



## Statewatch analysis

### Proposed amendments to Michael Cashman's report on the Regulation on public access to EU documents

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This analysis assesses the amendments proposed to the proposed new Regulation on access to documents:

a) in the draft report by the European Parliament (EP) rapporteur, Michael Cashman:

<http://www.statewatch.org/news/2009/feb/eu-access-reg-cashman-report.pdf>

b) the further amendments to that draft report proposed by the rapporteur and other MEPs:

<http://www.statewatch.org/news/2009/feb/eu-access-reg-amendments-to-cashman-report.pdf>

It concludes whether each of the major proposed amendments should be -

**supported or strongly supported** - because they would either protect the current standards applying to the right of access to documents from the Commission's attempts to lower these standards, or because they would enhance that right further; or

**opposed or strongly opposed** - because they would either endorse the Commission's attempts to lower the current standards, or because they would reduce standards even further than the Commission proposes.

This analysis refers back to the Statewatch article-by-article commentary on the Commission's proposal, which demonstrates that it would not improve the current standards in any way, and in many respects would lower them:

<http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf>

The Commission's original proposal can be found at:

<http://www.statewatch.org/news/2008/may/eu-access-reg-com-229-final.pdf>

The existing Regulation 1049/2001 on public access to EU documents:

<http://www.statewatch.org/news/2001/jul/newregoj.pdf>

#### **Amendment 25 - strongly supported**

This amendment is essential, since it would delete the new Art. 2(5) and Art. 2(6) as proposed by the Commission. As explained in Statewatch's article-by-article commentary on the proposal, these new provisions would lower the current standard of protection.

### **Amendment 27 - strongly supported**

This amendment is essential, since it restores the core definition of 'document' in the current Regulation. As pointed out in the Statewatch commentary, the Commission's proposed amendment here would significantly lower the standard of protection of the right of access to documents.

### **Amendment 35 - suggested amendments**

The proposed new Art.3a, which would take over the existing Art. 9 (see amendment 54), sets higher standards than the current rules in many respects, but in one respect it sets lower standards, because it widens the scope of the concept of classified/sensitive documents as compared to the current rules. To avoid this, the words *'in the areas covered by Article 4(1)(a), notably public security, defence and military matters'* should be added after the words *'Member States'* in Art. 3a(1), so that the scope of the classified/sensitive documents clause is not altered.

Alternatively, it could be considered that the scope of this provision should be narrowed even further, in order to raise standards. To that end, the words *'as regards public security, defence and military matters'* should be added after the words *'Member States'* in Art. 3a(1). This would make the list of matters covered by Art.3a exhaustive.

### **Amendment 37 - supported**

This amendment would make the 'public interest' ground for refusals discretionary, rather than mandatory. It should therefore be supported, as it would raise current standards.

### **Amendment 38 - supported**

This amendment to the 'public security' exception would narrow its scope as compared to the current rules and as compared to the Commission's proposal, since the new words 'including the safety of natural or legal persons' would be deleted. As pointed out in the Statewatch commentary, it is not clear whether the new words would lower current standards, but it would be preferable to delete the new wording to make sure of this.

### **Amendment 39 - supported**

This amendment would make the 'private interest' ground for refusals discretionary, rather than mandatory. It should therefore be supported, as it would raise current standards.

### **Amendment 40 - strongly supported - proposed amendment**

This amendment would largely restore the current wording of the 'privacy and integrity' exception, as compared to the Commission's proposed new wording of Art. 4(5) (see amendment 45). The amendment would also add the words 'as well the principle of transparent and good administration outlined in Article 1(c)'. The retention of the current wording would maintain current standards, for the Commission's proposal for the new Art. 4(5) would significantly lower current standards, for the reasons set out in the Statewatch commentary. The new amendment would have the potential to raise current standards.

In order to protect the current case law, the following words could also be added to the end of this provision, as suggested in the Statewatch commentary:

'In any event, the names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed.'

### **Amendment 41 - supported - suggested amendment**

This amendment should be supported since it would raise standards by limiting the scope of the current exception. But in order to ensure that the judgment in the Turco case is

maintained, the following additional wording could be added: '; this exception shall not apply where the document concerned is a legislative document, within the meaning of Art. 3(ab)'

It should be recalled that, as pointed out in the Statewatch commentary, the reference to 'arbitration and dispute settlement' proceedings in this exception is new, and so the Commission's draft would clearly lower standards here as compared to the status quo. However, the draft EP amendment, as it stands, would counteract that effect.

#### **Amendment 42 - oppose**

This amendment would widen, rather than narrow or abolish, a proposed new exception to the access rules. As such it would lower standards even further than under the Commission's proposal. However, arguably there are sound objective reasons for developing exceptions as regards selection procedures and procurement procedures, for the limited period which the draft amendment refers to.

#### **Amendment 43 - strongly support**

The Commission would have lowered standards here by widening the scope of the exception (see the Statewatch commentary), but the EP draft more than compensates for this by abolishing the 'decision-making' exception entirely. Obviously this would raise standards.

#### **Amendment 44 - strongly support**

This amendment would a) widen the scope of the override clause to cover paragraph 1 and b) specify further grounds of application of the override clause. Obviously this would raise standards.

#### **Amendment 46 - support**

A five-yearly review of non-disclosed documents would raise standards.

#### **Amendment 49 - strongly oppose - suggested amendment**

This draft amendment would confirm and in fact worsen a key Commission proposal to lower standards as compared to the status quo. As pointed out in detail in the Statewatch commentary on the Regulation, the case law concerning the current Regulation only allows Member States to insist on non-disclosure of their documents on the basis of the rules in the Regulation, or on the basis of national law which contains parallel exceptions to those in the Regulation. Member States cannot refuse to disclose documents on the basis of their national law per se.

The draft amendment 49 equally lowers current standards because it accepts the principle proposed by the Commission - and furthermore because it deletes some wording that the Commission proposed which arguably could be understood to refer back to the current case law - 'The institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.' The Commission's drafting is very poor but the solution is not to remove these words but to improve their clarity - see below.

In order to maintain the current standards, the Statewatch commentary suggesting either maintaining the wording of the current Art. 4(5), or replacing it with the following text:

*'Where an application concerns a document originating from a Member State, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4.'*

In order to reflect the case law fully the words 'or in equivalent provisions of its national legislation' could be added at the end.

The EP draft amendment also refers to Article 296 of the Treaty. Legally it is true that a Regulation cannot amend the wording of the Treaty. But in order to be more precise the exact wording of the Treaty could be used: *'objects on the basis of Article 296(1)(a) of the EC Treaty to the supply of information the disclosure of which it considers contrary to the essential interests of its security'*.

Finally, in order to reflect the intention of the Commission's proposal and the EP amendment to limit the scope of this provision, and furthermore to take account of the further limitation proposed in point 4 of the Cashman resolution of 2006, the following wording could be used:

*'Where an application concerns a document originating from a Member State, not acting as a Member of the Council, or as regards information submitted to the Commission concerning the implementation of Union legislation, until such time as any proceedings before a court have begun, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4, or in equivalent provisions of its national legislation, or objects on the basis of Article 296(1)(a) of the EC Treaty to the supply of information the disclosure of which it considers contrary to the essential interests of its security.'*

#### **Amendment 51 - supported**

This amendment would clearly raise standards as compared to the status quo.

#### **Amendment 52 - supported - further amendment suggested**

This amendment would maintain the status quo. It would be desirable to reject also the proposed amendment to Art. 6(3), with a view to maintaining current standards.

#### **Amendment 53 - supported**

This amendment would protect the status quo. As pointed out in the Statewatch commentary, the Commission's proposal here would lower standards.

#### **Amendment 55 - opposed - further amendment suggested**

This amendment would lower the current standards as it would increase the possibility for charging for access. Furthermore, as pointed out in the Statewatch commentary, the proposed amendment to Article 10(1) should be rejected, as it would lower current standards.

#### **Article 12 - amendments needed**

For the reasons pointed out in the Statewatch commentary, the amendments here would lower current standards. In order to maintain current standards, Article 12(1) should not be amended and Article 12(4) should not be added.

To improve the current status quo, as set out in recommendation 2 of the Cashman resolution, Article 12(2) should read as follows: 'In particular, documents drawn up or received in the course of procedures for the adoption of [EU legislative acts or non-legislative acts of general application] shall, subject to Article [3a], be made directly accessible to the public'.

#### **Amendment 56 - support in part**

This amendment would generally increase obligations to publish measures in the OJ, and so should be welcomed. However, it would be preferable to include an obligation to publish Member States' third pillar proposals in the OJ (this would raise current standards), rather

than delete any reference to this altogether as proposed in the EP amendment - this would lower current standards.

**Amendments 57-61 - support**

These amendments would improve administrative practice regarding transparency.

**Amendment 62 - oppose**

It would be preferable simply to require the publication of these names in all cases (see comments above).

**Amendment 81 - support**

This amendment prevents the lowering of standards as proposed by the Commission.

**Amendment 82 - oppose**

The Commission proposal significantly lowers the existing level of protection and inserting a reference to the case law of the Court of Justice would be contradictory - as the proposal aims to overturn the case law. The second sentence has nothing at all to do with the case law, and would be illegal as it excludes a category of documents entirely and for all time from the scope of the access rules, without any qualification or justification.

**Amendment 84 - support**

This amendment would make clear that separate international measures could only raise standards, not lower them. It would therefore increase standards as compared to the status quo.

**Amendments 85, 86 and 88 - strongly support**

These amendments would preserve the status quo as regards the core definition of 'document', and therefore prevent the Commission's intention to lower standards.

**Amendment 87 - strongly oppose**

This amendment would retain the Commission's intention to lower standards significantly as regards the core definition of 'document'.

**Amendment 89 - oppose**

This amendment partly retain the Commission's intention to lower standards significantly as regards the core definition of 'document'. It would be preferable to reject this approach altogether.

**Amendment 95 - strongly support**

This amendment would a) drop the extension of the court proceedings exception and b) retain express protection for the application of the Turco judgment.

**Amendment 96 - support**

This amendment would also retain express protection for the application of the Turco judgment, but would not be as good as amendment 95, which would also drop the extension of the court proceedings exception.

#### **Amendment 97 - support**

This would limit the scope of the exception in the same way as the main draft report, but it would not expressly retain express protection for the application of the Turco judgment (although such express protection would probably not be necessary).

#### **Amendment 98 - support**

Deleting this new exception would maintain the status quo.

#### **Amendment 99 - oppose**

As with the main report, expanding the scope of this new exception would lower existing standards.

#### **Amendment 100 - support in part - oppose in part**

This is not to be preferred to the main report, which would delete Art. 4(3) entirely. However, at least it would make Art. 4(3) subject to the principle of transparency as regards legislative and similar procedures, so would be an improvement on the status quo. However, it would in part reduce current standards, since it would take over the Commission's suggestion of applying the exception in Art. 4(3) to all documents, not just a specific category of documents.

#### **Amendment 101 - support**

This is not to be preferred to the main report, which would delete Art. 4(3) entirely. However, at least it would make the application of the exception in Art. 4(3)(a) subject to a further condition, so would be an improvement on the status quo.

#### **Amendment 102 - support**

This is preferable to the proposal in the main report in that it also provides for transparency in legislative and similar procedures as an overriding principle. However, the proposal in the main report is better in that it also applies to paragraph 1. In any case, this amendment would be an improvement on the status quo.

#### **Amendment 103 - strongly support**

This is preferable to the proposal in the main report in that it also provides for transparency in general as an overriding principle. Furthermore, like the proposal in the main report, it also applies to paragraph 1. This amendment would be a significant improvement on the status quo.

#### **Amendment 104 - support**

This is an improvement in the status quo because it would extend the environmental override to more of the exceptions. However, the amendment in the main report is preferable - since it would extend the environmental override to the whole of paras 1 and 2.

#### **Amendment 105 - support**

A definition of environmental emissions would be useful.

#### **Amendments 106 and 109 - support**

These limitations on the scope of the exceptions would raise current standards.

### **Amendment 107 - strongly support**

This amendment would prevent any lowering of standards as regards disclosing the names of lobbyists as it entirely reflects the current case law - unlike the Commission proposal. However, it is not clear whether any data protection exception would still remain in the Regulation - it would be useful to retain the current Art. 4(1)(b) as it strikes the right balance between data protection and access to documents.

### **Amendment 108 - strongly oppose**

This amendment would accept in substance the Commission's proposal, which would lower current standards.

### **Amendment 111 - very strongly support**

This amendment limits Member States to invoking exceptions in their legislation, and takes on board also all of the points made in the 2006 Cashman resolution. It also limits the exception to cases where the MS are not acting as Council members.

### **Amendment 112 - strongly support**

This amendment improves the main report's amendment by including rules on lobbyists and the implementation of EU law.

### **Amendment needed – new Article 6a**

Freedom of information:

1. Notwithstanding Article 6, an applicant has the right to seek information on the activities or policies of the institutions without initially identifying specific documents.
2. In the case of a request for information referred to in paragraph 1, the institutions shall apply Article 6(2) and (4) of this Regulation to the extent that there may be existing documents which are relevant to the request for information. They shall also supply any additional information which may be required to answer the request for information fully, in accordance with the principle of good administration.

### **Amendment 115 - support**

The capacity to get the Ombudsman's opinion would be useful in practice, and would raise current standards.

### **Amendment 117 - oppose**

This amendment would endorse a lowering of standards in the Commission's proposal.

### **Amendment 121 - support**

This amendment would raise standards in the Commission's proposal and as compared to the status quo.

### **Amendments 124 and 125 - support**

These amendment would prevent a lowering of the current standards in the Commission's proposal.

### **Amendments 126 and 127 - strongly support**

These amendments would confirm the correct interpretation of Article 11, and moreover improve current standards.

### **Amendments 128 -130 - strongly support**

These amendments would confirm the correct interpretation of Article 12, and moreover improve current standards.

### **Amendment 131 - support**

This amendment would improve current standards.

### **Amendment 136 - support**

This amendment would improve current standards and also prevent a lowering of standards as proposed by the Commission.

### **Amendment 137 - support**

This amendment would prevent a lowering of standards as proposed by the Commission. The previous amendment is preferable, though, as it would also improve current standards.

Full background documentation on the proposed changes to the Regulation can be found on:

**Statewatch's Observatory: the Regulation on access to EU documents: 2008-2009:**

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

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