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AsktheEU.org TRANSPARENCY REPORT
2011-2013
THE COUNCIL OF THE
EUROPEAN UNION



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AsktheEU.org is built using the "Alaveteli" software tool designed specifically to help members of the public make requests with public bodies and to make the answers available to all. It is a prime example of the use of new information technologies for promoting government transparency, participation and accountability.

The purpose of AsktheEU.org is to make it easier to file documents requests with the EU and to shed light on EU transparency. All requests from members of the public and the responses from EU institutions are published online in real time. As a result, AsktheEU.org aims to:

AsktheEU.org shows what the requesting process is like and brings visibility to the right of access to EU documents, promoting its use as a tool for citizen engagement and for increasing EU accountability.

Since all correspondence, responses and documents are published online, EU officials should not need to answer the same request twice.

EU officials and civil society alike can get an indication of the type of documents that citizens are interested in. This helps to pinpoint what type of information should be published proactively.

Comparative analyses of the institutions' respect for the right of access to EU documents can be carried out (comparison between institutions and also evolution of one institution over time).

Report on the Council of the European Union and the right of access to EU documents

EXECUTIVE SUMMARY

The Council of the EU is failing to comply with EU transparency rules by not respecting time frames for responding, applying too many extensions to requests, and not informing all requesters of their right to appeal when information is denied.

Analysis of 50 access to documents requests submitted to the Council between 2011 and 2013 via the AsktheEU.org platform, found that the average time for answering was 20 working days, significantly over the maximum 15 working days permitted by EU law. Requests which resulted in partial denials of information were answered in an average of 49 working days. Excessive use was made of extensions which were applied in a full 32% of cases.

Analysis of the requests found that the majority sought information about the decision-making process, something which the EU treaties mandate should be as open as possible. In spite of this, only one third of requests (19 requests or 38%) were successful, resulting in the full disclosure of documents to the person seeking it.

This report also raises concerns about the broad application of exceptions such as privacy and international relations. The privacy exception was used to deny information about the identities of Member State representatives participating in Council meetings, even on legislative negotiations. The international relations exception was invoked to deny public access to multiple documents about the Council's interactions with third countries such as China and Mexico.

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A further issue was that of record keeping: the Council informed requesters that it does not keep minutes of all working parties and in one instance reported that legal advice had only been delivered to Member State representatives orally.

The concerns about transparency of the Council set out in this report, come shortly after Access Info Europe won a five-year legal battle before the European Court of Justice for access to a document containing the names of Member States putting forward proposals for reform of the EU's transparency rules. The Court upheld Access Info Europe's arguments that the information was essential to be able to participate in Council decision-making processes and to hold the EU to account.

In spite of this win, the data collected on AsktheEU.org reveals a series of problems with transparency of the Council which impede public participation and scrutiny of its activity and constitute violations of treaty requirements for EU institutions to work as openly as possible.

A constructive dialogue on Access Info's findings was also held with the Council of the EU, prior to publishing the report's findings. One of the issues identified was the need for the Council to consult with third parties (including EU Member States and other countries) before responding to requests, which impacts negatively on response times. This discussion revealed a further issue of some of the requests sent via AsktheEU.org were not handled under Regulation 1049/2001 despite requesters specifically quoting the regulation. The report contains a series of recommendations as to how to address these issues.

Access Info Europe recommends that the Council of the European Union should:

- Proactively publish relevant information about its decision-making process, policies and administrative information;
- Inform requesters of their rights, including in particular the right to appeal when information is denied;
- Respect the 15 working day deadline for responding to requests, reducing it from the current average of 20 working days;
- Limit the use of extensions to exceptional cases and respect the maximum additional 15 working day deadline;
- Avoid artificial distinctions between access to documents requests which are processed under Regulation 1049/2001 and which therefore include the possibility to appeal, and access to information requests which are currently dealt with under the guidelines on good administration and which have no legal remedy in case the requester is not satisfied;
- Ensure that exceptions are applied narrowly and with due regard for the public interest in transparency, participation and accountability;
- Improve record keeping, ensuring, inter alia, that full records are kept of meetings which are part of legislative processes and where legal advice is delivered.

DATA SUMMARY

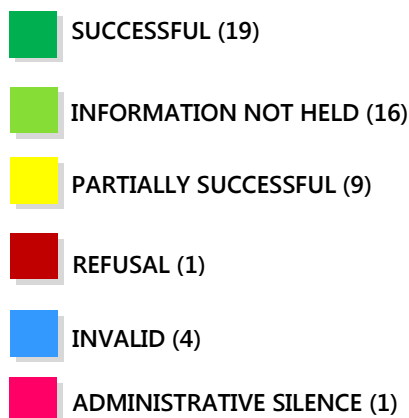
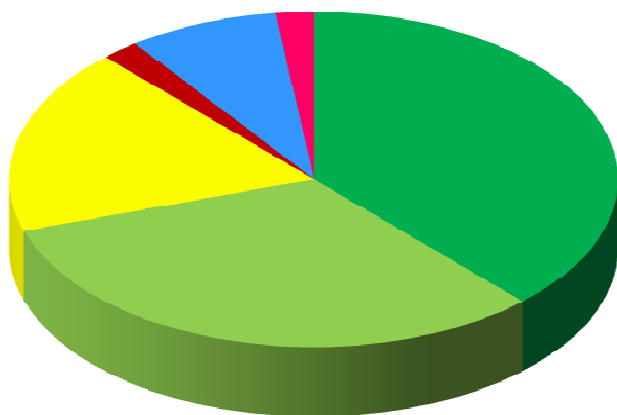
Since the launch of the AsktheEU.org web platform in September 2011, 50 requests for access to information held by EU institutions have been sent by members of the public to the Council of the European Union using the right of access to documents.

The right of access to EU documents is enshrined in the EU treaties and developed in *Regulation 1049/2001 regarding public access to European Commission, Parliament and Council documents*. Requests must be answered within 15 working days and refusals may only be based on a limited set of exceptions to protect interests such as personal privacy or the protection of international relations.

Of the 50 requests submitted to the Council of the EU, over one third (19 requests or 38%) were successful, resulting in the full disclosure of documents to the requester.

In response to just under a third of requests (16 requests or 32%), the Council assured requesters that it did not hold the information they were seeking, which is a legitimate response although in some cases it also raised questions about record keeping.

Requests sent to the Council of the EU via AskTheEU.org - 2013



Of the remaining requests, one in five (nine requests or 18%) resulted in partial disclosure of information, which is when some documents are withheld or parts of the document are redacted or blanked out, based on the exceptions contained in Regulation 1049/2001. Refusals to provide information must always be duly motivated and reasons for refusing information must be based on the listed exceptions, a requirement that the Council complies with.

One request was refused in its entirety on the basis of the need to protect the EU's international relations, with no partial access granted to the requester.

On four occasions (8%), the response by the Council was classified by Access Info Europe as "invalid" because the answer was either not relevant to the information being requested or was too vague to be of use to the requester, consisting only of links to general information that didn't fully respond to the initial request.

In one case, the Council failed to answer the request at all, despite the fact that the requester received an automatic acknowledgement of receipt. This request has therefore been classified as a case of "administrative silence". The Council asserts that this was most likely due to a technical failure and that the request was misplaced in spite of the automatic acknowledgement.

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MAIN FINDINGS

CITIZENS WANT DOCUMENTS RELATED TO DECISION-MAKING

Requests filed via AsktheEU.org show that citizens are interested in knowing about how decisions are taken in Brussels. Nearly half of the requests (23 requests, 46%) sent to the Council via AsktheEU.org sought information about its decision-making processes.

Of these 50 requests, nine sought information about how the Council relates to other EU bodies during decision-making processes, including the European Parliament, the Commission, the EU Anti-Fraud Office, or the Fundamental Rights Agency.

Another seven requests about decision making sought information about Member State positions during Council negotiations on the EU budget, on common defence policy, and on the reform of the EU Regulation regarding access to EU documents.

The remaining seven requests for decision-making documents sought information such as minutes of meetings and lists of attendees from the Council's Working Parties, which are in charge of negotiating draft policies and legislation on behalf of the EU Member States.

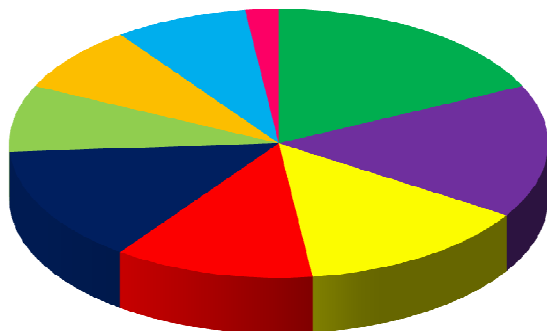
Aside from decision making, other requests submitted to the Council via AsktheEU.org sought information ranging from spending and statistics (8 requests, 16%), to EU policies vis-à-vis third parties or countries (6 requests, 12%),

administrative information including the contact details of officials (4 requests, 8%), implementation by Member States of EU law (4 requests, 8%), or lobby contacts with the Council on a particular legislative or policy process (4 requests, 8%).

One further request sought access to documents from the Council of Europe (the 47-member human rights body based in Strasbourg) and not from the Council of the European Union, perhaps indicating confusion as to the difference between the two institutions.

The Treaty on the Functioning of the EU at Article 15 requires that the institutions "conduct their work as openly as possible" and specifically mandates the Council to "ensure publication of the documents relating to the legislative procedures." Given the high interest in decision-making information, Access Info Europe recommends that basic documents such as minutes of meetings, lists of attendees, and officials' contact details should be made available proactively by the EU institutions so that citizens and civil society can more accurately follow the decision-making process and participate more effectively in EU policy debates and the development of legislation.

What do EU citizens want to know about?



- COUNCIL COORDINATION WITH OTHER EU BODIES (9)
- SPENDING AND STATISTICS (8)
- MEMBER STATE POSITIONS ON COUNCIL NEGOTIATIONS (7)
- EU POLICY ON THIRD PARTIES OR OTHER COUNTRIES (6)
- COUNCIL WORKING PARTY DOCUMENTS (7)
- ADMINISTRATIVE INFORMATION (4)
- LOBBYING CONTACTS (4)
- IMPLEMENTATION OF EU LAW BY MEMBER STATES (4)
- REQUEST FOR COUNCIL OF EUROPE (1)

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CITIZENS NEED TO BE GIVEN MORE INFORMATION ABOUT THEIR RIGHTS WHEN REQUESTING

Evaluation of the requests and responses on AsktheEU.org revealed that the Council of the European Union does not fully inform requesters of their rights under regulation 1049/2001, nor does it always notify requesters in advance when their response will be delayed. In a few instances, the Council also denied full access to the information requested without providing further information about the appeals mechanisms.

Currently, in response to all requests, the Council of the European Union sends requesters an automatic confirmation of receipt in English, French and German. This is good practice as it reassures the requester that their request is being processed, and it makes clear what the deadline is for the Council to respond, stating specifically that the 15 working days are counted from the next working day if requests are received after 17:00.

Although the Council does specifically mention that requests will be processed in accordance with the EU's access to documents rules, it does not give the requester a link where they can read more about their rights, nor does it give guidance as to what to do in case they do not receive a response within the initial 15 working day time frame.

The Council of the European Union should ensure that citizens are informed of their rights under Regulation 1049/2001 on accessing EU documents before making a request and throughout the requesting process. The Council's automatic acknowledgements of receipt should include a link to the regulation including further information on the right of access to documents in the EU and all refusals should include information about the right to file an appeal, which at the EU level is known as a "confirmatory application".

There were seven (7, 14%) occasions on which, bar the acknowledgement of receipt, citizens received no response to their request before the deadline. One of these requests resulted in administrative silence. In the other six (6, 12%) cases, the Council of the EU failed to apply an extension to the request and did not notify the requester that their response would be delayed. The Council should take steps to ensure that requests do not go unanswered and should inform citizens if it cannot meet the deadlines in advance. Citizens should always be informed about how to appeal cases of administrative silence or late responses, both on the Council's web page and in the automatic acknowledgements of receipt.

There were also three (3, 6%) cases in which requesters were denied access to part of the information requested but were not informed of their right to file a confirmatory application. These three (3) requests were about the EU's arms embargo on China, the EU's relationship with Mexico fighting organised crime, and data on all the access to documents requests made to the Council in 2011 and 2012.

When the Council denies full access to documents, it should inform requesters of their right to challenge the original decision of the institution if they are unsatisfied with the response to their request or feel that too much information has been denied. Fulfilling the obligation to inform citizens of the right to file a confirmatory application ensures that citizens are fully able to exercise their right of access to documents.

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THE COUNCIL'S AVERAGE RESPONSE TIME IS ONE WEEK OVER THE DEADLINE

Through AsktheEU.org, Access Info has found that just over half (27, 54%) of the requests sent to the Council were answered within the 15 working day deadline stipulated by Regulation 1049/2001.

| Requests | Number of requests | Average No. of days for response |
|--|--------------------|----------------------------------|
| Total requests sent | 50 | 20 |
| Requests answered within the 15 working day time limit | 27 | 7 |
| Requests answered after the time limit | 22 | 36 |
| Requests with no response (Administrative Silence) | 1 | N/A |

Table: Average time frames for responses (in working days)

The table above shows that for the 50 requests filed to the Council of the EU from 2011 to 2013, the Council took an average of 20 working days to respond, which is five (5) working days longer than the rules permit.

When the Council did comply with the time frame, it processed requests relatively quickly, taking on average just seven (7) working days. This is an example of good administrative practice, as it demonstrates efficiency in the handling of citizens' requests.

The other half of the requests sent to the Council, however, were either answered past the deadline (22 requests) or not at all (1 request). For the 22 requests that were answered past the deadline, the average time frame for responding to a citizen was 36 working days, which is over seven weeks.

Access Info Europe notes that the 15 working day time limit stipulated by Regulation 1049/2001 is the maximum amount of time that it should take an institution to respond to a requester. The Council should strive to improve its response time to well below this upper limit.

TOO MANY EXTENSIONS, UNCLEAR DEADLINES

Regulation 1049/2001 permits EU institutions to apply extensions to requests in "exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents", but data from AsktheEU.org reveals that the Council of the European Union applied extensions in response to a full third of the requests received (16 requests or 32%). This indicates a need to improve internal procedures for managing requests so as to comply with the time limits without the need for an extension.

The Council of the EU's extensions also lasted an average of 28 working days, which is almost double the 15 day extension permitted by the access to documents rules, and means that requesters were waiting an average of nine weeks to obtain a final response. The Council of the EU should work to process

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requests from the public without undue delay, and should always strive to comply with the maximum time frame for extensions.

Regrettably, a quarter (four) of the extensions applied by the Council failed to specify the new deadline for responding to the request. This is an example of poor administrative practice as it leaves the requester with little idea of when he or she will be able to file an appeal - a confirmatory application - against a failure to reply. These requests also took disproportionately longer to respond to, with the unspecified extensions lasting an average of 53 working days, or 10-11 weeks extra, compared to specified extensions which took an average of 19 additional working days to resolve.

| Extensions | Number of extensions | Average length of extension (minus initial 15 working days) |
|--------------------------------------|-----------------------------|--|
| Total number of extensions | 16 | 28 |
| Extensions - new deadline not stated | 4 | 53 |
| Extensions - new deadline specified | 12 | 19 |
| - Answered within the deadline | 10 | 13 |
| - Answered after the deadline | 2 | 50 |

Table: New Deadlines and Average Time Frames for Extensions

The table above shows that when the Council did specify the length of the extension, it complied with the new deadline on ten occasions, taking an average of 13 working days for the extension instead of the maximum of 15 working days. There were, however, two instances in which this was not the case, with requests relating to the Common Security and Defence Policy (58 days) and the Markets in Financial Instruments Directive (42 days), hence these late requests had an average extension of 50 working days

The Council of the EU should limit its application of exceptions to comply with Regulation 1049/2001 so that these are used only in "exceptional" circumstances. When the Council does apply extensions, it should respect the 15 day time frame specified in the access to documents rules. The Council should always make clear what the new deadline is so that citizens can know when it is reasonable to expect a response and should never apply unspecified or indefinite extensions.

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LONG DELAYS FOR REFUSALS.

As part of the time frame analysis, Access Info Europe assessed which types of responses took longest to answer. This analysis of the averages revealed patterns, with Information Not Held and Invalid answers being issued well within the 15 day time frame but significant delays in the processing of requests that resulted in partial refusals. The table below shows the average number of days that it took, per type of answer.

| Requests | Number of requests | Average number of days taken to answer |
|--|---------------------------|---|
| Total number of requests | 50 | 20 |
| Successful answers | 19 | 16 |
| Information not held answers | 16 | 13 |
| Partially successful answers | 9 | 49 |
| Information refused | 1 | 28 |
| Invalid answer | 4 | 4 |
| Requests with no response (administrative silence) | 1 | N/A |

Table: Average timeframes per type of response

In contrast with the average of 16 days for successful responses which provided information, the Council took an average of 49 working days – almost ten weeks – to issue partial refusals. Such significant delays raise concerns about the efficiency of the internal process for applying exceptions to documents to be released.

Access Info Europe understands that some of the delays were caused by the need to consult with other parties. A number of the requests to the Council via AsktheEU.org have been partially refused based on considerations of third parties, including for reasons of harm to international relations and protection of privacy of the individual.

Regulation 1049/2001 anticipates the need to consult with third parties, which could include other EU institutions, Member States and their representatives, other countries, and other international institutions. The Council is required by Regulation 1049/2001 to consult with third parties “unless it is clear that the document shall or shall not be disclosed”.

Such consultations inevitably have an impact on time frames as they mean that the Council has to wait for an answer from a body or individual that is external to it and is not necessarily bound by the EU's rules on access to documents. This can lead to significant delays in processing requests which in turn interferes with citizens' right of access to documents.

Access Info Europe recommends that the Council Secretariat takes steps to speed up this process. These should include ensuring that third parties know what the time frames are and that they must respond within a specified time.

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frames are and that they must respond within a specified time.

Inside the Council every effort should be made to ensure that those who sign off releasing or denying documents, including the Council Legal Service and, where relevant, the Working Party on Information, do so within the time frames set out in Regulation 1049/2001.

DENIALS OF ACCESS TO DOCUMENTS

EU documents are public by nature and the right of access to documents is a fundamental right for European Union citizens and residents. The application of exceptions by the Council must be grounded in law and appropriately justified. The EU's transparency rules require the Council to provide public access to its documents if they are not covered by one of the exceptions found in Regulation 1049/2001 and to inform the requester of the reasons for the refusal and of the right to appeal (confirmatory application).

The Council of the EU applied exceptions to ten requests, nine (9) of which resulted in partial disclosure of documents and one (1) of which was refused in its entirety. The Council complied with its duty to state reasons for its refusals, specifically citing the relevant exceptions to justify why certain documents or parts of documents cannot be released.

The Council's most frequently cited exceptions were to protect the privacy and the integrity of the individual and to protect international relations. Sometimes more than one exception was invoked in denying access. The table below shows which exceptions were applied to which requests.

| Request Title | Final outcome | Exception(s) applied |
|---|----------------------|---|
| Access to documents requests 2011 and 2012 | Partially successful | Protection of the Privacy and Integrity of the Individual |
| Data Protection Package | Partially successful | Protection of Court Proceedings and Legal Advice; Protection of decision-making process |
| Documents addressed to the Council Working Group on the revision of the tobacco product directive | Partially successful | Protection of the Privacy and Integrity of the Individual |
| Documents relating to the 26th January 2004 GAERC meetings (China-EU arms trade) | Partially successful | Protection of International Relations; Documents classified as RESTREINT UE/EU RESTRICTED |

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| | | |
|--|----------------------|---|
| EU sanctions against third countries | Partially successful | Protection of Court Proceedings and Legal Advice |
| Working Party Information Participants List | Partially successful | Protection of the Privacy and Integrity of the Individual |
| European Council December 2013 | Partially successful | Protection of the Public Interest as regards Defence and Military Matters; Protection of the Decision-making process |
| EU Support to UN Peacekeeping | Information Refused | Protection of the public interest with regard to International Relations; Documents classified as RESTREINT UE/EU RESTRICTED. |
| Relaciones UE - Mexico: lucha contra el crimen organizado [EU-Mexico relations on fight against organised crime] | Partially successful | Protection of Public Security; Protection of International Relations; Documents classified as RESTREINT UE/EU RESTRICTED |
| Working Party on Structural Measures - Participants list | Partially successful | Protection of the Privacy and Integrity of the Individual |

Table: Exceptions Applied to Each Request**REFUSALS REVEAL TRANSPARENCY CHALLENGES**

There were, however, some examples on AsktheEU.org of information being denied in a way which Access Info Europe considers to be overbroad and which reveal the ways in which the EU's access to documents framework is not fully consistent with the highest international standards.

Protection of Personal Privacy: On three of the four occasions on which the exception to protect personal privacy was used by the Council, it was applied to government representatives attending three Council's Working Parties. Respectively on Health, on Information, and on Structural Measures. For these requests, the names of the participants in the working parties and/or their email addresses were blanked out, despite the fact that they are government representatives who act on behalf of the citizens of their country during legislative processes within the Working Parties of Council of the European Union.

The right to personal privacy is a fundamental human right but so is the right of access to EU documents, which means that the two rights should be balanced on a case by case basis, taking into consideration the public interest in accessing the information. If a public official is working in a public capacity on a policy or law that has an impact on the public at large, it would be reasonable to expect

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that he or she would face a higher level of scrutiny than a private individual.

There is currently a conflict at the EU level between the rules on access to documents and on personal data protection. This is something which negotiations over Regulation 1049/2001 during the 2008-2012 period sought to resolve, but no agreement was reached between the Commission, Council and Parliament on the reforms.

The current situation is that the Council of the European Union consults with the individual concerned to ascertain whether or not they agree to have their data released following an access to documents request.

This means that public scrutiny of the decision-making process is contingent on the personal will of the individual concerned, raising questions about democratic accountability. It can also contribute to unequal access to the decision-making process for citizens from different countries; for example, representatives at the Working Party on Structural Measures all agreed to provide their details following an access to documents request, except for the representatives of citizens from 3 countries - Luxembourg, Latvia and Greece.

The Council should address this problem by enacting a policy whereby it provides advance notice to all public officials (from Member States and other institutions) who are involved in Council decision-making processes that their names and professional affiliations are prima facie in the public domain.

Consistent with its treaty obligations to work as openly as possible, the Council should take steps to publish this information proactively. At a minimum, there should be proactive publication of the names of all those involved in work on legislative files.

International Relations: The exception to protect international relations can be problematic if it is applied over-generously to documents relating to interactions between the EU institutions and a third country or an inter-governmental organisation. Regulation 1049/2001 permits withholding information which would "undermine the protection of" international relations but does not establish a public interest test for this exception, meaning that the Council does not have to weigh the public interest in transparency against any purported harm to international relations. This is out of line with international standards, such as the Council of Europe Convention on Access to Official Documents, which requires that a public interest test be applied to all exceptions.

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Image of a redacted document from the Council Working Party on Information, in charge of reviewing the EU's transparency rules

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This leads to a situation in which large quantities of information about the EU's international negotiations can be excluded from public access, even where there is a significant public interest for citizens to know more details about relations with other countries.

For example, in response to a request asking for documents on the cooperation between the EU and Mexico in the fight against organised crime, the Council refused to release any of the documents that had been submitted by the Mexican authorities, arguing that unilateral disclosure of the documents would potentially harm the relationship of trust upon which EU-Mexican relations are based. The exception was also applied to documents relating to negotiations involving China and to discussions regarding EU support for UN Peacekeeping. The exception was broadly applied even though the Council is not bound by the objections from the third countries.

Access Info Europe recommends that when considering refusals of information relating to relations with third parties, the Council should carry out a particularly rigorous assessment of whether disclosure of the specific information at issue would in fact undermine international relations. In its initial contacts with a third country during a specific decision-making process, the EU should make clear that it is compelled by certain transparency requirements to respect and fulfill citizens' right to know.

Access Info Europe also recommends that in any future reform of Regulation 1049/2001, the public interest test be applied to all the exceptions, so as to bring the European Union transparency rules into line with international standards and with the fundamental right of access to documents set out in the EU treaties.

EU Restricted Documents: In one instance, the Council denied access to documents based solely on the fact that they had previously been classified as *EU Restricted*. Denying information without referring specifically to one of the exceptions listed is contrary to Regulation 1049/2001, which requires that all documents be assessed on a case-by-case basis to determine whether or not one of the exceptions can be legitimately applied to that document.

In this case, the request related to EU involvement in UN Peacekeeping missions and it was the only request that was denied in full. The specific documents referred to were a discussion paper on "Enhancing EU CSDP Support to UN Peacekeeping Operations" and a note containing a document originating from the EEAS entitled "Military Advice on Enhancing EU CSDP Support to UN Peacekeeping Operations".

The Council should ensure that all documents are reassessed following an access to documents request and should always argue refusals on the basis of the exceptions found in Regulation 1049/2001. This includes documents that were registered as EU Restricted, as often the initial reasons for the classification of the document become less salient with the passage of time. An additional benefit is that the classification of documents is revised and continually updated.

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THE RIGHT OF ACCESS TO INFORMATION VERSUS THE REQUESTS FOR ACCESS TO DOCUMENTS

Discussions between Access Info Europe and the Council of the EU prior to releasing this report revealed a difference in the number of requests sent via AsktheEU.org and the number of requests formally registered as access to documents requests by the Council.

This difference resulted from application by the Council of a narrow interpretation of what constitutes a formal request for documents as regulated by Regulation 1049/2001 as contrasted with a looser request for "information".

Access Info questions the distinction between access to documents and access to information requests because the definition of a document in Regulation 1049/2001 is sufficiently broad to cover all recorded information – specifically stating that "*document* shall mean any content whatever its medium".

Making such a distinction is also problematic because only access to documents requests give rise to the right of legal recourse to the European Court of Justice.

Differentiating between requests based on the way in which they are formulated places an undue burden on members of the public exercising a fundamental right and seeking to learn more about European Union policies and processes. Such an approach discriminates against some requesters who are left without legal means of redress.

Access Info Europe notes that all requests submitted via AsktheEU.org specifically mention that they are requests for documents as under Regulation 1049/2001 and hence they should be processed in accordance with that Regulation.

It is of particular concern that some of the AsktheEU.org requests were treated differently based not on the formulation of the request but on the existence or not of documents which could be supplied in response. Such an approach is likely to skew statistics on the rate of positive responses.

Access Info Europe recommends that the Council of the EU ensure that all requests that seek recorded information as defined in Regulation 1049/2001 be treated as access to documents requests and processed as such, with all the legal protections and time frames applying, irrespective of exactly how they are worded. These requests should also be included in the annual statistics on compliance with the right of access to documents.

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RECORD KEEPING

The requests made on AsktheEU.org have revealed that the Council of the European Union was not always consistent about record-keeping, which is of concern as it makes it more difficult for national parliaments, citizens, and civil society to keep a track of the decision-making process and to hold the Council to account.

For example, the Council was sent two requests asking for the minutes of the Working Group on Company Law meetings of 12 July 2013 and 17 September 2013 respectively. The Council replied to one request stating that minutes “had not been produced” and to another request saying that they “had not been issued”.

In another case, a requester asked for the legal opinions given to the Council with regards to the terrorist listing of the Iranian PMOI (*People's Mojahedin Organization of Iran*) and Palestinian Hamas organisations. The Council responded stating that it did not hold this information as the legal opinions in this case had only been oral in nature and had not been recorded.

Good record-keeping is an essential part of good administrative practice, as stated in the Code of Good Administrative Practice (2005), and the right to good administration is a fundamental right for all EU citizens under Article 41 of the Charter of Fundamental Rights.

That the Council of the European Union relies on oral legal advice for taking decisions on whether or not an organisation should be taken off the EU terrorist list is striking in terms of the possibilities it creates for misunderstandings or errors in communication between the Brussels representatives and the national capitals.

There is a similar concern about not recording meetings where there is a debate on legislation or policies that have an impact on European citizens: this is contrary to the principles of good administration and could be detrimental to the decision-making process. It directly interferes with the right of the European public to follow and participate in public debate about legislative and other decision-making processes.

The Council of the EU should endeavour to ensure that it upholds an efficient system of record keeping that is then made available for the public to access, in line with the Lisbon Treaty which requires openness in order “to promote good governance and ensure the participation of civil society.” The Council should keep a detailed record of the minutes of working party meetings and other preparatory bodies, and it should record in writing the legal opinions received about legislative negotiations or EU policies.

RECOMMENDATIONS FOR IMPROVEMENT

1

PROACTIVE OPENNESS OF DECISION-MAKING: The Council should strive to make more information about its decision-making process proactively available online in order to permit public participation and scrutiny. This includes information about minutes and attendees of Council Working Parties, about how the Council relates to other EU bodies when taking decisions, and about what the positions of the Member States are during Council debates or negotiations. Such information should always be made available when it relates to a legislative process.

2

INFORM REQUESTERS OF THEIR RIGHTS: The Council of the EU should amend their automatic acknowledgements to include a link that provides more information about the right of access to documents, including information about the public register, the deadlines and the possibilities for appealing in the event that the Council does not respond within the 15 day deadline or in case the requester is unsatisfied with the response received. When refusing access to information, the Council should always inform the requester of the possibility to file an appeal or confirmatory application.

3

RESPECT THE TIMEFRAMES: The Council should work to lower its average response time from the current 20 working day average to well within the maximum 15 working days stipulated in Regulation 1049/2001.

4

LIMIT THE USE OF EXTENSIONS: The Council should improve its procedures for handling requests in order to reduce its current heavy reliance on extensions. Extensions should last no more than an additional 15 working days, the maximum permitted by Regulation 1049/2001. The Council should always make sure that requesters are notified of delays in advance, are given detailed reasons for the extension and are informed of the new deadline. Unspecified extensions should never be applied.

5

ENSURE THIRD PARTIES ARE AWARE OF THE EU'S TRANSPARENCY OBLIGATIONS: The Council should proactively inform third parties, countries and individuals of its obligations to provide information to the European public under Regulation 1049/2001. Outsiders should know from the outset that the European Union will need to publish certain information in order to fulfil the fundamental right of access to EU documents.

6

ACCESS IS THE RULE AND SECRECY THE EXCEPTION: The Council should ensure that it respects the principle that EU documents are public by nature and that therefore the application of exceptions needs to be fully justified:

- The Council should work to strike the right balance between the right to privacy and the right of access to documents and it should enact a policy whereby it provides advance notice to all individuals involved in decision-making processes that their names and

professional affiliations are prima facie public. The Council should proactively publish the names of all those involved in work on legislative files

- The Council should always assess the specific harm to international relations that may be caused by publishing certain information, and should weigh this against the public interest in the information as a matter of good practice. In its initial contacts with a third country during a specific decision-making process, the EU should make clear that it is bound to respect citizens' right to know.
- EU Restricted documents should be reviewed following an access to documents request to determine whether they should be released to the public or not.

7

GUARANTEE THE RIGHT OF ACCESS TO EU DOCUMENTS:

All requests coming from AsktheEU.org specifically mention Regulation 1049/2001 and they should therefore be processed in accordance with the Regulation so that citizens have a means to appeal if they are unhappy with the way their request has been processed. Artificial distinctions between access to documents requests and requests for general information should be avoided for this reason, and all requests should be included in the annual statistics on access to documents.

8

IMPROVE RECORD KEEPING: In line with the Treaty of Lisbon, the Council of the EU should strive to take a detailed record of relevant information, such as legal advice, the minutes of meetings and documents that form part of the Council's decision-making process. This is both for record-keeping purposes and to promote citizen participation in EU decision-making. It also allows for EU accountability before national Parliaments and citizens.

access
!Nfo

Access Info Europe

is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe and globally as a tool for defending civil liberties and human rights, for facilitating public participation in decision-making and for holding governments accountable. This mandate is established in our statutes.

Access Info's mission is that the right of access to information be enshrined in law and deliver greater transparency in practice.

Our vision is that everyone in Europe has the right to know what their elected representatives are doing with the power entrusted to them, and how the public's money is being spent and that everyone can access the information they need or are interested to know.



AsktheEU.org
is a project of
Access Info Europe

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