reform of EU regulation 1049/2001.*

"Due to the upcoming Ea[s]ter holidays and the number of files we have to investigate in order to make a reply to your request, I am pleased to inform you that I estimate that we

9 This reference number can be used to track the status of a person's request online.

10 Told that the Office of Public Relations of the Ministry of Foreign Affairs had tried to send it on 10 June but that it could not be delivered before. The acknowledgement informed us that they had forwarded the request to "the competent office", but after this no response was received, even after the request was also e-mailed by Access Info to the competent office on 22 June.

11 Access Info had received some correspondence prior to the receipt of this official acknowledgement and reference number. On 15 April we had been told by the Permanent Representatives of the Netherlands to the EU that the "authorities" were in the process of assessing our request and that it would take "some more time". The official acknowledgement was sent by the Ministry of Foreign Affairs of the Netherlands, and also included a four week extension notice.

will be able to respond to you within 3-4 weeks." The information was provided after 29 calendar days, or a bit under 4 weeks.

Similarly **Sweden** replied after nine calendar days apologising for the late response and saying that the request would be answered "as fast as we can". The information was subsequently provided after 49 calendar days.

On the other hand, the **UK** only provided an acknowledgement on the 27 April, confirming that the request was received on 7 April and saying that they would "aim to respond within 20 working days". After another 9 calendar days an extension of an additional 10 working days was applied – see Section 4.4 – following which a refusal was issued after a total of 43 calendar days or about 30 working days. Only when Access Info Europe submitted a new request for the UK's position did we receive this information, after a total of 72 calendar days.

4.2 Referrals, Transfers and Consultations with the Council

Five countries – **Greece**, **Hungary**, **Luxembourg, Romania**, and **Slovakia** – responded to the request by referring Access Info back to the European Union.

An example of such a referral was that of **Luxembourg** which, responding to a reminder sent 76 days after the first request, stated that it was "*physically impossible to compile such a file*" and recommended that "*full use be made of the transparency tools that Regulation 1049/2001 provides you*."

When Access Info Europe followed up, the response from Luxembourg's Permanent Representative to the EU was to insist that they had no obligation to respond to the request, which is correct insofar as Luxembourg is one of the one of four countries in the European Union which does not have an access to information law. This also highlights a problem with the Council's referral of Access Info Europe to the Member States: not all have access to information regimes which can be used to request and receive information.

Figure 3: The final response from Luxembourg (translation by Access Info Europe)

Madame Bartlett, C'est par politesse que j'ai répondu à votre requête. Je suis en charge de suivre le dossier, le suivre, c'est tout. Meilleures salutations	Mrs. Bartlett, I replied to your request out of politeness. I am in charge of following the file, following it, that's all. Best Wishes

A more fully-reasoned referral came from **Hungary** which replied after a full 35 days, cited Article 5 but then concluded: "*We regret that, in our opinion we alone are not entitled to disclose the full minutes, as it contains the opinion of other Member States ... in our opinion ... Article 4 also declares that the consultation with the other Member States is the task of the relevant institution of the European Union*." Access Info replied to this message

asking whether Hungary had in fact consulted with the Council, but no reply was received to that follow up.

At this point in the story it's important to note that the Working Party on Information does not in fact keep minutes of the meetings. Access Info Europe's research team had not realised that when the requests were submitted. This will come up again later when we see in Section 5 that some countries refused access to these non-existent documents.

Whilst a referral to another body within the same country is often legitimate under national law, the picture is more complicated when it comes to documents submitted by Member State to the EU and documents held by Member States that originate from a European institution.

Regulation 1049/2001 requires at Article 5 that when a Member State receives a request for a document originating from an EU institution, it should either consult with the institution or forward the request to the institution.

Romania followed the correct procedure, consulted with the Council, and then got back to Access Info Europe in just 9 days informing us that there are no minutes of Working Party meetings and that it had not made any written submissions. The letter then went on to suggest that further requests "*concerning EU documents (documents used in EU meetings) should be directed to the General Secretariat of the Council and not directly to the Member States. This is the procedure established by the Regulation 1049/01.*"

This advice from Romania at least partly contradicts the arguments given by the Council during the Court case: the Council says that it is up to Member States to provide this information whereas the Romanian government says that it is the Council that must be asked, even when it comes to documents submitted by EU member states.

Slovakia replied after just two days with a friendly e-mail saying that submissions had been made orally and suggesting that further requests be directed to the Council:

Figure 4: Response from Slovakia

Dear Sir,

With reference to your request - SK position to the EU Regulation 1049/2001 revision Slovakia state as follows:

SK estimate that EU Regulation 1049/2001has worked remarkably well....

During revision´s debate on EU Regulation 1049/2001 pending WPI sessions there were very keen debates on concrete EU Regulation 1049/2001 Articles ....

a) SK has presented its position (on WPI sessions) on this issue verbaly..... (there´s no any writen version.. on it)

b) any futher requests concerning the mentioned issue please contact the General Secretariat of the Council

Sincerelly yours

SP: please fell free to contact me in case of data lack on this issue... :-)

When Access Info Europe replied asking for a statement of Slovakia's position on the proposed reforms on the 18 June 2010, and for copies of any minutes taken specifically by Slovakian representatives, no further response was received.

Estonia on the other hand correctly followed Article 5 and forwarded Access Info's request directly to the Council after 6 days, justifying the transfer by explaining that once position papers are submitted to Brussels they are registered as restricted Council documents. It is not clear to Access Info that this is the case as other countries were able to release their position papers (see Section 6).

In addition to these referrals, an initial response from the webmaster of the Ministry of Foreign Affairs in **France** to our first submission via a web form referred Access Info to the Commission on Access to Administrative Documents which is the appeal body that oversees the French access law but does not handle requests. Other requests submitted in France resulted in a refusal justified using Regulation 1049 itself rather than French law (see Section 5.2).

The **Polish** Office of Office of Electronic Communications which participated in the WPI meetings referred Access Info Europe to the Ministry of Interior and Administration, citing lack of competence in the matter.

As the examples above show, in this requesting exercise the referrals were tantamount to a refusal to provide information or to further process the request; other types of refusal are considered in Section 5.2.

4.3 Administrative Silence & Second Requests

Seven countries did not respond at all to the first request: **Austria**, **Bulgaria**, **Cyprus, Italy**, **Luxembourg**, **Malta**, and **Portugal** neither acknowledged nor answered. A second request was therefore submitted in early May.

In addition, a second request was also submitted to **Slovenia** after the Ministry of Public Administration on 5 May rejected the request sent on 6 April 2010. The second request was sent in Slovenian in order to be able to appeal. In the **Czech Republic** a resubmission was also necessary as the first request was not sent by the "official channel".

Of the total of nine countries where a second submission was necessary, seven did not release any information. This finding is consistent with other surveys conducted by Access Info Europe which indicate that if a requester does not receive information in response to a first request the chances of getting information in response to subsequent requests diminish significantly.[12]

The only two countries that provided information following resubmissions were **Malta** and **Austria** which sent us their positions, analysed in Section 6. **Luxembourg**, **Slovenia** and

12 See for example "Ask Your Government! The 6 Question Campaign" to be published on 29 March 2011 by Access Info Europe, the Centre for Law and Democracy and the International Budget Partnership.

the **Czech Republic** replied with denials, which will be analysed in Section 5.2. **Bulgaria**, **Cyprus** and **Portugal** did not respond to either request; **Italy** referred the request on but after that there was no response. These results were classified as administrative silence, and will be discussed in further detail in the next section, along with the rest of the results of the EU 27 access to information requests.

TABLE B: Outcomes of the Second Round of Requests

Country	First request sent	Second request sent	Response?	Calendar Days from 1st request
Austria	6 April 2010	31 May 2010	1 June 2010	**56 days**
Bulgaria	7 April 2010	8 June 2010	none	**∞**
Cyprus	26 March 2010	8 June 2010	none	**∞**
Italy	26 March 2010	9 June 2010	none	**∞**
Luxembourg	26 March 2010	9 June 2010	10 June 2010	**76 days**
Malta	26 March 2010	9 June 2010	21 July 2010	**117 days**
Portugal	Erroneous e-mail[13]	9 June 2010	none	**∞**
Slovenia	31 May 2010	28 October 2010	5 November 2010	**158 days**

In **Italy** the first request (sent to the Permanent Representation to the EU in Brussels on 26 March) went unanswered, and so the second attempt was sent both to the Permanent Representation to the EU and to the Ministry of Foreign Affairs via an online form on the 9 June 2010. This request was answered on the 17 June by the Office of Public Relations of the Italian Ministry of Foreign Affairs, who told us they were forwarding it "to the competent office".

13 The first request was sent on 6th April 2010 to reper@reper-portugal.be. Since there was no response to this, the request was resent on 9 June 2010 to reper@reper-portugal.be, to reper@reperportugal.be and to dirdg@dgac.pt. A failed delivery message for reper@reperportugal.be following this second attempt. This means that the first e-mail must not have arrived, and so the first date of contact becomes 9 June. However, no reply was received from either of the other two e-mails in response to this request.

On 22 June the Ministry informed Access Info Europe that the competent office was the Office of the Directorate General for European Integration, and included contact details. On the same day, the request was sent to the Directorate General via the e-mail address provided to us by the Office of Public Relations, but this request then also went unanswered.

The need to send a request more than once shows that the public authority is not giving due consideration to the public's right to know. It also makes the request process lengthier than it needs to be.

The **Czech Republic** responded to the first request sent on 23 March with an "unofficial answer" sent on 30 March by the Office of the Government of the Czech Republic instructing Access Info Europe to use an "official channel" for the request and at the same time noting that the most likely outcome would be a refusal based on Art. 11(1)(a)(b) of Free Access to Information Law.

The recommended "official channel" was the Government of the Czech Republic's website and the "edesk" whose mailing address is edesk@vlada.cz. We were told that requests not lodged through the electronic mail registry, which issues reference numbers and permits tracking of the requests, could not be treated as access to information requests.

A 31 May follow-up request from Access Info Europe was also referred to the e-desk, and on 2 June we submitted the request there. The response arrived the next day:

> *"The Office of the Government of the Czech Republic received on 2 June 2010 through e-mail your request for access to information regarding the position of the Czech Republic on the reform of the EU Regulation 1049/2001. Upon the inspection of your request under the Act No. 106/1999 Coll., on Freedom of Access to Information, as amended by later laws, it was found out that the request did not contain all the essentials which are necessary, in accordance with Article 14(2) of the aforementioned Act, for eligibility of the request to be considered.*
>
> *It is not clear, at the first place, whether the request was made by a natural person or on behalf of a legal person. When a request is made by a natural person, it has to contain his/her name, surname, date of birth and domicile address. When a request is made by a legal person, it has to contain its name, registration number and address of its registered office.*
>
> *It may, in both cases, also include address for the purpose of delivery in the event of being different from the address of domicile or registered office."*

Access Info believes that a requester should not have to provide more information about herself than is necessary as it is the State's obligation to provide public information, not the requester's obligation to provide private information. This formalistic approach by the Czech Republic, the only country in the EU to make such demands, had the effect of discouraging the requester and hindering the request process.

After some discussion in the Access Info Europe office, on 21 July Access Info acquiesced and told the Czech government that the request was being presented by a natural person on behalf of a legal person (an attempt to increase the chances of receiving information).

On 7 September, after an e-mail from Access Info enquiring about the status of the request, we were informed that the 30-day limit for presenting this information had passed since it should have been sent before 9 July. So Access Info had to resubmit the request for the third time.

This was done on 8 September, and on 22 September, the Czech government denied the request once again. The denial will be analysed in Section 5.2.

4.4 Extensions

Whilst the use of extensions is perfectly legitimate, they also make the request process far longer than necessary. Four countries – **Finland, Netherlands, Sweden** and the **UK** – applied extensions to the time limit for responding. This was done formally in the case of the Netherlands and the UK, and more informally in the cases of Finland and Sweden.

The **Netherlands** responded on 15 April to a 26 March request saying that the request was being assessed and that "some more time" was needed. On 22 April a formal letter notified Access Info of an extension of four weeks; the next communication was received on 1 June and was a refusal to provide the information.

The **United Kingdom** responded formally on 6 May to a 7 April request applying an extension of an additional 10 working days; the answer to the requests was sent on 20 May (so within the 10 additional days) and contained a refusal to provide the requested information (See Section 5.2 on Refusals and details of the partially successful Access Info appeal against it).

In the cases of **Finland** and **Sweden** the extensions were informal, both countries seeming to feel the **effects of the cloud of volcanic ash** which descended over Europe on 16 April 2010.

The request submitted in **Finland** on 6 April received a message on 15 April saying that an answer would be provided within a week, and on 22 April the following message was received:

> *"As I earlier informed you, we are examining your request, we have now identified the documents you have requested. However, I'm stuck in Florence at the moment and due to this unfortunate situation we might not be able to provide you with our answer by the end of the week. However, we are working on it and at latest, provide you with our answer in the beginning of next week. "*

The very next day, on 23 April, a message was received informing Access Info that access to the documents had been granted "to a large extent" and that access would be provided at the beginning of the following week; the documents were sent on 30 April, so within 24 calendar or about 17 working days of the request being submitted. The regular and amicable communication from Finland kept the requester updated on the situation, maintaining the human side of interactions between the public and officials. The answers were open, reflecting the realities of the lives of public officials working on EU affairs, who may well be travelling and, like Access Info Europe's own team members, were stuck in various parts of Europe when the Icelandic volcano erupted. In spite of these

inconveniences, Finland was the fastest country to provide answers to Access Info Europe's request and provided the fullest information.

Sweden, which has a reputation for answering information requests very rapidly, acknowledged the 7 April request on 16 April and then sent another message on 20 April with a message reporting that *"Due to the current situation with the Islandic ash-cloud, we are still awaiting the return of some colleagues. Thus, we are understaffed for the time being. Our handeling of your request will be somewhat delayed. I apologize for the inconvenience this might cause you."*

In the case of Sweden, however, in spite of the ash over Europe clearing within a few days, the next communication was received only on 27 May, apologetically informing the requester that the information would be provided in hard copy and asking for a postal address. Sweden was the slowest of the countries which provided information, but as will be seen in Section 7 below, significant amounts of information were eventually provided.

4.5 Time Frames for Responses

In the 24 countries of the EU 27 which have access to information laws, the average time limit for answering requests is **19 working days**. On average, it took Access Info Europe 58 calendar days or about **42 working days** to receive a response to our requests.

Out of the 27 initial requests, ten were answered within one month, seven countries responded within two months, and four within three months, while getting information in the **Netherlands** took almost 5 months, and getting a refusal from **Slovenia** (to the request sent in Slovenian) took over 6 months. The remaining four countries did not ever reply.

The table below shows how long it took to get a response to our access to information request, regardless of whether it was a positive or negative outcome. Where there is a follow up or appeal by the requester, we only count the time when the request is pending with the public authority without including the time taken by the requester to respond.

The table also shows the cases in which a second request had to be sent because the first one was not replied to. As can be seen, **Austria**, **Luxembourg**, **Malta** and **Slovenia** only replied after Access Info Europe resubmitted the request for the second time. In the table the time frames are calculated from the date of the very first request to the date of the eventual response.

TABLE C: Time Frames in calendar days from date first contacted to date of final response

Country	Date request sent	Request resent?	Initial response	Time for first response	Follow up?	Response?	Time for second response	Total time	Time frame national access law
Austria	6 April	31 May	31 May	**55 days**	15 June	14 July	**29 days**	**84 days**	60 calendar days
Belgium	25 March	No	7 April	**13 days**	16 June	25 June	**9 days**	**22 days**	30 calendar days
Bulgaria	7 April	8 June	None	**∞**	-	-	**-**	**∞**	14 calendar days
Cyprus	26 March	8 June	None	**∞**	-	-	**-**	**∞**	no law
Czech Republic [i]	25 March	No	30 March	**5 days**	31 May	2 June	**2 days**		15 working days
	2 June -	No	9 June -	**7 days** **-**	21 July 8 September	7 September 22 September	**48 days** **14 days**	**76 days**	
Denmark	25 March	No	23 April	**29 days**	22 June	25 June	**3 days**	**32 days**	10 working days
Estonia	25 March	No	31 March	**6 days**	20 July	6 September	**48 days**	**54 days**	5 working days
Finland	6 April	No	30 April [ii]	**24 days**	17 June	22 July [iii]	**35 days**	**59 days**	14 calendar days
France	26 March	No	31 March	**5 days**	24 June	None	**∞**	**5 days**	30 calendar days
Germany	25 March	No	17 May	**53 days**	22 June	23 July	**31 days**	**84 days**	30 calendar days
Greece	25 March	No	31 March	**6 days**	22 June	None	**∞**	**6 days**	30 calendar days
Hungary	26 March	No	30 April	**35 days**	21 June	None	**∞**	**35 days**	15 working days
Ireland	9 July	No	6 August	**28 days**	30 August	6 September	**7 days**	**35 days**	30 calendar days
Italy	26 March	9 June	17 June	(83 days)	22 June	None	**∞**	**∞**	30 calendar days
Latvia	26 March	No	27 April	**32 days**	21 June	None	**∞**	**32 days**	15 working days
Lithuania	26 March	No	22 April	**27 days**	26 April [iv] 21 June	None 8 July	**∞** **17 days**	**44 days**	20 working days
Luxembourg	26 March	9 June	10 June	**76 days**	21 June	21 June	**0 days**	**76 days**	no law
Malta	26 March	9 June	21 July	**117 days**	21 July	-	**∞**	**117**	??

								days	
Netherlands	26 March	No	1 June	**67 days**	14 July **appeal**	30 September	**78 days**	**145 days**	28 calendar days
Poland	6 April [v]	No	16 April	**10 days**	26 April	10 May	**14 days**	**24 days**	14 calendar days
Portugal	9 June [vi]	9 June	none	**∞**	-	-	**-**	**∞**	10 working days
Romania	6 April	No	15 April	**9 days**	18 June	none	**∞**	**9 days**	10 working days
Slovakia	6 April	No	8 April	**2 days**	18 June	none	**∞**	**2 days**	10 working days
Slovenia	6 April	No	5 May [vii]	**29 days**	31 May Resent 28 October	5 November	**158 days**	**187 days**	20 working days
Spain	7 April	No	9 April	**2 days**	18 June	none	**∞**	**2 days**	no law
Sweden	7 April	No	27 May	**49 days**	Not necessary	-	**-**	**49 days**	immediately
UK	7 April	No	20 May	**43 days**	8 June **appeal**	16 August [viii]	**69 days**	**112 days**	20 working days
	15 June	No	14 July	**29 days**	20 July **appeal**	20 September	**42 days**	**91 days**	

i) Two requests because first not sent by "official channel".

ii) The text of the decision was sent to Access Info via e-mail on 23 April, and the documents were e-mailed on 30 April.

iii) Links to the Finnish government's position provided on 18 June after one day. Further extensive documents sent on 22 July.

iv) No response was received to this follow-up e-mail and so it was resent by Access Info on 8 July.

v) Referred us to the Ministry of Interior and Administration, citing lack of competence in the matter (even though they attended the Working Party on Information meeting). Request sent to Ministry of Interior and Administration on 26 April and answered 14 days later.

vi) The first request was sent on 6th April 2010 to reper@reper-portugal.be. Since there was no response to this, it was resent on 9 June to reper@reper-portugal.be, to reper@reperportugal.be, and to dirdg@dgac.pt. A failed delivery message was received from reper@reperportugal.be. This means that the first e-mail must not have arrived, so the first submission date becomes 9 June. However, no reply was received from either of the other two e-mails.

vii) This was a refusal. In order to appeal, the request was resent in Slovenian on the 31 May 2010, after which we received no response. It was again on 28 October 2010, and Access Info Europe received the final reply – a refusal – on 5 November 2010.

viii) The answer to our request for an Internal Review, received on 14 June, also contained instructions to submit a new clearly defined FOI request if Access Info Europe wanted to request a statement of position and copies of notes or minutes taken by UK delegates. This new freedom of information request was submitted on 15 June.

The fastest response which yielded information was from **Finland** (24 calendar days, significant quantities of information provided), along with **Poland** (24 calendar days) which only provided its position. They were followed by **Denmark** (27 days) which provided partial information and **Latvia** (32 calendar days) which also only provided a position statement.

The fastest referral (to the Council) was from **Slovakia** which answered by e-mail in just 2 days, followed by **Greece** (6 days), **Romania** (9 days) and **Hungary** lagging behind at 35 calendar days. Overall, **referrals to the Council were the fastest type of answer**.

The quickest refusal was from **Spain**, which has no access to information law and which took only 2 days to deny the information requested based on its administrative procedures law,[14] stating that this information could not be provided because it was not part of a formal procedure (See Section 5.2).

The slowest country to provide information or documents in response to the initial request was **Sweden**, which took 49 calendar days to provide redacted copies of the documents requested. The only countries which took longer to provide information were those which disclosed information after appeals or resubmission of requests, namely the **UK** which took 72 calendar days before providing any information, and the **Netherlands**, which extended the time limit, issued a refusal, and then eventually provided documents following an appeal and after a total of 145 calendar days had elapsed.

Out of the countries which only supplied their position on the reform of Regulation 1049/2001 the slowest were **Austria** (78 calendar days) and **Malta** (87 calendar days).

When the countries which did not respond (administrative silence) are excluded, the **average response time was 49 calendar days** (35 working days).

Overall it took **63 calendar days (47 working days) to get partial information** about a Member State's engagement in the reform of Regulation 1049/2001 as against **42 calendar days (30 working days) to get a refusal or a** referral elsewhere.

When set against the time frames established by national laws, these response times are extremely poor. An average 7 working weeks for responses (49 calendar days) from Member States and **time frames which range up to 6 months** make it impossible for EU citizens to participate in the debate about the lawmaking process: by the time information has been received (which as these findings show it probably will not be), the debate is highly likely to have closed or at least moved on.

14 Ley 30/1992 de 26 de noviembre sobre el Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común.

5. Refusals and Silence

There are essentially two ways in which information can be denied: by means of a formal refusal and by means of administrative silence which, from the perspective of the requester and in the administrative law traditions of many countries, amounts to a refusal.

Access Refused	No response
Belgium	Bulgaria
Czech Republic	Cyprus
France	Italy
Germany	Portugal
Ireland	
Slovenia	
Spain	

In total seven countries formally refused access and a further four failed to respond to two or more requests.

5.1 No Response: Administrative Silence

In the first round of requests, eight countries did not respond, an outcome known as "administrative silence". After waiting for two months, Access Info Europe resubmitted requests, which triggered **responses** from **Austria** (a statement of position), **Italy** (a referral followed by more administrative silence), **Luxembourg** (a "polite" reply with no information), and **Malta** (a statement of position).

There continued to be **administrative silence** from **Bulgaria**, **Cyprus**, **Italy** and **Portugal**, even after requests were submitted twice.

Administrative silence is a huge obstacle for those exercising their right to information. The failure to acknowledge or respond to an access to information request is a violation of the public's right to know. Whether or not the government body holds the information, and whether or not that information falls under a legitimate exception which justifies not releasing it, there is always an obligation to respond to the requester.

This administrative silence can also have other, arguably graver, consequences including obstruction of the course of justice. For example in **Portugal** the lack of an acknowledgement or response also constituted a barrier to launching an appeal since the time limit for presenting an appeal is 30 working days after the request is submitted. As the case study in Box C shows, if the requester does not know this, by the time they consider appealing the silence, it may be too late.

Box C – Administrative Silence and Appeals in Portugal

In Access Info's EU-27 monitoring exercise, **Portugal** was one of the countries that completely ignored our request. Two months later, we sent it to them again, and they still failed to answer. Since Portugal has an independent Commission on Access to Administrative Documents (CADA in Portuguese), we decided to appeal this administrative silence, after having given the Portuguese government at least six weeks to reply to our *second* attempt.

However, the CADA website is difficult to navigate and it appears that there is no area to introduce your complaint/appeal. We managed to find a contact form which clearly stated it was not an official appeal form, and so we filled it in asking for help on how to present a formal complaint to the CADA. No reply was received to this query and so on 2 August 2010 Access Info e-mailed the CADA asking the same question again. The response was short and sweet: "you need to address the President of the CADA," but no contact details were given.

Access Info contacted the President of the CADA on the general CADA e-mail on 31 August. The response we received on 7 September 2010 was that our time to present a complaint had expired because the complainant only has 20 days after the reply to present a case.

Apparently, in the case of no reply, those 20 days begin 10 working days after the request was originally submitted, which essentially means that our deadline was on 14 July! But of course, how is the average individual supposed to know this if they don't even receive an automated reply to their request informing them about these legal provisions?

It is also interesting to note that Portugal's access to information law does not actually specify *any* time frames for the complainant to present an appeal, rather these time frames are to be found in the Code of Procedure of the Administrative Courts. This means that a person would have to know about both laws before submitting a request.

The failure to provide this information in a clear and easily comprehensible way is an obstruction of the people's right to access government-held information.

As this case study shows, administrative silence is a way of refusing access which makes it harder for the requester to challenge the refusal. For this reason, it should always be obligatory for public authorities to respond to requests for information.

5.2 Information Denied: Grounds for Refusal

Of the 23 countries which responded in some way or other to either the first or second request or to Access Info's follow-up request, all **23 countries relied upon exceptions** to a greater or lesser degree to withhold some or all of the relevant information in their possession.

The reasons for refusing to provide information, or for blacking out certain parts of the documents, are summarised in the table below. This is not to say that none of these countries provided information just that, in one way or another, they all had some (or various) reason(s) for not fully disclosing the information or documents asked for.

In these cases, Access Info Europe would reply arguing for the public interest in this information, and asking the institution to reconsider its position on non-disclosure. In two instances, we presented an official appeal to the **Netherlands** and the **UK**. The appeals will be discussed in more detail in Section 5.3.

Most countries applied the grounds for exception permitted by national law. The exception was **France**, where the legal service of the permanent representation of France to the EU overlooked the request in our letter for documents to be provided under France's access to documents law (Law No. 78-753 of 17July 1978) and refused on the basis of Regulation 1049/2001:

Figure 5: Reply from France (translation by Access Info)

Bonjour, Les autorités françaises ne sont pas dans la possibilité de répondre positivement à cette demande et refusent d'autoriser l'accès aux positions exprimées sur l'exercice de refonte du règlement 1049/2001, sur la base de l'article 4 paragraphe 3 de ce règlement relatif à la protection du processus décisionnel. Bien cordialement,	Good day, The French authorities are unable to respond positively to this request and refuse to authorise access to the positions expressed during the course of the revision of regulation 1049/2001, on the basis of Article 4 paragraph 3 of said regulation, which relates to the protection of the decision-making process. Sincerely,

When Access Info replied asking for French law to be applied, no further response was received.

The remaining national refusals include in particular protection of international relations, protection of ongoing negotiations, and protection of decision making. They also include some unexpected grounds such as that the information was "not submitted in the State's name", "might create misunderstanding", is not an "official proceeding" or is "not contained in a document".

The table below summarises the grounds for refusing to provide information.

TABLE E: Summary of Grounds for Refusing Access to Information/Documents

Grounds for Refusing Access	Austria	Belgium	Czech Rep	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Romania	Slovakia	Slovenia	Spain	Sweden	UK
Referral to the Council				■	■				■	■	■	■						■	■				
Damage to International Relations		■		■		■										■						■	■
Contain Other Delegations' Positions						■				■			■			■							
May Undermine Negotiating Position	■		■	■		■	■	■								■				■	■		■
Need to protect the decision-making process																				■			
For Internal Purposes Only	■		■	■	■															■			
Contains Personal Opinions of government officials		■																					
May Create Misunderstandings (documents not finalised)		■																		■			
Not an official "proceeding"																					■		
Not contained in a document								■															

The documents may be damaging to international relations:

This reason for denying access to documents is legitimate and is found in many access to information laws. However, it is not an exception to be taken lightly, and the burden falls on the States denying access to explain to the information requester the reasons for applying this exception.[15]

Countries applying this exception also need to demonstrate exactly how and why the release of these documents would be damaging to a country's international relations, and must prove that this harm is grave enough to override the presumption in favour of openness and the public interest served by making the information available, which in this case includes the need to be able to participate in and hold accountable the reform of Regulation 1049/2001.

Belgium, **Denmark**, **Finland**, **Netherlands**, **Sweden**, and the **UK** all evoked the international relations exception, but in many cases failed to demonstrate the harm. For example in the case of **Belgium**, in response to our first request for the minutes of the Working Party on Information (which do not in fact exist), it was argued that "*Given that interest in the publication (of the minutes) does not override the protection of Belgium's federal international relations interests, I find myself obliged to reject your request.*"[16]

Access Info Europe asked precisely how the publication of these factual minutes would harm international relations and the reply from the Foreign Ministry was to switch arguments and state that "*As these minutes contain individual opinions, the Belgian state cannot be bound by them. Effectively, since these minutes are not only limited to an enumeration of factual elements their disclosure could be a source of misunderstanding. Taking into account these individual opinions they should be considered as documents which are incomplete and which cannot bind the Belgian state. It is therefore clear that the disclosure of these documents could damage Belgium's federal international relations interests.*"

We note this answer was in response to the initial request for the WPI minutes which it later transpired do not in fact exist. It is therefore not completely clear to which minutes the Belgian authorities are referring.

The documents contain other delegations' positions

This exception is an extension of the international relations exception. Out of courtesy, it is reasonable to expect a State to be reluctant to give out information relating to the activities or points of view of other States without first consulting with them.

It appears, however, that the default position is not to consult and simply to refuse access to the information. As noted above in Section 4.2 on Referrals, the response from **Hungary** stated: "*We regret that, in our opinion we alone are not entitled to disclose the full minutes, as it contains the opinion of other Member States.*"

---

15 Turco Ruling, European Court of Justice joined cases C-39/05 P and C-52/05 P

16 Letter received in French; translation by Access Info Europe.

As in the case of Belgium, it is not clear to which minutes **Hungary** is referring as we later learned that no formal minutes of the WPI meetings are taken; they may have been referring to minutes taken by the national delegation. However this does not seem to be the case as the letter received on 28 April 2010 specifically refers to documents originating from an Institution.

The **Czech Republic** cited the need to maintain "mutual trust" with other EU Member States as the grounds for not releasing documents related to the reform of Regulation 1049/2001. Scant regard was given to the need to foster trust of EU governments and the EU itself among Europe's 500 million people.

There were, however, **good practice** exceptions to this, notably **Finland**, which evidently consulted with at least Estonia and Lithuania and two other Member States before releasing copies of joint submissions to the Working Party on Information. Access Info received documents in which the names of **Estonia** and **Lithuania** were visible but those of the other two countries were redacted.

The documents relate to ongoing negotiations / the formulation of government policy

Whilst there may be some circumstances at the national level where it is necessary for the effectiveness of the work of public authorities to have "space to think" and room for the frank and free provision of advice, this grounds for refusing or delaying access to documents cannot legitimately apply to inter-governmental discussions that are an inherent part of the legislative process which, as the Treaty on the Functioning of the European Union requires, should be open (See Box A).

The formulation of government policy, particularly when it comes to legislative acts, should be done in an open and accessible way. In general, this is the approach taken at the national level, and is the raison d'être of the openness of national parliaments.

Nevertheless, this was one of the most commonly used grounds for denying Access Info Europe the information requested. The countries which applied this exception were **Austria**, the **Czech Republic**, **Denmark**, **Finland**, **France**, **Germany**, **Netherlands**, **Spain**, and the **UK**.

It is of concern that these countries assert a right to negotiate in the name of their electorates at the EU level without ensuring that they are accountable to those people for the positions taken. Access Info firmly believes that the formulation of government policy in modern democracies should be a participatory process. Therefore, the fact that the documents relate to ongoing negotiations makes it even more important that they be accessible to the public.

In the case of the EU, it is essential that information be accessible since this supranational body is increasingly responsible for even minor aspects of the everyday lives of over 500 million people. But **the Council** of the European Union gave us the same answer, arguing that the public interest in effective decision-making in the Council, which they see as a direct result of not releasing the documents we asked for, was greater than the public interest in transparency in this case.

The reply from the **Czech Republic** made clear that they did not believe that any information should be provided until after any decisions had been taken, thereby eliminating the possibility of public participation (extract from letter translated with help of Google translate):

> *The draft regulation on public access to EU documents was [issued by] the Commission to the Council of the European Union on 30 April 2008 and since then the Council, including its working bodies, is still debating it. The Council concurred with this proposal [but] has not taken any formal position and has not yet achieved political agreement or a general approach. Making the framework position of the Czech Republic on this proposal and information on the position of the Czech Republic [with regard] to its individual parts public before the proposal is adopted by the Council, would be detrimental to the interests of the Czech Republic, it could narrow the negotiating room in the later phases and thereby reduce future bargaining positions of the Czech Republic.*

Some States, notably the **UK** and **Germany**, told us that releasing the documents would damage the negotiations because the officials would no longer be able to discuss issues in confidence, which they suggest is essential for the formulation of a good policy. The idea of public officials discussing a law on transparency in a "confidential" manner doesn't seem to make sense if the object of these discussions is to guarantee the public's right to access information. These are not hugely sensitive discussions on matters of imminent threats to national security.

The documents are for internal purposes only

The justification that the documents requested, including the Member State's position, was for internal purposes only was used by **Austria**, **Czech Republic**, **Denmark**, **Estonia** and **Slovenia** to refuse access to the minutes of the Working Party on Information meetings and to the "national" minutes taken by the Member States' delegates.

Whilst this reason for not disclosing documents is permitted by some access to information regulations, Access Info disagrees with this separation of "internal" documents and "external" documents – i.e. those that may be requested under an access to information law. In principle all information and documents should be accessible unless their disclosure would cause harm to a legitimate interest recognised by international standards and even then withholding the documents may only be justified after application of a public interest test.

Application of this provision is of particular concern when the documents relate to positions being taken by a government at the level of the European Union and in some cases when the documents will have been shared with representatives of 27 other countries.

One of the dangers of a division between "internal" and "external" documents is that there is a possibility that in the "external" documents, a government will modify information about its position to make it seem less controversial or more acceptable to the public. This is precisely the sort of practice that access to information laws are designed to prevent.

The danger of this sort of blanket exclusion of classes of documents is evident in the reply from **Austria** dated 14 July 2010, which stated "*With reference to your follow-up request dated 15 June, I regret to inform you that internal minutes of the meetings or Austrian position papers regarding the reform of Regulation 1049/2001, insofar as they exist, have been drafted for internal purposes of the administration only and are, also due to the ongoing reform process, not accessible to the public in accordance with the Austrian legislation*." The result is that no consideration is given to public participation or the need to be accountable to the electorate.

The documents have not been officially submitted in the State's name because they are in fact personal opinions of government officials

The justification that the submissions to the EU were not in the State's name but were the "personal opinions" of government officials came from just one country, **Belgium**.

This is not a grounds for refusal permitted by Belgium's 1994 Law on Transparency of the Administration, and runs counter to all common sense: the idea that a public official who has been mandated to work on the reform of EU Regulation 1049/2001 because of his or her particular expertise in the subject creates documents that are nothing more than "personal opinions" is hard to sustain.

This appears to be nothing but an attempt to hinder transparency under the cloak of personal data protection, which is unacceptable given that these government agents are working in their official capacity as representatives of their Member States any time they are in the Council, and as such are subject to freedom of information laws.

The documents may create misunderstandings

Continuing its use of grounds for refusal which are permitted by Belgian law but not by the Council of Europe's Convention on Access to Official Documents, Belgium also withheld information with the justification that it might create confusion: "*your request can be refused on the ground that the [minutes] concern administrative documents the disclosure of which might be the source of misunderstandings, the document being unfinished or incomplete (Article 6, § 3, point 1°, of the Law of 11 April 1994)*."

This exception reflects a rather paternalistic attitude towards the public: the idea that the release of documents could create misunderstandings stems from an outdated view of the public as ignorant and sensationalist, and does not credit it with common sense. Instead of withholding potentially "confusing" information, the most obvious solution is to publish those documents along with an accompanying note giving some context and explaining the situation in general. In this way, the individual is able to draw their own conclusions since the more information available, the richer the public debate and the better informed everybody is. Withholding "confusing" documents is therefore much more likely to cause confusion and speculation than anything else, especially if the only way that these documents can ever be accessed is through whistle-blowers and illegally leaked documents.

The information does not relate to an official "proceeding"

The response from **Spain**, which took only two days, states that the information does not relate to an "official proceeding" and is based on the Spanish Law on Public Administration (*Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*).

In the absence of a proper access to information law, requests for information are on occasion processed referring to Article 37 on the Right of Access to Files and Records. This provision grants access only to documents that form part of a file corresponding to a completed administrative procedure.

The reply from Spain also stated that since the negations over the reform of Regulation 1049/2001 were not a formal administrative procedure, and since the request related to an ongoing legislative negotiation, they would not be able to give us any information.

The letter from the Permanent Representative of Spain to the EU did add – noting that the information was provided "informally" – that Spain had not produced any documents or submitted any proposals of its own. When Access Info replied asking for a statement on the Spanish government's position, no response was received.

The information is not contained in a document

International access to information standards require that all information recorded in any form be made available to members of the public who request it (subject to legitimate exceptions). If requested information is not held by a public authority most laws provide for an "information not held" response as a legitimate answer.

In the case of **Germany**, the Federal Foreign Office responded to the follow-up request for its position in the discussions on the reform of Regulation 1049/2001, by arguing that this information did not exist in recorded form:

"A statement of the general position of Germany on the reform of EU Regulation 1049/2001 can not be provided under the German Freedom of Information Act as no such information are contained in the files of the Federal Foreign Office. The German Freedom of Information Act does only refer to information contained in files and official documents not "in the heads" of the officials involved."[17]

Given the volume of information received from a number of other States it is barely credible that no written documents exist in Germany relating to the reform of Regulation 1049/2001 which might be of value to the public in ascertaining Germany's position. The idea that the

17 Informal translation to official refusal letter, kindly provided in English by the Federal Foreign Office.

negotiating position of Germany in relation to the reform of an EU Regulation of this nature exists only "in the heads of the officials involved"[18] is tenuous to say the least.

5.3 Appealing some unfavourable decisions

Access Info decided to appeal some of the decisions to refuse information. This was done in response to refusals from the **Netherlands** and the **UK** and resulted in disclosure of information, although a further appeal to the Information Commissioner is ongoing in the UK as of 21 March 2011.

Access Info Europe would also have liked to appeal the refusal from **Slovenia**. Access Info's first request, sent on 6 April 2010, was answered by the Ministry of Public Administration on 5 May, and was rejected. On 28 May experts in Slovenia advised Access Info to resend the request in Slovenian in order to be able to appeal. The translated request was sent on 31 May but was not answered, so it was resent on 28 October. Access to the documents was again denied on 5 November. At that point, given the amount of time that had elapsed, and the fact that the appeal process had to be carried out in Slovenian, Access Info opted to concentrate on its appeals in the Netherlands and the UK.

On 1 June 2010, the **Netherlands** finally responded to Access Info Europe's information request, submitted on 26 March, with a decision not to release any information, based on exemptions contained in the Dutch Freedom of Information law, the Government Information (Public Access) Act. Specifically, the documents *"relate to ongoing negotiations on the amendment of the aforementioned regulation. Disclosing the requested information at the current time could affect good relations between the Netherlands and the Council of the European Union and the other involved Member States".*

Access Info was given six weeks to appeal, which it did, on 14 July 2010. Using the same legal provisions the Dutch had applied to deny access to information, Access Info argued the following:

18 Direct quote from e-mail received on 23/07/2010, rejecting our request for information.

Box D: Access Info's Administrative Appeal to the Netherlands (Extract)

The basis for [your] argument is said to be found in sections 10 and 11 of the Dutch Government Information Act. However, section 10.2 clearly states that information shall not be released "insofar as its importance does not outweigh" one of the exceptions accounted for, such as in this case relations between the Netherlands and other states or international organisations, as argued by the Permanent Representation of the Kingdom of the Netherlands to the EU.

I would like to point out that my request refers to minutes of a meeting relating to the reform of a law of a very public nature, which naturally requires public participation in order to ensure its maximum effectiveness. Clearly, this is very important for the public in general; but obviously, without access to these documents, this is impossible.

When it comes to freedom of information, especially of public information of this nature, the presumption is (or at least should be) in favour of disclosure, and from the existing legislation it is clear that the burden of proof falls on the public authority to convincingly argue the likely harm to international relations, which is needed to engage the exemption claimed by the Permanent Representation of the Kingdom of the Netherlands to the EU in their denial of my access to information request.

I therefore require a valid, strong argument demonstrating exactly how the release of these documents will "affect good relations between the Netherlands and the Council of the EU or its other Member States".

In addition, it will need to be argued that this effect on Dutch "good relations" is sufficiently grave for it to outweigh the public interest in transparency, participation in decision-making, and democracy.

I believe that your letter did not make this case convincingly and therefore the presumption should be in favour of access. As I am sure you are aware, government openness and transparency allows for good administrative practice, a more informed public debate, adequate participation in decision-making, and the gradual rapprochement of citizens and government.

The decision by the Dutch authorities was issued on 30 September 2010, and arrived in hard copy at Access Info's office in Madrid in mid October 2010. After considering the appeal, the Netherlands decided to release thirteen documents. The information released is useful for understanding the Netherlands' position and gives and insight into the discussions in Brussels. However, as with all the other countries that disclosed documents, the most "sensitive" information, such as the names of the other Member States, was redacted.

From these documents, Access Info Europe was able to deduce that the Netherlands' position on the future reform of EU Regulation 1049/2001 was generally in favour of greater transparency and tended to side more often with the European Parliament and with the European Data Protection Supervisor than with the Commission. The documents are analysed in Section 7.3.

Given the Netherlands' largely pro-transparency position it is surprising that it was necessary for Access Info Europe to take legal advice, present an administrative appeal, and have to wait a total of 145 calendar days to obtain the information.

In the case of the **United Kingdom**, as of March 2011 an official complaint to the Information Officer has yet to be resolved. Access Info's original request, sent on 7 April 2010 and answered on 20 May was answered with a denial to provide information based on Section 27 of the Freedom of Information Act which provides an exemption for documents which would, or would be likely to, prejudice the UK's international relations.

Box E: The UK's Rationale for Denying Access to the Documents Requested

> There are public interest arguments in favour of, and against, disclosing this information and I am required to consider and balance the public interest. I have concluded that it is in the public interest to maintain these exemptions as they outweigh the public interest in disclosing this information.
>
> There is a clear public interest in transparency in the workings of government and the Council of the European Union, but it is also important that the Council should be able to discuss issues in confidence.

Access Info was also told that the Council had confirmed that no minutes were taken during the Working Party on Information meetings and that therefore the UK could not be in possession of these minutes.

In response to the UK's denial, Access Info requested an internal review on 31 May 2010. In its letter, Access Info Europe argued for the public interest in accessing this information and asked the UK to demonstrate exactly how the release of documents submitted to the Council by the UK would cause "prejudice" to its international relations.

Access Info Europe also asked if the UK had taken any minutes of its own, and if it would be possible to access these. In addition, we requested a statement of position from the UK regarding the proposed reforms of Regulation 1049/2001. An extract of this letter can be found below.

Box F: Extract from Access Info's Request for an Internal Review from the UK

> ...you have found the public interest to lie on the side of non-disclosure, which implies that the public's interest is better served when they are unable to participate in the discussions that lead up to the adoption and implementation of laws that then directly affect their everyday lives. I am assuming that this is because you are satisfied that the public release by the UK of these Working Party documents will inevitably damage the relations between the UK and any other State, or between the UK and any international organisation or court (Section 27 (1) a. and 27 (1) b. of Freedom of Information Act 2000).
>
> I, however, am not convinced by this, and argue that the public interest actually lies on the side of disclosure, for a variety of reasons: Not only is it highly unlikely that relations between the EU and the UK be prejudiced if the UK releases documents which are of its own production (that is to say, authored by the UK), and which do not reflect the position of the Council, or of the European Union as a whole; but, it is also clear that documents submitted to the working party by the UK are mere legislative proposals or opinions which are by nature non-binding and part of understandably fluid negotiations. Therefore, the real and significant risk of harm for our international relations which you allude to in your rejection of my request is not so clear.
>
> Under the Freedom of Information Act, the presumption is in favour of disclosure and from the legislation it is clear that the burden of proof falls on the public authority to convincingly argue the likely harm to international relations, which is needed to engage the exemption. … I believe that your letter did not make this case convincingly and therefore the presumption should be in favour of access.

The response from the UK, which Access Info received by e-mail on 16 August 2010, but which was dated 29 July, was still negative. The Foreign and Commonwealth Office had decided that the information was in fact correctly withheld under Section 27 because the potential damage to the UK's negotiating position of disclosure at that stage outweighed the public interest in disclosing the document. They concluded that once the negotiations were completed it would be entirely consistent for this document to be disclosed.

The second request to the UK

In the meantime, the UK had also responded that for access to any notes pertaining to the EU access to documents negotiations taken by UK delegates, a new and clearly defined FOI request would have to be submitted. This was submitted by Access Info Europe to the UK Foreign Office on 15 June.

On 14 July 2010, the UK responded to this second request. Once again, the minutes taken by the UK delegates themselves were withheld under Section 27 (protection of international

relations) and also under Section 35 because the documents related to the formulation of government policy. The representative of the Europe Directorate of the Foreign and Commonwealth office stated, repeating earlier arguments, that:

> *"There are public interest arguments in favour of, and against, disclosing this information and I am required to consider and balance the public interest. I have concluded that it is in the public interest to maintain these exemptions as they outweigh the public interest in disclosing this information.*
>
> *There is a clear public interest in transparency in the workings of government and the Council of the European Union, but it is also important that the Council should be able to discuss issues in confidence. Also, it is absolutely vital that UK civil servants are able to make informal notes in confidence."*

The UK did, however, provide a statement of position, which will be discussed further in Section 6.6.

Access Info Europe replied on 20 July 2010 requesting an Internal Review of this decision and arguing, once again, for the public interest in this information. We also asked the UK government to please demonstrate why and how the publication of these documents would undermine the confidentiality of the Council or of UK civil servants if it was obvious that these were just informal notes. This time, the results of the Internal Review were more favourable. On 20 September 2010 the UK decided to release 4 out of 31 documents relating to this issue.

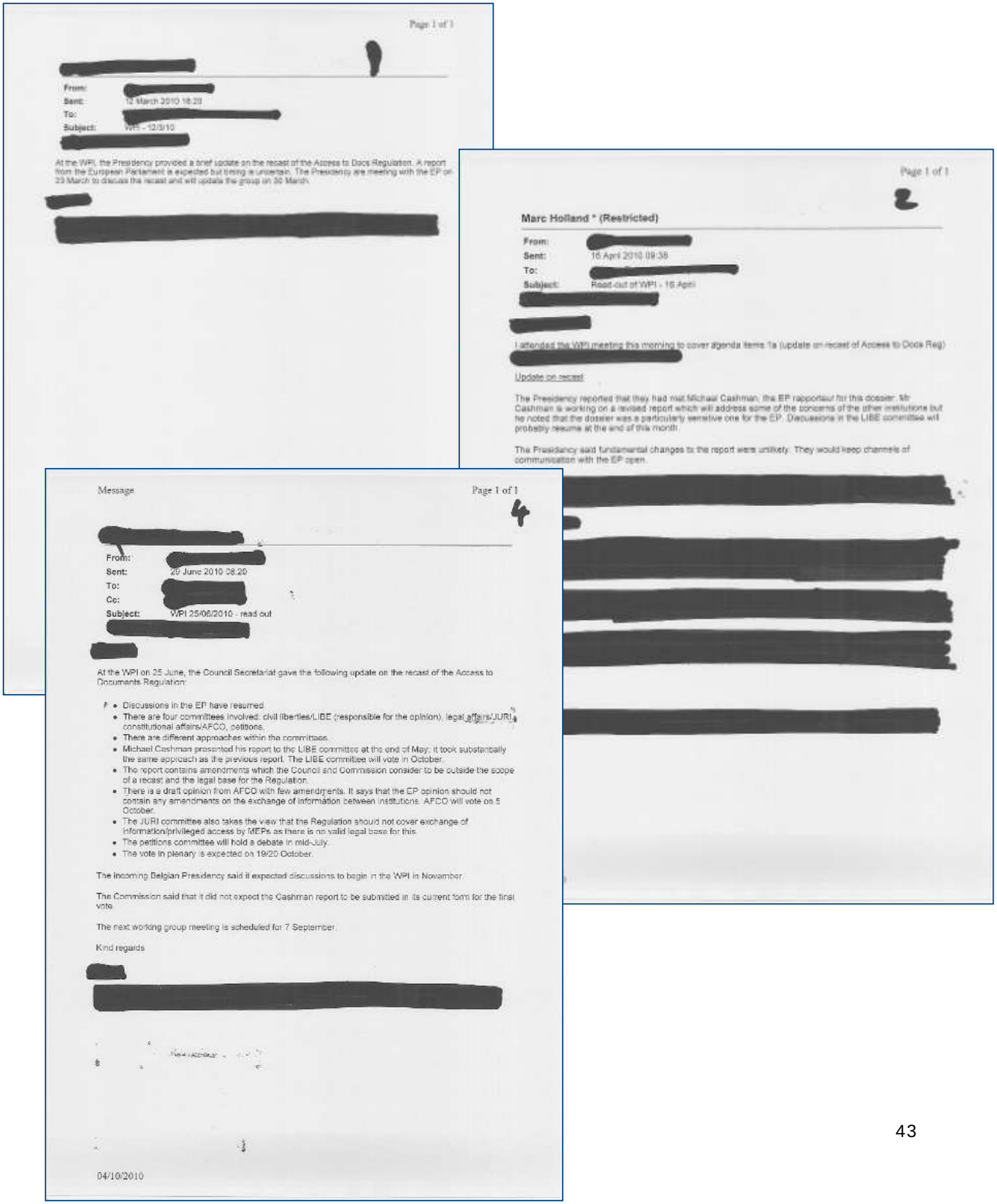
Box G: Letter from Head of UK's Europe Directorate (extract)

During my assessment of the documents I took into account the public interest, in so much as disclosure might lead to a better understanding of how negotiations within the Working Group are undertaken. But at the same time, I also considered whether its disclosure might prejudice the UK's ongoing negotiations within the Working Group. I concluded that the release of these documents would harm the UK's negotiating position and damage relations with other Member States (who negotiate on the basis that Council Working Group negotiations are not public).

The documents also contain comment and advice to officials and ministers on UK negotiating tactics and policy development. Having reviewed these 27 reports, I have concluded that the information contained therein was also correctly withheld under Section 35(1)(a) of the Freedom of Information Act 2000. I am satisfied that the release of these documents would harm the internal deliberative process of policy making; would discourage civil servants from providing full and frank advice; and would inhibit the debate and exploration of a full range of policy options. After careful consideration of the arguments on both sides, I concluded that the potential damage to the UK's negotiating position of disclosure at this point outweighed the public interest in disclosing the document.

The four documents released by the UK government were heavily redacted, and were generally just facts about when the next meetings would be. Copies of three of these documents can be found below:

Figure 6: Documents released by the UK following Internal Review



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From:
Sent: 12 March 2010 18:29
To:
Subject: WPI - 12/3/10

At the WPI, the Presidency provided a brief update on the recast of the Access to Docs Regulation. A report from the European Parliament is expected but timing is uncertain. The Presidency are meeting with the EP on 23 March to discuss the recast and will update the group on 30 March.

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Marc Holland * (Restricted)

From:
Sent: 16 April 2010 09:38
To:
Subject: Read-out of WPI - 16 April

I attended the WPI meeting this morning to cover agenda items 1a (update on recast of Access to Docs Reg)

Update on recast

The Presidency reported that they had met Michael Cashman, the EP rapporteur for this dossier. Mr Cashman is working on a revised report which will address some of the concerns of the other institutions but he noted that the dossier was a particularly sensitive one for the EP. Discussions in the LIBE committee will probably resume at the end of this month.

The Presidency said fundamental changes to the report were unlikely. They would keep channels of communication with the EP open.

Message

Page 1 of 1

From:
Sent: 29 June 2010 08:20
To:
Cc:
Subject: WPI 25/06/2010 - read out

At the WPI on 25 June, the Council Secretariat gave the following update on the recast of the Access to Documents Regulation:

- Discussions in the EP have resumed.
- There are four committees involved: civil liberties/LIBE (responsible for the opinion), legal affairs/JURI, constitutional affairs/AFCO, petitions.
- There are different approaches within the committees.
- Michael Cashman presented his report to the LIBE committee at the end of May; it took substantially the same approach as the previous report. The LIBE committee will vote in October.
- The report contains amendments which the Council and Commission consider to be outside the scope of a recast and the legal base for the Regulation.
- There is a draft opinion from AFCO with few amendments. It says that the EP opinion should not contain any amendments on the exchange of information between institutions. AFCO will vote on 5 October.
- The JURI committee also takes the view that the Regulation should not cover exchange of information/privileged access by MEPs as there is no valid legal base for this.
- The petitions committee will hold a debate in mid-July.
- The vote in plenary is expected on 19/20 October.

The incoming Belgian Presidency said it expected discussions to begin in the WPI in November.

The Commission said that it did not expect the Cashman report to be submitted in its current form for the first vote.

The next working group meeting is scheduled for 7 September.

Kind regards

04/10/2010

6. Country Positions Provided

Six countries provided Access Info Europe with their position on the reform of Regulation 1049/2001. These were **Austria**, **Estonia**, **Latvia**, **Malta**, **Poland**, and the **UK**. In five cases, this was the only information provided. The only country which released more than just the position was the UK, but as seen above, the documents provided were heavily redacted.

Latvia, **Malta** and **Poland** provided this information in response to Access Info's first information request. The other countries provided positions in response to follow-up e-mails.

6.1 Austria

Responding to a resubmitted request after a total of 78 days, **Austria** wrote a letter which possibly indicates that it is not in favour of greater openness.

Box H: Reply from Austria

> Austria has received the Commission's proposal for a recast of Regulation 1049/2001 in a generally favourable manner, since it seeks to build into it practical experience gathered during its application by the EU institutions as well as very useful precisions that have been made to some of its provisions by the European Court of Justice.
>
> Some of the proposed modifications, though, touch upon principles and values which in Austria's view deserve a carefully balanced approach and a thorough drafting, and where a satisfactory solution has not been found yet.
>
> Among these I would like to mention the safeguards necessary in order to preserve the **quality of legal counsel to the EU** institutions, the quality of procedures facilitating and **ensuring the efficient and correct implementation of Union law** as well as the fundamental right to **protection of personal data**. [*emphasis added*]

The Austrian response takes a careful line mentioning the issues where further discussion and drafting is needed but not expressly stating the Austrian governments' position on these, while hinting that the exceptions, such as protection of legal advice, need to be strengthened. It is a useful starting point for engagement with the Austrian authorities but does not make it easy to establish what line Austria is taking.

6.2 Estonia

Estonia forwarded the request to the Council (See Section 4.2 above). When an Access Info team member followed up asking for the notes or minutes taken by the Estonian delegates and for a statement of Estonia's position on the reforms, the request for Estonian minutes was rejected because they are for internal governmental use only.

Access Info Europe was informed that the exception applied to the Estonian-drafted minutes has a five year time limit, with the possibility of prolonging it for another five year period. While being notified of the timeline for an exception can be considered to be a good practice, it is of little value for an ongoing legislative process likely to have been long concluded by the time the five years (or ten years) have elapsed.

As for the documents which Estonia had initially stated were registered as restricted Council documents, Access Info Europe was now told that they were documents which Finland had in the meantime released although the Estonian Permanent Representation to NATO restated the belief that these are registered as Council documents, noting that the Council often restricts access to such documents on grounds of protection of negotiations.

Box I: Reply from Estonia (extract)

2) (a) we do not have the documents that were presented also on behalf of Estonia in other form than registered Council documents. These proposals were forwarded by Finland and Finland asked us the permission to release these documents to you, that we did agree to.

(b) the proposals are in the possession of the Council as registered Council documents

(c) the Council can restrict the access to documents only in accordance with the regulation 1049/2001 and that is a common practice in the ongoing negotiations on delicate subjects.

Access info also received a statement of position from Estonia which is strongly in favour of greater transparency:

> *"Transparency is a fundamental principle of the European Union and there is no doubt that openness contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increases their confidence in them. Widest possible access to institutions documents is one of the main possibilities to increase transparency and bring EU closer to citizens. Whereas the current proposal of the Commission contains some positive improvements in this regard, some amendments would, quite the contrary, lower the present standard.*

Estonia does not support the narrowing of the scope of the regulation on categories of documents a priori in the scope of the regulation. Regulation principles - the widest possible scope and the widest possible access - should not be changed lightly.

The *current broad definition of the document must also be maintained and the institutions can not have the right to decide, what is a document, based on the vague criteria.*

In case of the documents originated from a Member State, it should not have a veto concerning their publication, on the basis of its domestic law alone.

Wide scope of application and assessment of harm on a case-by-case basis are the core principles of the Regulation and should be preserved. We are not aware of problems relating to the implementation of the current Regulation to the documents mentioned in Art 2 (5) and (6). We understand the Commission concerns, but if and only if there is a need to strengthen the protection of documents of this kind, this could be done in the framework of exceptions contained in Art 4. We should also think about the political signal we are sending by amendments.

We do not see the purpose and aim of the Commission proposal, the Commission itself in its explanatory memorandum concludes as the result of public consultation that 'As regards the general feeling is that the current wide definition of the document should be maintained.' Accepting the new definition proposed by the Commission in Art 3 would risk excluding certain documents from the scope of the Regulation.

We believe that the existing Art 4(1)(b) together with the established case law (notably the Bavarian Lager case T–194/04) provide a good balance between the two fundamental rights, the public access to documents on the one hand and privacy, integrity and data protection on the other. There seems to be no direct need to change the provisions which are working, so it would be preferable to retain them. We must retain the condition that access can be denied only when disclosure would undermine the protection of "privacy and the integrity of the individual".

This is a very clear and useful answer and is the kind of statement which it would have been useful to receive from other Member States.

6.3 Latvia

Latvia replied to Access Info's request by referring us to the General Secretariat of the Council for the minutes and documents discussed in the Working Party on Information. As with Estonia, the Latvian Ministry of Foreign Affairs provided a detailed statement of position, which in this case appears to be in favour of most of the Commission's proposals:

"Overall Latvia is satisfied how the current Regulation on public access to EU documents works. Meanwhile Latvia favours also Commission's proposal that specifies a number of issues being so far left open.

Article 2 – Beneficiaries and Scope: Latvia does not object Commission's proposal regarding article 2.5[19]. Confidentiality is required to ensure a proper course of court proceedings, considering that every person possesses rights to defend its interests without any external influence. According to the Rules of Court, written submissions are communicated solely to the parties and institutions whose decisions are in dispute. This is of particular importance if the right on access be granted to any natural or legal person as proposed in Article 2.1. Similarly Latvia makes no objection also to Article 2.6[20].

Article 3 – Definitions: Latvia holds a view that the definition of document should not be narrowed. At the same time it must be explicitly fixed what is understood by a document. Otherwise it complicates the work with applications requesting all the information in the file, consequently impeding the processing of applications that are precise. … Latvia welcomes the reference proposed by Commission on data contained in electronic storage, processing and retrieval systems.

Article 4 – Exceptions: Latvia considers that information related to person's professional life should be accessible to the public unless there are particular conditions, when disclosure of this information could harm person concerned.

Article 5 – Consultations: Latvia holds a view that a Member State should be given rights to ground its argumentation on refusal to grant access to documents also on its national law. …Latvia favours insertion of a time limit for Member States to give their argumentation within process of consultations."

Although the wording in general conveys a sense of openness, some of these amendments would result in a weaker public right of access to EU documents. For example, a definition of documents which refers only to documents which have been registered will exclude those that public officials have failed to register.

6.4 Malta

Malta's Permanent Representative to the EU responded to the second submission of the request after 42 days, a total of 87 calendar days after the first request was sent. This response, received on 21 July, contained only a statement on Malta's position.

19 Commission's proposal: "This Regulation shall not apply to documents submitted to Courts by parties other than the institutions."

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

Box J: Response from Malta

> The Proposal adopted by the Commission on 20 April 2008, which amends Regulation (EC) No 1049/2001, seeks to increase transparency through the changes to the rules of access to documents from EU institutions. Transparency recognises interest representation to be a legitimate, essential and indispensable source of information for EU policy-making. Malta believes that this is an ambitious policy process which should aim at finding the right balance between ensuring the proper functioning of the decision-making process within the EU and the right to information by the general public. Malta is of the view that any efforts made to improve transparency should not in any way jeopardise the current EU decision-making process.
>
> Moreover, it is felt that **increasing transparency does not necessarily lead to greater support and confidence in EU institution**s. The latter is more linked to tangible deliverables and the speed by which these are achieved. [*emphasis added*]

From this answer it appears that Malta is opposed to making regulation 1049/2001 stronger and making the European Union more transparent. Whilst this might be consistent with the current situation in Malta – where access to information provisions have been adopted but not yet entered into force – it is a position which runs directly counter to the principles of transparency governing the European Union as set out in Article 15 of the TFEU.

6.5 Poland

The Polish Office of Electronic Communications of the Republic responded saying that its delegation to the Working Party on Information had not drawn up any minutes or submitted any documents relating to the amendments to Regulation 1049/2001. However, on 20 May 2008, the European Committee of the Polish Council of Ministers had unanimously adopted the position of the Government of Poland regarding the proposal for the recast of Regulation 1049/2001. This was sent to Access Info in Polish.

Working from a translation provided by a Polish colleague, it would appear that in general Poland accepts the Commission's Proposals for the reform of Regulation 1049/2001 and has some concerns with regard to the level of protection guaranteed for classified documents:

> "*Recognizing the legitimate adoption of the draft regulation, the Polish Government wishes to note that some of the solutions proposed require further legal analysis. [The Polish government has] Doubts concerning Article 9, which governs the treatment of sensitive documents. This article does not account for all classified information. Includes documents marked clauses: TRÈS SECRET / TOP SECRET, SECRET and CONFIDENTIEL ("sensitive documents"), but does not refer to classified documents RESTREINT*

(RESERVED). Documents RESTREINT / RESERVED - in accordance with national and EU should also be taken as classified information."

The Polish position document goes on to mention that in Article 9 the exceptions provided for by Article 4 are improperly quoted, "hereby unduly limiting the terms of reference of sensitive information". According to the Polish government, the quote should include not only "public security, defence and military matters", but also information on international cooperation and issues of economic policy. The Polish Government proposes to amend this provision as it stands in the subsequent stages of the legislative process.

The Polish Government also points out "*that the eventual introduction of the principle that the EU institutions disclose documents originating from Member States, provided the latter do not provide convincing reasons why these documents should be disclosed (Article 5 paragraph. 2) is consistent with the ruling of the Court Justice (C-64/05 P) and does not alter the responsibilities of the Polish public administration, as in the current legal [system] persons interested in such documents may submit an application under the Act of 6 September 2001 on Access to Public Information, and so [these documents can] come into their possession*."

The Polish position is therefore somewhat mixed because although it appears that they are decidedly in favour of less transparency, they do not argue for a Member State veto over documents submitted to EU institutions and seem to emphasise that they are willing to grant access to EU documents under their national Law on Access to Public Information as well.

6.6 The United Kingdom

In response to the second request to the United Kingdom asking for a statement of position on the reform of Regulation 1049/2001, the Foreign and Commonwealth Office released three documents on 14 July 2010. One of these was already published online and so Access Info was sent a link to it.[21] The other two documents were included as attachments to the e-mail. One of these is the UK's submission in response to the Commission's 2007 consultation on Regulation 1049/2001, carried out from 18 April to 31 July 2007.

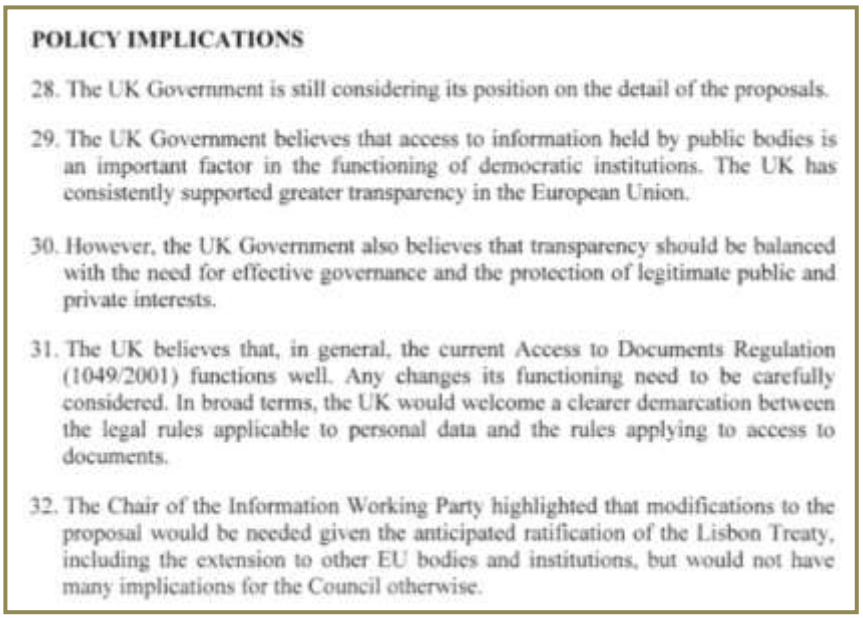
Denmark had also, on 25 June, sent Access Info Europe this link to the Commission's website at http://ec.europa.eu/transparency/revision/contributions_en.htm.)

Denmark and the UK were the only countries to refer to the submission made to the Commission's consultation, despite the fact that in that process the governments of the Czech Republic, Finland, France, Greece, Hungary, Italy, the Netherlands, Slovenia, and Sweden had also made submissions. Although these are not positions taken after the Commission finalised its proposals in 2008 subsequent to the consultation, they are currently the closest that the public can get to the finding out what the positions of some of these Member States on the transparency of the EU are.

21 http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/108/09031801.htm

The other document which the UK provided is a six page document of which only the following section makes reference to the UK's position:

Figure 7: Extract from one of three position papers provided by the UK



POLICY IMPLICATIONS

28. The UK Government is still considering its position on the detail of the proposals.

29. The UK Government believes that access to information held by public bodies is an important factor in the functioning of democratic institutions. The UK has consistently supported greater transparency in the European Union.

30. However, the UK Government also believes that transparency should be balanced with the need for effective governance and the protection of legitimate public and private interests.

31. The UK believes that, in general, the current Access to Documents Regulation (1049/2001) functions well. Any changes its functioning need to be carefully considered. In broad terms, the UK would welcome a clearer demarcation between the legal rules applicable to personal data and the rules applying to access to documents.

32. The Chair of the Information Working Party highlighted that modifications to the proposal would be needed given the anticipated ratification of the Lisbon Treaty, including the extension to other EU bodies and institutions, but would not have many implications for the Council otherwise.

These documents indicate that the UK's position on access to documents in the EU tends to lean towards the protection of interests other than the public interest in transparency, such as for example personal privacy or "legitimate public and private interests". However, not much else can be deduced from this particular document.

From the other two documents it can be seen that the UK's position on this issue in 2007 was that "*any changes to the functioning of 1049/2001 need(s) to be carefully considered so as to not jeopardise the effective functioning of the EU*." This could be read as implying that strengthening the access to documents regime might "interfere" with the functioning of the EU.

When it comes to proactive publication and public participation, the UK appears to have quite an open approach:

> *"In order to increase the level of information to EU citizens the UK supports the active dissemination of information. This could be done by publishing documents as news items on the revenant institutions website under specific topics (e.g. by Commissioners portfolios). Consideration should also be given to launching a newsletter via e-mail that EU citizens could subscribe to. Creative methods of highlighting consultation exercises should be considered. For example many Non-Governmental Organisations, particularly in the area of environmental issues, have extensive memberships. Consideration should be given to working with such NGOs to encourage participation in consultation exercises (e.g. by putting a notice in a NGOs newsletter). The UK believes that failure to think creatively will not result in information being made more widely available but may only benefit existing interest groups (e.g. lobbyists are likely to subscribe to a newsletter in their field). These groups already have good access to information."*

Access Info is in favour of greater proactive publication but notes that most of the UK's other proposals would actually limit the right of access in practice. For example, the UK is in favour of allowing Member States to apply exceptions that are found in their own freedom of information laws, arguing that when a Member State has a freedom of information law, they should be able to refuse access to documents based on the exceptions found in this law and that the exemptions found in EU Regulation 1049/2001 should apply only to Member States with no access to information law.

When it comes to the exceptions in Regulation 1049/2001 the UK states that the Commission's proposals do not make "particularly substantive changes" but at the same time seems to be in favour of reversing some recent judgments of the European Court of Justice, noting that "*The judgment of the ECJ in the Turco 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*." [22]

The UK also appears to favour the importance of commercial and economic interests over the public interest in accessing such information. It argues that "*Much of this information is supplied to the Commission in confidence in order for it to effectively carry out its duties in these areas. If there were an assumption to automatically release the information then third parties would be reluctant to pass this information on to the Commission, thereby hindering its operations*." This is a similar to the argument made by the Commission to Access Info Europe in response to our requests for information.

Lastly, when it comes to environmental information and aligning Regulation 1049/2001 with the Aarhus convention, "*The UK supports the creation of a single set of rules for access to documents as an important step to create clarity for citizens. However,* ***there should not be any rush to broaden 1049/2001*** *to include the access provisions in 1367/2006 (the Aarhus Convention)[23]. Exemptions are important to ensure the functioning of the EU decision-making can be effective*." [*emphasis added*]

It took Access Info Europe 141 calendar days to receive information which indicates that the UK's position on EU transparency is extremely cautious, and tends towards limiting rather than expanding access. Access Info Europe is still appealing against the application of exceptions with a case pending before the UK Information Commissioner.

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22 The document with this position can be found at: http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/108/09031801.htm. Access Info Europe notes that in fact this refers to a parliamentary debate in which the UK government answered questions rather than an actual position statement drafted by the Government.

23 Regulation No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0013:EN:PDF

7. Information Disclosed

In total five countries released original documents. Three did so in response to the original request, and it is notable that these are the EU Member States with the best reputations for transparency and some of the longest-standing access to information laws: **Denmark** (law adopted 1985), **Finland** (law adopted 1951), **Sweden** (law adopted 1766).

In addition, **Lithuania** (law adopted 1996) told Access Info that they would not object to releasing documents as long as the co-author (Finland) didn't mind. When Access Info replied to Lithuania asking them if they had conferred with Finland and letting them know that Finland had already sent us this document, Lithuania replied saying that in that case, there was nothing left for them to send. **Estonia** is also referred to in these documents and their name has not been redacted which implies that Estonia gave its consent.

The **Netherlands** (law adopted 1978) released information following an appeal.

That said, even these countries redacted much of the information in the documents provided, usually for the purpose of protecting international relations. At play here is the traditional deference to the position of other states when it comes to the field of international relations. The problem when it comes to negotiations over the transparency of the European Union is that such deference results in less transparent Member States being able to ensure that discussions on key policy questions take place behind closed doors and out of reach of citizen participation and accountability.

If the pro-transparency countries are to have an impact on EU transparency in the long term, they will need to take a stand, and to be ready to expose the anti-openness positions of other Member States which currently have free rein to claim to be in favour of transparency at home and to lobby against it in Brussels.

The remainder of this section examines the responses received from the five countries which released extensive documents. We will look at information from Denmark, Finland, Sweden and the Netherlands.

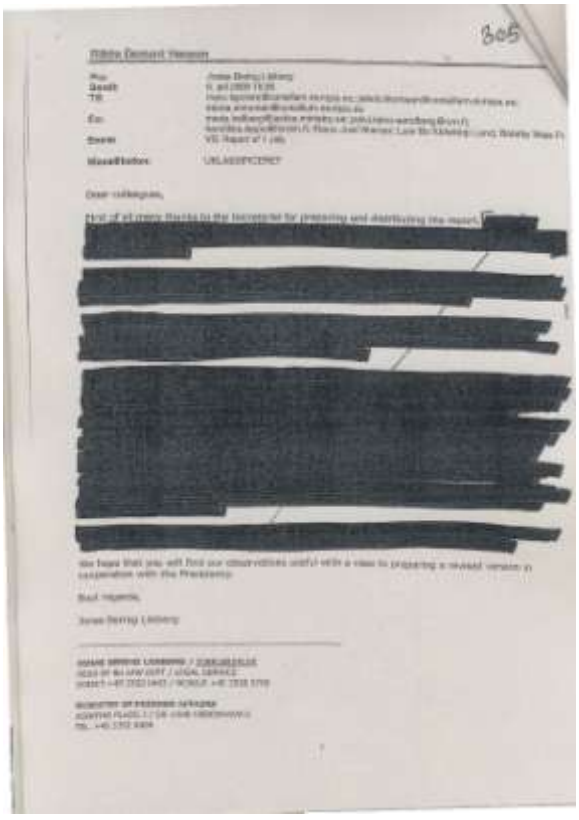
7.1 Denmark

In the case of Denmark, a list of all the documents relating to the request was sent to Access Info on 23 April 2010. This list identifies the documents being provided and notes which exemptions had been applied under the Danish Access to Public Administration Files Act.

Figure 8: List of documents sent by Denmark with grounds for refusal

J.nr. 400.A.14.			
File date	Doc.type and number	Subject	Remarks
10 March 2009	Internal e-mail (524 a)	Internal Danish minutes of meetings in Bruxelles 5 March 2009	Exempted (Sections 7, 11 and 13.1.2)
25 February 2009	Annex to e-mail (524 b)	Comments from the European Data Protection Supervisor	Disclosed
	(533)		Doublet of 524 a and b
11 March 2009	External e-mail (537 a)	Internal Danish minutes of meetings in Bruxelles 5 March 2009	Partly exempted (Section 13.1.2)
4 March 2009	Annex to external e-mail (537 b)	Report from the Sec. Gen. of the Council on the proposal for a regulation in access to documents	Exempted 13.1.2
10 March 2009	Annex to external e-mail (537 c)	Revised report from the Sec. Gen. of the Council on the proposal for a regulation in access to documents	Exempted 13.1.2
31 March 2009	External e-mail to Sec. Gen. of the Council (556a)	Danish comments - WPI meeting 2 April 2009	Partly exempted (Section 13.1.2)
20 march 2009	Annex to e-mail of 31 march 2009 (556b)	Report from the Sec. Gen. of the Council on the proposal for a regulation in access to documents	Exempted 13.1.
6 April 2009	Internal e-mail (563)	Internal Danish minutes of WPI meeting 2 April 2009	Exempted (Sections 7, 11 and 13.1.2)
16 April 2009	External e-mail to Sec. Gen. of the Council (568a)	Proposal for article 3 a	Partly exempted (Section 13.1.2)
	Annex to e-mail (568b)	Proposal for article 3 a	Exempted (Section 13.1.2)
16 April 2009	External e-mail to Sec. Gen. of the Council (570a)	Proposal for article 3 a	Partly exempted (Section 13.1.2)
	Annex to e-mail (570b)	Proposal for article 3 a	Exempted (Section 13.1.2)
25 April 2009	Internal e-mail (580)	Internal Danish minutes of WPI meeting 21 April 2009	Exempted (Sections 7, 11 and 13.1.2)
18 May 2009	Internal e-mail (616)	Internal Danish minutes of WPI meeting 14 May 2009	Exempted (Sections 7, 11 and 13.1.2)
28 may 2009	External e-mail to Sec. gen. of the Council (619a)	Proposal for article 5 (2)	Partly exempted (Section 13.1.2)
	Annex to e-mail (619b)		Exempted (Section 13.1.2)
9 June 2009	Internal e-mail (622a)	Danish resumé of WPI meeting 3 June 2009	Exempted (Sections 7, 11 and 13.1.2)
	Annex to email (622b)	UK memorandum	Exempted (Section 13.1.2)
	Annex to e-mail (622b)	Commission argumentaire - article 4 (1) (a)	Exempted (Section 13.1.2.)
8 July 2009	Internal e-mail (630a)	Internal Danish minutes of WPI meeting 8 July 2009	Exempted (Sections 7, 11 and 13.1.2)
	Annex to e-mail (630b)	German proposal for art. 2	Exempted (Section 13.1.2)
	(653)		Doublet of 630 a and b
14 September 2009	Internal e-mail (664)	Internal Danish minutes of WPI meeting 10 Sept. 2009	Exempted (Sections 7, 11 and 13.1.2)
4 November 2009	Internal e-mail (737a)	Internal Danish minutes of WPI meeting 4 November 2009	Exempted (Sections 7, 11 and 13.1.2)
	Annex to e-mail (737b)	Draft agenda from Swedish Presidency on meeting of the Interinstitutional Commitee	Exempted (13.1.2)
	Annex to e-mail (737c)	Legal opinion from EP Legal Service of 16 October 2010	Disclosed
14 January 2010	Internal e-mail (736)	Internal Danish minutes of WPI meeting 14 January 2010	Exempted (Sections 7, 11 and 13.1.2)
6 July 2009	E-mail to Sec. Gen. of the Council (nr.305)	Danish comments to the progress report concerning the recast of Regulation 1049/2001	Partly exempted (Section 13.1.2)
22 July 2009	E-mail from Sec. Gen. of the Council (nr.320 a)	Revised version of the progress report concerning the recast of Regulation 1049/2001	Disclosed
	Annex to e-mail (nr. 320 b)	Revised version of the progress report concerning the recast of Regulation 1049/2001	Exempted 13.1.2

Figure 9: Danish redacted document



The image on the right shows an example of a "partly exempted" document from which information has been withheld on the grounds of Article 13.1.2 of the Danish access to information law which protects Danish foreign policy.

The only documents that Denmark provided in their entirety originated from EU institutions and were

already in the public domain, such as the opinion of the European Data Protection Supervisor and an Opinion of the European Parliament provided to the Civil Liberties Committee (document SJ-0483/09).

None of the non-exempted information initially provided by Denmark revealed much new about the reform of Regulation 1049/2001, although in the redacted document shown above we can see that e-mails from Denmark to the Commission are copied to Finland and Sweden, even though we cannot know the content of those documents.

Access Info Europe followed up by asking Denmark for its position on the reforms. The Ministry of Foreign Affairs replied on 25 June 2010 with a link to the consultation answers submitted by the Danish government in 2007 (prior to the Commission's proposed amendments), and links to two memoranda from the Danish Government to the Danish Parliament dated 6 July 2007 and 16 October 2008 with the links provided.[24] These documents are in Danish and are scanned images making it very hard to translate them in an on-line translator. After some cutting and pasting, the Access Info Europe team managed to get an approximate on-line translation which revealed a very thorough national process preparing Denmark's position on the reform of Regulation 1049/2001.

Both documents summarise the Commission proposals. The 6 July 2007 document summarises the submissions to the Danish public consultation held prior to Denmark submitting its official position to the Commission's 2007 Consultation. This document also contains a statement of Denmark's commitment to EU transparency:

> *"[t]he government has continued to work actively for the widest possible access to the EU. The government will continue this work and actively participating in the current process. The Government will launch a broad Danish hearing, see paragraph 8 above, and, when the outcome of this consultation are available, prepare the government's submission to the Commission. The Government's submission to The Commission is under preparation and will as usual be sent to parliament for orientation."*

The document from 16 October 2008 summarises developments on Regulation 1049/2001 and reports which groups participated in the public hearing and details their submissions and the issues raised. The submissions from journalists, archivists, human rights organisations, and others, are critical of the Commission's proposals.

The 16 October document also notes that, at the time of writing, no official country positions were known but anticipates that based on past experience there will be different country groupings on the question of access. A short statement notes that "*the government's interim general attitude [is that] the government has continued to work actively for the widest possible access to EU [documents]*" and that the Danish government will be active in the negotiations.

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24 http://www.ft.dk/samling/20072/kommissionsforslag/kom(2008)0229/bilag/2/600766/index.htm and http://www.eu-oplysningen.dk/upload/application/pdf/40a037f6/200701852.pdf

7.2 Finland

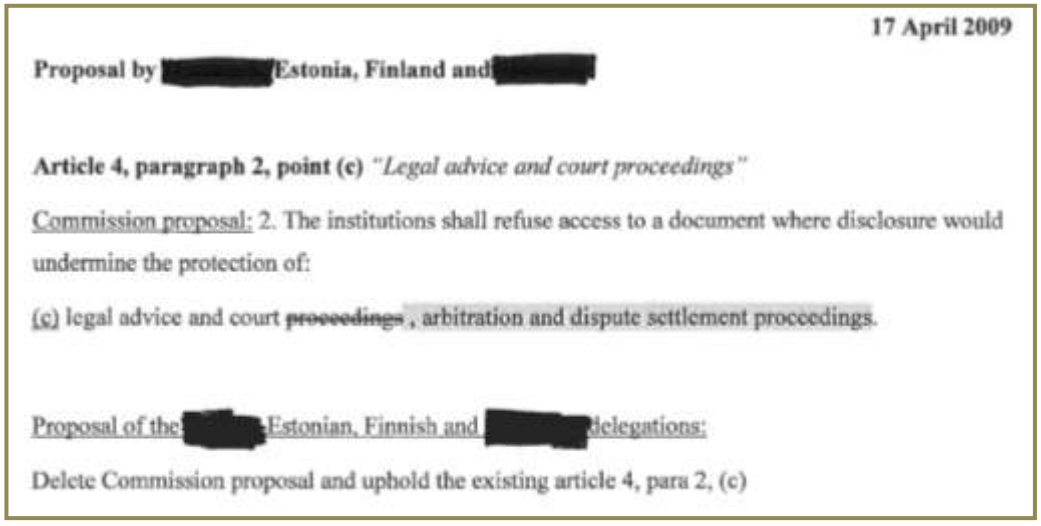
Finland took just 24 days to provide information in response to Access Info Europe's request, submitted to the Ministry of Foreign Affairs on the 6 April and acknowledged the next day. The Finnish representatives seemed professional and thorough, keeping the requester up to date on the status of the access to information request. So, for example, the Finnish representative let Access Info Europe know as soon as a decision had been taken to provide information even though the documents were sent a week later (on 30 April):

> *"Thank you for your request for documents. We are pleased to inform you that access may be granted to a large extent to the content of the documents which we have identified as being requested by you.*
>
> *The documents we were able to identify as belonging to the first part of your request are the proposals we have submitted to the working party of information (wpi). In this respect, indications to some of the delegations which made these joint proposals with us will have to be erased, as disclosing these parts would undermine the protection of international relations in the meaning of § 24 paragraph 2 of the Act on the Openness of Government Activities. We will therefore provide you with these documents at the beginning of next week.*
>
> *As regards the second part of your request, it is our understanding that you are inquiring access to the minutes that are drawn by the Council Secretariat and in our possession. If this is the case, we regret to inform you that we do not have such documents in our possession. If you are, instead, referring to reports of the wpi-meetings drawn by the Finnish representatives, could you please specify your request accordingly. Should this be the case, we kindly draw your attention to the fact that these reports exist only in Finnish."*

Naturally, Access Info replied asking for access to these minutes as well.

The documents sent by Finland on 30 April revealed that Finland had consulted with Estonia on the issue of releasing these documents, and that Estonia had accepted. However, another two unknown countries were not quite so transparent (our guess is that one of these is Denmark given the cc'd e-mails, and the other possibly Sweden).

Figure 10: Redacted document from Finland



17 April 2009

Proposal by [redacted] Estonia, Finland and [redacted]

Article 4, paragraph 2, point (c) *"Legal advice and court proceedings"*

Commission proposal: 2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(c) legal advice and court ~~proceedings~~ , arbitration and dispute settlement proceedings.

Proposal of the [redacted] Estonian, Finnish and [redacted] delegations:

Delete Commission proposal and uphold the existing article 4, para 2, (c)

Finland (and Estonia) believes that the Commission's proposal should be rejected because

> *"Access to such documents [relating to legal advice and court proceedings] can only be denied following a case-by-case assessment if they are covered by one of the exceptions provided for in the regulation." The delegations go on to stress that "access to some legal opinions should rightly be granted. It has not been demonstrated that access to these specific legal opinions would have caused damage to the protected public interest, i.e. the effectiveness of the Council decision-making. It has furthermore not been established that access to [some] specific legal opinions would be detrimental to the capacity of the Council Legal Service to offer frank, objective and comprehensive legal advice."*

Access Info Europe supports this view, and has indeed used similar arguments during the Court Case against the Council of the European Union, mentioned in the introduction. It is a shame that the other two countries involved in the drafting of this positive proposal either did not consent to having their names revealed or perhaps had not responded to Finland by the time it took the decision to release the information.

When it comes to documents submitted by Member States to EU institutions, Finland (and Estonia) once again showed a pro-transparency approach, disagreeing with the Council's proposed amendments. Finland took the position that:

> Allowing for exceptions to be based on national law *"might risk reconstituting the 'Member State Veto' specifically abolished by the legislature when adopting Regulation 1049/2001...The proposed deletion [of the Commission's amendment] is necessary in order to make sure that national legislation is not added as a new general exception to the current right to access EU documents, thus effectively risking to create an absolute veto power for the Member States"*.

The Finnish proposal goes on to state that:

> *"In the Charter of Fundamental Rights and its explanations (OJ 2007/C 303/02) the obligation of the administration to give reasons for its decisions is closely linked to the citizens right to an effective remedy. In the case of an application for a document currently held by an EU institution but originating from a Member State, it is the institution that will ultimately defend the possible refusal before the Community Courts. For this reason, the institution needs to be convinced of the corrected of the reasons behind this refusal."*

The final document provided by Finland deserves to be pasted almost in its entirety, as the arguments presented are entirely consistent with the need to protect EU transparency from the Commission's proposals.[25] The document refers to the Commission's idea to introduce the following exceptions to Regulation 1049/2001:

> 2(5). This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.
>
> 2(6). Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.

25 Access Info Europe, ClientEarth and Greenpeace are currently (March 2011) coordinating a Campaign to Protect EU Transparency in the face of the Commission's proposals for Regulation 1049/2001. This report serves as proof that the only amendments the regulation needs are those that would guarantee a greater right of access to the public.

Figure 11: Finland's position on the Commission's proposal on exceptions

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

Regulation No 1049/2001 covers all documents held by the three institutions. It is a basic principle of the Regulation, repeatedly confirmed by the Court of Justice, that requests to documents should be assessed on a case by case basis, assessing the actual harm that might be caused by their release to the interests specifically protected by the exceptions established by Article 4 of the Regulation. This follows from the aim of the Regulation "to ensure the widest possible access to documents". The proposal of the Commission is incompatible with this aim in excluding whole categories of documents outside the scope of the Regulation irrespective of the harm that their release might or might not cause. As a result, citizens would automatically be denied the possibility of requesting access to documents that are under the present system not covered by exceptions, since the harm that their release might cause would never be assessed.

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

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

It is to be pointed out that the Commission has never argued that the current exceptions in this area would not give adequate protection to the relevant interests. Its only aim seems to be releasing its officials from the duty to handle requests with the justification that the process would not in any case "lead to disclosure of documents with a significant interest for transparency". This explanation is hardly satisfactory if granting widest possible openness is seen as a value in itself. It is also hardly compatible with the Commission's own Plan-D for Democracy, Dialogue and Debate, aimed at improving citizen participation and building trust in EU bureaucracy.

If the current rules on procedures are not satisfactory in responding to the requests by the citizens, they could be developed further by allocating more resources to the process, developing the public registers of the institutions so as to make them more user-friendly, and strengthening the co-operation between the applicant and the institution.

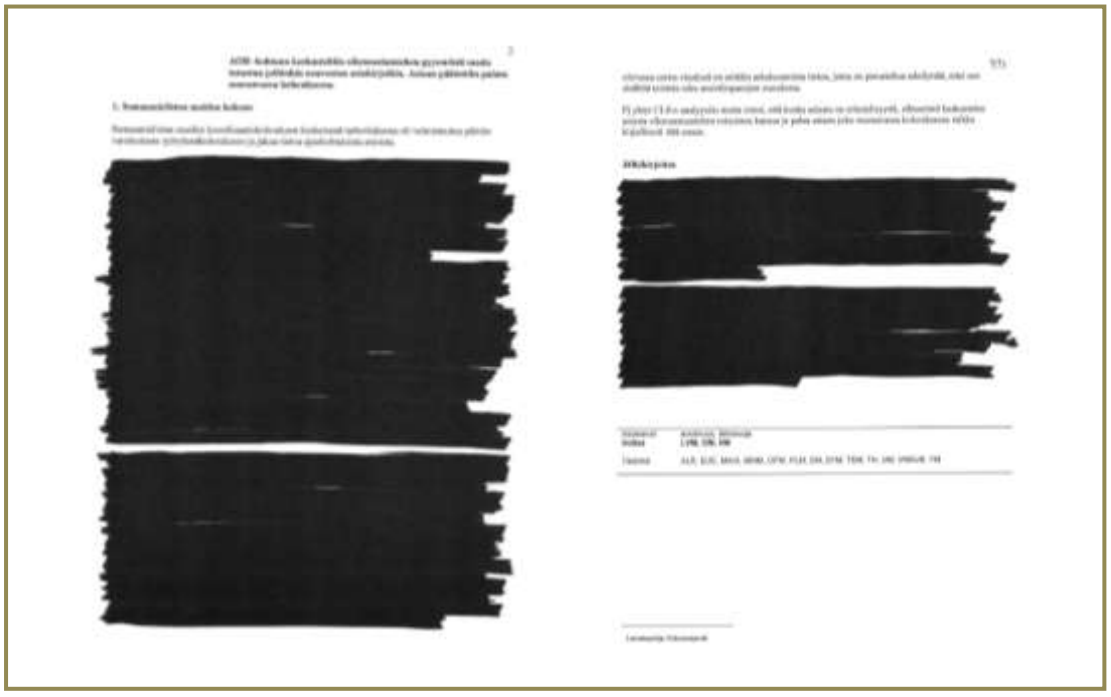
Access Info is in favour of Finland's efforts to guarantee that the citizens and public of the EU have access to documents that allow them to see how the European Union works, that permit them to hold the EU institutions to account, and that encourage more active citizen participation in EU policy-making. It is encouraging to receive documents of this type, given the rest of Access Info's experience trying to access position papers, minutes of meetings and other information on the reform of Regulation 1049/2001.

As for the minutes taken by Finnish delegates, these were requested on 17 June by Access Info, in order to get a deeper insight into the position being taken by Finland and in the hope that these documents would reveal more about the discussions in the WPI that had not been obtained from other sources. This request was answered the next day with a further 7 links to various position papers, and information on the Parliamentary scrutiny of Finland's official position on Regulation 1049/2001.

Access Info was also told that "*as regards the reports from the WPI -meetings, as the request is quite extensive in this respect, we will need more time to go over all documents covered by the request. This will probably take some weeks; I will get back to you on this issue as soon as we can provide you with our answer*."

On 22 July, a further ten documents were provided to Access Info Europe. Once again, these were redacted to blank out the names and indeed the positions of the countries involved in order to protect Finland's international relations or its ability to participate in international cooperation, in line with Article 24 paragraph 2 of the Finnish Act on the Openness of Government Activities. Access Info was told that "*The withheld parts include indications to other delegations. They also contain evaluations of other Member States' and the European Parliament's actions during the negotiations, as well as cooperation with other delegations. Disclosing these parts of the reports could damage Finland's negotiation position in the on-going recast process of Regulation 1049/2001."*

Figure 12: Heavily redacted pages sent to Access Info by Finland:



Given the amount of information provided to Access Info by the Finnish Ministry of Justice, it might be inferred that these redactions reflect other delegations' lack of transparency rather than Finland's. Once again, the lowest common denominator had prevailed and Access Info Europe had come up against the secrecy wall that surrounds actual discussions inside the Council.

Even the detailed information received from Finland cannot substitute for greater transparency of the Council and of EU decision making on legislative proposals.

7.3 Netherlands

The documents disclosed by the Netherlands reveal some new information about discussions in the Working Party on Information.

For example, we learned that seven Member States are against the Commission's proposal to extend the right of access in principle to any natural or legal person, as opposed to only citizens of the Union or natural or legal persons with offices in a Member State. We do not however know the names of these countries as they have been redacted. Five other countries are reportedly in favour of this amendment, one of which is the Netherlands. However, the Netherlands also emphasises that Article 255 of the Treaty Establishing the European Community (now Article 15 of the Treaty on the Functioning of the European Union) does not provide legal basis for the change.

Apparently there is also "broad support" for the Commission's proposal to add the exception that the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards: (a) public security, "including the safety of natural or legal persons". The Netherlands notes that the justification for this is to protect those involved in humanitarian missions or in other conflict situations, but it seems to oppose this addition, emphasising that a threat to public safety is of a different order than a threat to the safety of natural or legal persons.

It also seems that the Netherlands believes that there is no need for this amendment because the Commission has already proposed a paragraph specifically on this subject (Article 4, paragraph 5) by which the "Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned."

The Netherlands also rejects the ex-ante (blanket) exclusion of legal advice from the scope of the Regulation. Whilst underlining the importance of confidentiality, the Netherlands believes this should be assessed on a case-by-case basis, and mentions the need to clarify exactly which Courts should be covered by this exception.

When it comes to the exceptions, the Commission's proposal is to allow Member States to limit access to information based on their own freedom of information laws. The danger with this is that countries are then able to apply lower transparency standards than they should under EU Regulation 1049/2001. The Netherlands recommends that Member States should be allowed to

base their refusals on provisions in their "own legislation, insofar as these provisions regard a public interest deserving protection on the basis of Article 4(1)."

This information received from the Netherlands is extremely helpful for European citizens wanting to know its position and to get a feeling of the arguments being used in the debates in the WPI. As noted in Section 5.3 it is unfortunate that to get this pro-transparency position Access Info Europe had to appeal and wait a total of 145 calendar days.

7.4 Sweden

Access Info's request to the Swedish Foreign Ministry was sent on 7 April 2010. An e-mail was received on 16 April assuring Access Info that the request was being dealt with and apologising for the late response. On 20 April the ash cloud situation resulted in another e-mail from Sweden explaining to Access Info that the Permanent Representation of Sweden to the EU was still awaiting the return of some colleagues and so the handling of our request would be "somewhat delayed". On 27 April we were told that *"Now, we have at least been able to go through Your request and are able to reply to it (in quite a positive way, as You will see). Since a number of the documents were not available in electronic format, we would like to send the relevant documents to You by mail."*

Access Info asked if there were any documents available in electronic format that could be sent straight away. Two documents were released, which were a note from the Presidency to the Council (Document 12492/09) and a Legal Opinion of the European Parliament provided to the Civil Liberties Committee (document SJ-0483/09). (This document, which is already in the public domain, was also provided by Denmark).

The ten documents arrived at Access Info's office in Madrid in hard copy in the first week of June. Like Finland, Sweden has demonstrated evidence of brilliant record keeping and high levels of transparency with minutes provided to Access Info for each of the eight Working Party on Information meetings included in Access Info's request. The documents contained, for example, detailed distribution lists in which no names were blacked out. This is consistent with the principle that information related to civil servants working in their official capacity is public.

When it comes to the names of other countries, however, it's a different story: the names of the delegations putting forward opinions and proposals in the WPI were redacted under Article 15 of the Swedish Public Access to Information and Secrecy Act, which relates to the protection of Sweden's international relations.

Eight of these documents were in Swedish and, since they are in hard copy, running them through an online translator would be laborious. It is not entirely clear to Access Info that these documents only exist in paper format. One of the problems with Sweden's access to information law is that there is no obligation to provide electronic copies of documents even where these exist.

The other two documents were the note from the Presidency mentioned above, but instead of sending the Legal Opinion also mentioned above, another note from the Presidency was sent (document 11669/09) which gave Access Info information about the divisive issues amongst

the Member States such as Article 3(a) and the "method used for alignment with the Aarhus Regulation, relevant for proposed amendments in Articles 4(1)(e), 4(2)(a) and (b), 4(4) and 4(7)."

In spite of receiving a full set of documents from Sweden, even if after a considerable delay, Access Info Europe was not provided with a statement of position. Access Info welcomes the transparency and good minute-keeping of the Swedish government whilst noting that providing documents in electronic format would be of more use to the requester.

7.5 The Council (thanks to Estonia)

Slightly to Access Info Europe's surprise, we received a response from the Council of the EU on 26 April 2010 as a result of Estonia forwarding our request on 31 March. An acknowledgement of receipt of the request was sent on 27 April, a day after the Council had given us their reply.

The Council stated that no minutes were drafted of the meetings of the Working Party on Information but that they were sending Access Info a report by the General Secretariat of the Council.

However, since the discussions were "still at an early stage and no convergence of views has been recorded and no conclusions have been drawn", the General Secretariat of the Council was "unable to grant full public access to the document, since the release of the document would seriously undermine the protection of the Council's ongoing decision-making process, in accordance with Article 4(3), first subparagraph of the Regulation."

Therefore, once again, Access Info was granted access to the content of the report (document 10859/1/09 REV 1), which included information on the various positions put forward, but which blacked out the parts which would have enabled the delegations concerned to be identified.

According to the Council, if Access Info were able to identify what each member state was saying during the debates, this would *"compromise[e] the delegations' possibility to be able to express their views freely …Disclosure at this stage of those parts of the document which allow identification of the delegations that have adopted positions on the subject still under discussion could, in addition, narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion."*

Access Info followed up on 17 May asking: *"What are the criteria for deciding whether or not minutes shall be kept of EU Working Party meetings? In the event that it has been decided that minutes are not to be kept, what are the mechanisms in place for ensuring that those that were unable to attend the Working Party meeting are kept informed of the issues discussed at said meeting?"*

The Council sent us another acknowledgement of receipt, the following day, and answered on 4 June telling us that they had no documents related to this request, but stating the following:

> *As ruled by the Court of First Instance in its judgment in Case T-264/04 (WWF-EPO vs Council)[26], the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner draw up and retain documentation relating to their activities. This being so, it is not possible to conclude that the Council would be under an obligation to draw up minutes of all meetings of the Council's preparatory bodies and covering all items on their agendas.*
>
> *As regards the Working Party on Information, the rotating Presidency together with the Chairman of the Working party decide on a case-by-case basis if an item discussed at the Working Party calls for any follow-up measures and if discussions relating to such items should be recorded in a summary report or other subsequent document of the Working Party. Regarding the discussions held in the Working Party on Information … summary reports have regularly been drawn up since the beginning of these discussions. References to those documents are recorded in the Council's public register. One of these reports is contained in document 10859/1/09 REV 1 to which partial access has already been granted.*

Access Info is concerned by the lack of minutes for a key body such as the Working Party on Information. Record-keeping is part of good administrative practice. Minutes are essential to keep track of developments over the course of a series of meetings, to ensure that the representatives attending Working Party on Information meetings can be held accountable both by their colleagues, and by the citizens of the EU. They are also part of the historical record.

The fact that minutes of the meetings are not kept also calls into question an assertion made by the Council during the Court process that greater transparency would discourage written records of the meetings: it seems that the problem is that this record is already not being created, even in the absence of transparency and full public scrutiny. The solution here is to make a record and to make it public.

26 Judgment of 25 April 2007, WWF v. Council , Rec.2007,p.II-911, point 61.

Annex A : The Council's Reasons for Non-Disclosure

The Council's reasons for denying access to the positions taken by Member States in the debates on the Access to Documents Regulation

The Council responded with three arguments:

"If it were to be accepted that such documents containing the written position of delegations on particularly sensitive issues were to be disclosed in their entirety in an ongoing decision-making procedure, **delegations would be induced to cease submitting their views in writing**, and instead would limit themselves to oral exchanges of views in the Council and its preparatory bodies, which would not require the drawing up of documents. This would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and **it would also be seriously prejudicial to the overall transparency of the Council's decision-making**."

"The Council recalls that this document and any other legislative document relating to the proposed Regulation **will be made available to the public after the final adoption of the act** in accordance with the rules laid down in Article 11(6) of Annex II to the Council's Rules of Procedure." (*emphasis ours*)

"The Council has also examined whether it would be possible to assess, on a deletion-by-deletion basis, whether the name of the Member States concerned could be released. However, this option was rejected because it would lead to very arbitrary assessments with themselves could be challenged. This approach does not, of course, **prevent the Member State delegations concerned from making public their own positions, as they see fit**."[27]

According to the Council, since the documents will eventually be made public once the decision has already been taken, there is no need to release them now. The obvious result of this partial access is an annihilation of the possibility for public participation in the decision-making process. It means that there is no possibility for individuals to voice their opinions, at least not until it becomes too late to make a difference. 7

The Council also suggests that full disclosure "would lead to the entrenching of positions, since delegations would lose some of their ability to modify their positions in the course of discussions and to justify a compromise solution before their public, which may differ from

27 Reply adopted by the Council of 26 February 2009 to Confirmatory Application 01/c/01/09

their initial position. This in turn would seriously affect the chances of finding a compromise on the legislative proposal within the Council".

The Council even goes as far as to suggest that public pressure in circumstances where it has not yet discussed the written contributions contained in the requested document would "risk influencing delegations' possibility to present and defend their preliminary views freely and would, consequently, distort the debate in the Council."

The Council also states that "delegations would be deprived of the chance to have serene discussions within the Council if the public were to get involved, and that that would make it difficult for the Council to move the revision of the Regulation forward."

This is clear evidence that the Council of the European Union does not believe that the public has anything positive to contribute to the debate, offering instead nothing but "distortions", a ruining the "serene" atmosphere. This idea that laws are better made by lawyers a high level officials is not only elitist but also extremely outdated in these times of widespread information technologies and higher education throughout the European Union. It is also contrary to the principles of participatory democracy.

The point of an open and participatory legislative process is that there is more chance for people to voice their opinions and for more ideas to be brought forward that perhaps closed policy circles may overlook. This, along with transparent debating in the Working Party on Information a within the Council, would mean a far higher chance of reaching a compromise that would be satisfactory for a far larger number of people.

In addition, since the public would be allowed to participate meaningfully in these negotiations, there would be a greater sense of ownership of the outcome of these legislative process a therefore no selling, spinning or justification of policy decisions would be necessary. Therefore, the Council's arguments again transparency would become irrelevant. This is particularly the case if jurisprudence from the European Courts is taken into account.

The European Court of Justice recognised in the Turco case[28] that "Openness... contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights".

28 Joined Cases C-39/05 P and C-52/05 P, Kingdom of Sweden and Maurizio Turco v Council of the European Union - to be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0039:EN:HTML

Annex B: Institutions Contacted

Country	Institution	Form of submission	Date first sent
Austria	European Union Permanent Representation Austrian Foreign Ministry	E-mail Online form	6 April 2010 6 April 2010
Belgium	Federal Public Service – Ministry of Foreign Affairs, External Trade and Development Cooperation	E-mail	25 March 2010
Bulgaria	Permanent Representative to the European Union[29]	E-mail	7 April 2010
Cyprus	Press a Information Office of the Republic of Cyprus	E-mail	26 March 2010
Czech Republic	Ministry for European Affairs	E-mail	25 March 2010
Denmark	Ministry of Foreign Affairs	E-mail	25 March 2010
Estonia	Permanent Representation of Estonia to NATO	E-mail	25 March 2010
Finland	Ministry of Justice Ministry of Foreign Affairs	E-mail E-mail	6 April 2010 6 April 2010
France	Permanent Representation of France to the EU	Online form and e-mail	26 March 2010
Germany	Federal Foreign Office	Online form	25 March 2010
Greece	Permanent Representation of Greece to the EU	E-mail	25 March 2010
Hungary	Ministry of Justice a Law Enforcement	E-mail	26 March 2010
Ireland	Permanent Representation of Ireland to the EU Department of Foreign Affairs	E-mail Regular mail, along with €15	26 March 2010 28 June 2010
Italy	Permanent Representation of Italy to the EU Ministry of Foreign Affairs	E-mail online form	26 March 2010 9 June 2010

29 The attendee at the Working Party on Information representing Bulgaria was completely illegible so we sent it to the EU Permanent Representative

Latvia	Ministry of Foreign Affairs	E-mail	26 March 2010
Lithuania	Permanent Representation of Lithuania to EU	E-mail	26 March 2010
Luxembourg	Permanent Representation of Luxembourg to the EU	E-mail	26 March 2010
Malta	Permanent Representation of Malta to the EU	E-mail	26 March 2010
Netherlands	Permanent Representation of the Netherlands to the EU	E-mail	26 March
Poland	Office of Electronic Communications of the Republic of Poland	E-mail	6 April 2010
	Ministry of Interior and Administration	E-mail	26 April 2010
Portugal	Permanent Representation of Portugal to the EU	E-mail	9 June 2010
Romania	Permanent Representation of Romania to the EU	E-mail	6 April 2010
Slovakia	Ministry of Foreign Affairs	E-mail	6 April 2010
Slovenia	Ministry of Public Administration	E-mail	6 April 2010
Spain	Permanent Representation of Spain to the EU	E-mail	26 March 2010
Sweden	Permanent Representation of Sweden to the EU	E-mail a online form	7 April 2010
UK	Permanent Representative of the UK to the EU	E-mail	7 April 2010