Statewatch analysis

The European Commission proposals to amend the Regulation on access to EU documents (1049/2001)

Tony Bunyan, Statewatch editor, comments:

"The scope of the Commission's amendments and its consultation do not consider many of the fundamental questions posed by civil society and the European Parliament.

Perhaps the most crucial is the public's right to know what is being discussed before it is adopted in Brussels – a practice that would never be tolerated at national level.

Moreover, two of the Commission amendments are highly retrogressive. The new definition of a document would mean that if an official does not register it then it is not a "document" – a recipe for abuse. And the obligation of institutions to give public access to the full text of documents would be limited to legislative measures – and not cover the hundreds of thousands of other documents produced and received.

The Amsterdam Treaty was agreed 11 years ago (1997) and was meant to herald a new era of openness and transparency – we got half a loaf and are still waiting for the other half."

The European Commission is due to adopt (Wednesday) a proposal to amend Regulation 1049/2001) on access to EU documents.

It claims legitimation for its proposed amendments from a report produced by the European Parliament in September 2006, a public consultation process conducted by the Commission in 2007, and recent case law.

Many problems raised by civil society and the European Parliament which have not even been considered.

The main proposals that are retrogressive are:

- The amendment concerning Article 12: the right of public access to the full-text of documents which currently covers **all** documents is restricted to legislative ones only.

- the definition of a document which would mean that if a document is not recorded it does not exist

- the period for responding to confirmatory applications (appeals against refusal) is increased from 15 to 30 days

European Parliament

The Commission says it took up five suggestions by the European Parliament (EP).

<u>1. Article 255</u>

The EP asked that Article 255 of the EC Treaty should be referred to and it is proposed that Article 1 contain a reference to this.

<u>2. Full legislative transparency</u>

The EP has called for:

"All preparatory documents to legal acts should be directly accessible to the public"

The Commission says:

"This recommendation is fully accepted and addressed in Article 12"

Here the Commission is economical with the truth. True the EP, quite rightly, says all legislative preparatory documents should be directly accessible. However, the effect of the Commission's proposed amendment makes no guarantee that preparatory documents will be publicly available before a measure is adopted.

In fact the Commission uses the EP's argument to propose a massive backward step.

Current Article 12:

"*Direct access in electronic form or through a register*

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located."

The proposed amended Article 12

***1. 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 Articles 4 and 9, be made directly accessible to the public*.**

2. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible in electronic form.

3. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

***4. Each institution shall define in its rules of procedure which other categories of documents are directly accessible to the public*.'**

Apart from the changes to the definition of a "document" this is the most sweeping change proposed by the Commission.

1. The current Article 12.1. covers **ALL** documents – whether legislative or not – and is directly linked to Article 11. Article 11 says all documents produced and received should be listed on the public register without delay and Article 12.1 says that in principle **all** of these documents should be – "as far as possible" – directly accessible to the public in electronic form.

The proposed amendment by the Commission **REMOVES THIS PRINCIPLE!**

The amendment **LIMITS** the commitment to give direct access to legislative (and non-legislative) "acts" – and this would be greatly limited by applying the exceptions in Articles 4 and 9..

As to the hundreds of thousands of other documents – produced and received – there is a vague commitment where possible to make available policy or strategy documents.

To compound matters there is another major change in the new Article 12.4 whereby each institution can decide for itself "***which other categories of documents are directly accessible to the public.***"

This is an utterly outrageous proposal.

3. Confidentiality, Member States documents and Registers

The three other matters the Commission says were raised by the EP are:

The EP wants rules on classified documents to be changed - "to ensure parliamentary control" – the Commission fails to respond to this.

The EP also raised Member States' vetoes on requests for access to their documents when placed in EU decision-making (see below under Case law).

Finally, the EP wants "a single access point to preparatory legislation", a common interface to the institution's registers and common archiving rules. The Commission welcomes this recommendation but proposes no changes to the Regulation.

Public consultation

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1. Active dissemination

A large number of respondents wanted the institutions' registers to be easier to access and more "harmonised".

Extraordinarily the Commission states that Article 11 (on the obligation to set up public registers listing all documents produced) allows for this so no change is needed.

The failure of the European Commission to maintain a full and proper public register of documents under Article 11 is the subject of a complaint by *Statewatch* to the European Ombudsman:
http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf

2. Aligning the Regulation with the Aarhus Convention.

The Commission says that the majority of respondents backed this realigning except *"environmental NGOs and .. the chemical and biotechnological sectors"*

It thus proposes two amendments, a new Article 4.2 and the application of the amended 5.2. (see below)

New Article 4.2 (exceptions allowing refusal of access)

"The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) commercial interests of a natural or legal person; ***this ground for refusal does not apply to information on emissions which is relevant for the protection of the environment;"***

3. The protection of commercial interests

The Commission concludes:

"The general feeling is that the current rules strike the right balance. Journalists, NGOs and a majority of citizens claim that more weight should be given to the interest in disclosure.

Therefore, the Commission does not propose to amend this provision."

In other words, government and big business did not want any changes, just the rest of us.

4. "Excessive requests"

A long-standing desire of the Commission is to limit access to people asking for too many documents but this notion was not backed in the consultation.

The Commission is proposing a "clarification" where documents cannot be easily identified in Art 6.2:

Existing Article 6.2:

"If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents."

Proposed "clarification" amendment:

6.2. If an application is not sufficiently precise ***or if the requested documents cannot be easily identified,*** *the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.'*

There are two other changes to the processing of requests:

a) in Article 8.1: The time limit for a response to confirmatory applications of 15 days becomes **30** days;

b) There is a new Article 10.5 which includes:

"the payment of a fee or a consultation without the right to take copies"

5. The concept of a document

The Commission says that the definition of a document in existing Article 3.a stays with a "clarification" with regards to databases.

"3 (a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;"

New Article 3.a

"(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ***drafted or received by an institution and transmitted to one or more recipients or circulated within the institution or otherwise recorded; data contained in electronic storage, processing and retrieval systems are documents if they can be printed or extracted in readable form in an electronic file using the available tools for the exploitation of the system****;"*

According to this new definition a "document" drafted or received which is **NOT** transmitted to others or circulated or recorded is **NOT** a document.

This confusing "clarification" is made even more so in the Explanatory Memorandum which says (p6, para 3.2):

"a "document" only exists if it has been sent to recipients or circulated within the institution and has been entered in the institutions' records"

If the EM is accurate then this is outrageous! A "document" is a "document" regardless of whether it is entered into an institution's records – indeed it is certainly no unknown for official not to register all documents of which they are the author in the Commission's retrieval system (ie: Adonis).

Moreover, in the *Statewatch* complaint to the European Ombudsman the Commission has repeatedly stated that it does not accept, and does not feel bound by, the current definition of a "document".

The current definition of a "document" in Article 3.a should remain unchanged with the addition of the new provision on databases.

6. Time frames for exceptions

The Commission in the consultation sought to introduce a "time frame" before which a document could not be released (eg: before it was adopted) which found little support.

There was support for the systematic disclosure of documents after "specific events" and well before the 30 years rule.

However, the Commission does **not** make any proposed amendments.

7. Scope

Most of those consulted want the scope of the Regulation to cover all EU institutions, bodies and agencies. The Commission says that this will only be possible under the new Lisbon Treaty.

Recent case-law

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1. Access to personal data

The ECJ ruled in the Bavarian Lager case (8.11.07) that the personal data of officials involved in the institutions activities can be released providing disclosure would not adversely affect the persons concerned.

A new Article 4.4 is inserted in the Regulation saying:

"4. Personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EU legislation on the protection of individuals with regard to the processing of personal data. Disclosure of names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities is deemed to be lawful under the data protection legislation unless, given the particular circumstances, disclosure would adversely affect the persons concerned."

This is, in principle, a positive amendment.

2. Access to documents originating from a Member State

It is proposed that the current Article 4.5 is replaced by a new Article 5.2:

"A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement." (Art 4.5)

“Where an application concerns a document originating from a Member State, as defined in Article 3(3), the authorities of that Member State will be consulted, unless the document is already lawfully in the public domain. The institution holding the document will disclose it unless the Member State gives reasons for withholding it, based on exceptions laid down in Article 4 of this Regulation or on specific provisions in its own legislation preventing disclosure of the document concerned.” (new Art 5.2)

This does introduce an obligation for the institution to disclose a document from a Member State. However, this is limited by the Member State being able to invoke any of the exceptions in Article 4, for example, Article 4.3 where access can be refused where a proposal is under discussion (one of the largest categories for refusal of access by the Council and the Commission).

Member State documents concerning the legislative process should be public.

3. Examining requests which are “manifestly unfounded”

This is a specific ruling by the Court concerning documents to be submitted as part of the court’s proceedings prior to an oral hearing. New provisions in Art 2.5 and 2.6:

“5. Documents submitted to Courts in the course of judicial proceedings are not accessible to the public before a public hearing has taken place. Access can only be granted to the Institutions' own submissions.

6. Without prejudice to specific rights of access for interested parties established by EU law, documents forming part of the file of law enforcement proceedings leading to an administrative act of individual scope are not accessible to the public until such act has become definitive. Information obtained from undertakings in the framework of such proceedings is not accessible to the public.”

STATEWATCH together with other NGOs have called for:

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1. The need abolish the absolute power of Member States to 'veto' the documents which they have 'authored';

2. The need to abolish the power of non-EU states (“third parties”) to veto access in practice, especially the USA;

3. The need to restore some meaning to the “public interest” override over the ability of the EU institutions to refuse access to documents, because the case law of the EU's Court of First Instance has effectively wiped out the

prospect of using the override; no appeal for disclosure on the basis of the "public interest" of the public to know has ever been successful.

4. The need to re-examine and limit the exceptions to the right of access under the Regulation, in particular the exceptions for decision-making by the EU institutions – establishing the "right to know" was is being discussed before it is decided in Brussels.

5. The need to extend access to documents in practice by clarifying and reinforcing the obligation of the EU institutions to establish full registers of documents and to make as many documents as possible directly accessible via the registers.

6. A need to clarify the status, and regular review, of "Restricted" documents.

7. Documents produced by the Legal Services, where they do not concern a court case, should be public.

The European Parliament report (2006)

In addition, or complimentary to, the issues referred to by the Commission:

1. There should be clear rules on access to administrative documents, eg for the implementation of legislative acts.

2. The classification of documents "Confidential" or above should be regularly reviewed

3. Unlike the Commission proposal above the EP says that all preparatory documents should be accessible:

*"as soon as those documents are **formally submitted** by each institution taking part in the decision"*

This public access should extend to *"complementary information or documents"* and the *"contributions submitted by the secretariats of the institutions (including the legal service)."*

4. There should be a distinction between access to documents concerning on-going operations – which are understandably secret – and "the requirements of accountability and *a posteriori* control.

5. Documents concerned with bilateral agreements with third countries should be accessible to the EP.

6. Give full access to information submitted by Member States to the Commission when drafting or implementing legislation.

BACKGROUND NOTE

1. All the Commission documents are on Statewatch's Observatory: Freedom of Information in the EU: **http://www.statewatch.org/foi/foi.htm**

2.*Statewatch* has been working on access to EU documents since 1991. It has lodged with the European Ombudsman eight successful complaints against the Council of the European Union (the governments) and two, more recently, against the European Commission – the first of which it won and second decision is due soon. Each of these complaints increased the rights of all to access to EU documents.

In 2001 *European Voice* newspaper: Tony Bunyan, Statewatch editor, was selected by a distinguished panel as one of the "EV50", one of the fifty most influential people in the European Union over the year for Statewatch's work on access to documents in the EU

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