



Transparency and Access to Documents in the EU: *Ten Years on from the Adoption of Regulation 1049/2001*

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Introduction

Transparency is a prerequisite of good governance: it empowers citizens. It allows them to scrutinise and evaluate the activities of the public authorities and to call them to account. It also renders more effective the use of other public and political rights, particularly the freedom of speech and the right to information. At EU level, transparency is indispensable for increasing citizens' understanding of EU decision-making and for enhancing their confidence in EU institutions. Public access to EU institutions' documents strengthens their democratic credentials and helps to close the gap between them and the citizens. The central instrument in the EU to that purpose is Regulation 1049/2001 of the European Parliament and of the Council, setting out the modalities for a right of access to EU documents and regulating transparency of disclosure procedures¹. This contribution discusses the thorny process of reforming this instrument and the current state of play.

The legal framework 1992-2008

The principle of openness was introduced by the Maastricht Treaty in 1992. Declaration No 17 on the Right of Access to Information² was attached to the Treaty with a view to 'strengthening the democratic nature of the EU institutions and the public's confidence in the administration³'. On the basis of this declaration, the Commission and the Council adopted a Code of Conduct on Access to Documents (1993), in which the two institutions committed themselves to providing 'the widest possible access to documents'. Afterwards, the Council, the Commission and later also the European Parliament adopted implementing decisions laying down detailed conditions for access to information⁴. In 1997 the Amsterdam Treaty embedded the right of access to information in the EC Treaty by providing in Article 255 the right of access to documents of the European Parliament, Council and Commission to all natural and legal persons residing or having their registered office in one of the Member States. Pursuant to this Article, the Council and the European Parliament adopted Regulation No 1049/2001 on public access to European Parliament, Council and Commission documents. The purpose of the Regulation is '(a) to define the principles, conditions and limits [...] governing the right of access to [...] documents provided for in Article 255 of the EC Treaty [...] as to ensure the widest possible access to documents; (b) to establish rules ensuring the easiest possible exercise of this right; (c) to promote good administrative practice on access to documents.'

The approach adopted in Regulation 1049/2001 corresponds to the Nordic concept of public access to documents. Every natural or legal person resident or established in the EU enjoys the right to request access to documents held by an EU institution without the need to specify any reason. That does not imply that all documents must be made public: Article 4 of Regulation 1049/2001 contains a list of exceptions which may justify restraining access to documents, and places the burden of proof on the institution to which the request is addressed.

Proposed reform of Regulation 1049/2009 by the European Commission

As part of its 'European Transparency Initiative' launched in November 2005, the Commission started a review of Regulation 1049/2001, eventually adopting a proposal for a new regulation in April 2008⁵, aimed at achieving more transparency in legislation and bringing EU provisions into alignment with the Århus Convention⁶. The proposal was based on views of the European Parliament expressed in its resolution of April 2006⁷, the outcome of a public consultation exercise launched by a Commission Green Paper⁸ and the case law of the General Court and the Court of Justice of the EU interpreting Regulation 1049/2001.

The Commission's proposal provoked a vivid debate amongst the institutions. The European Parliament was not happy with the choice of a recast procedure of the regulation as well as some of its content. And although it voted in March 2009 on a report containing a great number of amendments, it decided not to adopt a legislative resolution, as it considered that this dossier should be referred to the next parliamentary term. As a result, no formal position of the European Parliament was forged at first reading.

Some of the most controversial issues of the proposal concerned: the definition of 'document' [Article 3(a)] and the scope of application [Article 2(5),(6)]; the exception of legal advice provided by the legal services of the EU institutions [Article 4(2c)]; relation between the right of access to documents and the right to personal data protection [Article 4(5)]; and 4) Members States' documents and Member States' rights to restrict access [Article 5(2)].

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Definition of 'document' and scope of application

The Commission's proposal [Article 3(a) and Article 2(5), (6)], stipulates that a document needs to be 'formally transmitted to one or more recipients [...] or otherwise recorded'. This definition has received much criticism by the European Ombudsman who believed that it would allow for access to fewer rather than more documents⁹. Such a definition seems to be too narrow because it excludes information meant for internal circulation by providing a blanket waiver regardless of the document's purpose or function. The previously non-existent requirement for a formal transmission brings a substantial number of 'non-papers', trilogue documents and other informal exchanges outside the scope of public scrutiny. In addition, the definition laid down in Regulation 1049/2001 could be easily argued to accommodate databases as documents. The 2008 proposal, however, deals with databases explicitly and restricts them from being classed as a document under the regulation to situations when 'data [...] can be extracted in the form of a print out or electronic format copy using the available tools for the exploitation of the system.' These more restrictive provisions therefore seem to be a retaliatory response by the Commission to the case law of the Court relating to Regulation 1049/2001.

Relation between access to documents and personal data protection

The right balance between the two fundamental rights of access to documents by the public and personal data protection of an individual is a delicate issue. It is noteworthy that the 2008 proposal explicitly refers to the relevant case T-194/04, *Bavarian Lager*, but at the same time, the proposed Article 4(5) stipulates that personal data shall be disclosed in accordance with the conditions laid down in EU legislation on the protection of individuals with regard to the processing of personal data.



This wording appears to be problematic as it might suggest that access to documents which contain personal data should be considered under Regulation 45/2001 on data protection instead of Regulation 1049/2001. This would be contrary to the General Court's ruling of 2007 on *Bavarian Lager*¹⁰, clearly stating that personal data of officials must be released if disclosure would not mean 'actually and specifically undermining the privacy and integrity of the persons concerned'. However, the Court of Justice recently overruled the General Court's judgment in this case and held that the Commission had sufficiently complied with its duty to openness by releasing a version of the document in question without divulging the names of participants who had not given their consent¹¹. It however failed to give specific indications on how to balance the relationship between transparency and data protection so that uncertainty still remains today about the legal correctness of the Commission's 2008 proposal in this regard. Very recently the European Data Protection Supervisor proposed a way out of this dilemma, by calling for a proactive approach by the institutions: the institutions would need to assess and subsequently make clear to data

subjects – before or at least at the moment they collect their data – the extent to which the processing of such data includes or might include its public disclosure¹².

Legal advice provided by the legal services of the European institutions

The proposal has been criticised for not reflecting the Court's jurisprudence (*Sweden and Turco v. Council and Others*¹³) that disclosure of legal advice in legislative procedures increases the transparency and openness of the legislative process and strengthens the democratic rights of European citizens. Therefore, the European Parliament proposes to refine the exception as meaning 'legal advice and court proceedings, except for legal advice in connection with procedures leading to a legislative act or a non-legislative act of general application'.

Member States' documents

It is important to remember that Regulation 1049/2001 applies only to EU institutions. It has an impact on national provisions only where it lays down conditions of access to Member States' documents. Regulation 1049/2001 goes much further than the national legislation usually does, as it includes the documents of the legislator. The 2008 proposal now allows Member States to enjoy more discretion in restricting access to documents [Article 5(2)] on two different grounds.

The first of relevance is the derogation relating *inter alia* to overriding reasons of public interest [Article 4(1)], or when a decision has not yet been taken by the institution and the disclosure would undermine the decision-making process [Article 4(3)]. In *'Sweden and Turco v. Council and Others'*¹⁴ the Court of Justice ascertained that all documents drawn up in the course of a legislative procedure shall be made 'directly accessible'. Moreover, in a very recent case of March 2011 'Access Info Europe'¹⁵, the General Court ruled that possible criticism by the public and media are not sufficient reasons to withhold disclosure during the legislative process under the current Article 4(3). The European Parliament as well as several civil society organisations have therefore considered that the proposed Article 4(3) is contrary to the Treaties altogether and should be repealed: Article 15(2) and 15(3) fifth paragraph clearly state the duty of openness and accessibility of legislation, and render the current derogation under Article 4(3) incompatible with the Treaties.

The second ground for discretion is an unfolding of Article 4(5) addressing the specific rights of the Member States to oppose disclosure of documents originating from them. The Court of Justice ruled that documents submitted by the Member States in the course of a legislative procedure did not have the character of a third party document but had an 'EU' character (Council Documents), and were therefore excluded from the exception under Article 4(5) of the Regulation 1049/2001.

In addition, Article 5 of the 2008 proposal allows Member States to veto the disclosure of documents sent by them to the European institutions providing reasons for withholding it. Those reasons could also be based on exceptions for access to information found in the national law, not only based on Article 4(1)-(3) of the Regulation 1049/2001. However, in the light of the case law of the Court of Justice, national provisions can only be invoked when the Member States' documents do not have an 'EU' character. Moreover, as in 'Commission v. Sweden' [C-64/05], Member States must prove the adequacy of their national provisions under the conditions laid down in Article 4(1)-(3) of the Regulation 1049/2001. Article 5 of the proposal cannot therefore be interpreted as an *a priori veto* right. It should be read together with Article 4 of the Regulation 1049/2001, whereby the national provisions protecting disclosure should be subject to an objective harm test.

Conclusion

The controversial issues discussed above have so far prevented any progress on the 2008 proposal to amend Regulation 1049/2001. The proposal itself seems to be a missed opportunity to substantially amend Regulation 1019/2001 and to adapt to modern standards of open administration, as well as to codify the case law of the European Courts. An important challenge lies in the clarification between the balancing of transparency and data protection. The proactive approach proposed by the European Data Protection Supervisor seems to be an interesting way out of this dilemma.

Rather curiously, faced with the new requirements of the Lisbon Treaty extending both the personal scope of Article 15 TFEU (applying to all EU institutions, bodies and agencies (with some exceptions for the Court of Justice, the European Central Bank and the European Investment Bank) and the material scope ('whatever the medium'), the European Commission adopted yet another proposal to amend Regulation 1049/2001 in March 2011¹⁶. Importantly though, this proposal is only to adapt the Regulation to the requirements of the new Article 15 TFEU and leaves the 2008 proposal intact. This means that the debate on the reform of Regulation 1049/2001 along the lines of the 2008 proposal will continue. It could very well be that with this binary approach with two parallel proposals to amend Regulation 1049, the Commission is searching for a way to withdraw its 2008 proposal and come up with a new one altogether.

Notes

¹ OJ, C191, 29 July 1992, p. 1.

² Official Journal, C-191 of 29 July 1992, p. 1.

³ In addition, Article 1(2) EU Treaty provided that decisions '[...] shall be taken as openly as possible and as closely as possible to the citizen.'

⁴ Council Decision 93/731/EC on public access to Council documents OJ L 340, 31 December 1993, p. 43, Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents OJ L 46, 18 February 1994, p. 58 and European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, OJ L 263, 25 September 1997, p. 27.

⁵ COM(2008)229.

⁶ Convention on Access to Information, public Participation in Decision-making and Access to Justice in environmental Matters, signed in Århus, Denmark, on 25 June 1998. Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention to Community institutions and bodies (OJ L 264, 25 September 2006, p. 13).

⁷ P6_A(2006) 052.

⁸ COM(2007) 185, Green Paper, *Public Access to Documents held by institutions of the European Community - A review*.

⁹ See e.g. Nikiforos Diamandouros, P., Contribution of the European Ombudsman to the public hearing on the Revision of Regulation 1049/2001 on public access to documents, European Parliament - Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2 June 2008.

¹⁰ See also Nikiforos Diamandouros, P.

¹¹ Case T-194/04, especially p. 81, 89 of the judgement.

¹² EDPS, Public access to documents *Bavarian Lager* ruling, 24 March 2011.

¹³ Joined cases C-39/05 P and C-52/05 P.

¹⁴ Joined cases C-39/05 P and C-52/05 P.

¹⁵ Case T-233/09.

¹⁶ COM(2011) 137.