WikiLeaks or Wiki-Lex?

Helen Darbishire, European Parliament, Brussels, 13 April 2011.

Good morning Ladies and Gentlemen,

As I am sure most of you know, on 22 March the General Court of the European Union ruled in a case brought by the human rights group, Access Info Europe, against the Council, that this document related to the reform of Regulation 1049 should be made public in its entirety. The names of the countries should not have been blacked out because, as the Court said:

> *If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process.*

It's basic stuff. The principle of legislative transparency is a well established one going back to the Enlightenment and before. At the national level it's quite normal to expect to know the position of political parties and members of government on laws currently up for discussion.

Any member of parliament or minister who refuses to state his or her position on a particular policy or draft law gets short shrift from the public and is roundly criticised in the media.

As one person who wrote to me immediately following the news Court's ruling said "It's surprising that you needed to bring the case in the first place!" The irony of having to go to court to get access to documents about the EU's transparency rules was not lost on many people around the continent.

This case was about the almost-instinctive reflex to secrecy still prevalent in Brussels institutions, where requests are systematically denied even when that is disproportionate and unnecessary.

The scale of this can be seen in the Commission's 2009 annual report. What was the rate of "confirmation" of refusals at the confirmatory application stage? Just 25%! The Secretariat General overturned a full 75% of initial refusals: 25% partially overturned and a full 50% fully overturned. Three out of every four refusals were in some way wrong. That's the secrecy reflex in action.

And what happens in a culture of secrecy when too much information is held back from the public? Information starts to leak out. It's pretty common in Brussels. In fact, the document which was the subject of the Access Info Europe case had already been leaked, although I didn't know it at the time or we couldn't have bothered to appeal.

We also tried to get the information from the 27 Member States but came up against the tendency to defer the Brussels secrecy reflex. This was especially true when requests were sent to the Permanent Representatives. In total, only 11 of the 27 provided information, and often then only after insistence and even appeals on our part, for example pro-EU transparency Netherlands provided 14 documents but only after a formal challenge to its application of the international relations exception.

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

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

* Information provided only after an appeal
** Estonia forwarded the request to the Council but then gave us their position. The Council sent Access Info Europe one further document as a result.
*** Appealed and received position, but complaint to the Information Commissioner still pending

Six (6) countries formally refused to provide us with information, often on the grounds of harming international relations or decision making (France actually applied Article 4.3 of Regulation 1049 to refuse a request submitted under its national law), and another six (6) referred us back to the Council; back to square one. The only way the EU legislative process will open up is if it opens up here in Brussels. If it does not, Member State transparency will be damaged as well.

Our case then became an unusual *in vivo* test of the claim that disclosure would cause harm, and was one of the main points of discussion during the hearing in Luxembourg in October 2010.

The Council argued that there had been harm to its decision-making but the Court was not convinced by the arguments, and insisted that the public has a nuanced understanding of the decision-making, including of the need for negotiations and for delegates to change positions as part of those negotiations. The idea that transparency would cause entrenchment and make it impossible to work was rejected. Rightly as we know from the national level that it's not true.

The Court's support for open and participatory legislative processes had messages pouring into my inbox from around the world. A Kenyan rights activist wrote saying how useful the judgement will be for them. A South African website ran a story, as did a leading Mexican political weekly with a detailed 1500 word article explaining case for readers in Latin America.

Ombudsman's offices from New Zealand and Chile, journalists from Bosnia and Canada, academics from Argentina and the US, democracy campaigners from Pakistan, Israel, and Morocco and from Europe's struggling democracies such as Albania and Moldova – for all these people it's important that there are high EU standards on the right to participate in public debates around law making.

In that sense the General Court ruling echoes the April 2009 judgement of the European Court of Human Rights in the case of TASZ (Hungarian Civil Liberties Union) vs. Hungary which was also about the right to information in the context of a debate on proposed legislation; in the Hungarian case about a proposed drugs law.

The Strasbourg Court noted that when public bodies are monopoly holders of information needed for debate on matters of public interest, there is a right to information subject to only limited exceptions. It's an Article 10 protection of freedom of expression that is at stake: the right to access and to reuse information.

In the context of our discussions here today, with access to EU documents now enshrined in Article 15 of the Treaty on the Functioning of the EU, this is all good news because it seems

that there has been a significant step forward in the transparency of the legislative process in Brussels.

Unfortunately however, the progress in jurisprudence is not welcome in all quarters. In what has become a relatively typical knee-jerk reaction to losing a case in favour of greater transparency, word has it that the Council is holding meetings this week to discuss the "Access Info case" and to consider an appeal and other measures such as pressing the Commission to propose yet another reform to the exceptions.

If this were to happen it would be a disaster not only for the transparency of EU decision making but in terms of the impact on all those following developments here in Brussels. Three days after the court ruling, I walked into the office of a law professor in Istanbul and he said he'd received the news of the decision from no less than eight different people: clearly for those promoting European standards in aspiring democracies it's important that the EU uphold its own standards.

To backtrack on those standards by appealing the case or by finding a way to undermine the court's ruling would therefore send a very bad signal and would show great disregard for the advances in the right to know since 2001 when Regulation 1049 was adopted.

Not only has the number of access to information laws around the world nearly doubled to more than 90 countries – with large EU member states such as the UK and Germany among those bringing new laws into force – but there has been significant standard-setting work by the Council of Europe, first with its 2002 recommendation on access to official documents and then with drafting of the world's first Convention on this right, from 2009, not yet in force.

Regulation 1049, however, does not meet these standards in some key respects, which other speakers have already mentioned, such as the definition of a document or the application of a public interest test to all exceptions.

There is still much to be worked out on the application of exceptions in practice before radical reforms are made. For example there is currently a question mark over the right balance to strike between transparency and protection of privacy in respect of farm subsidy data and in the meantime much valuable information has been taken off line. A November 2010 Court ruling left that issue open and the Commission should resolve it, taking into full

consideration the public interest in knowing about large payments to farmers acting as businesses.

It is here that the EU also risks falling behind on what is being called the "open data revolution" with many governments now releasing entire sets of raw data for the public to make use of in creative and innovative ways for the social good. For example, the EU should start making proactively available timely, comprehensive and comparable information about spending on foreign aid as pledged under the International Aid Transparency Initiative. The technical means to do so exist, the obstacle is political will.

In general, all information held in electronic formats should be considered for proactive publication as well as on request, including databases which should be available in open source formats to facilitate maximum reuse.

So, to conclude, if reforms are to be made to 1049, they should only be in the direction of bringing it up to the minimum standards of the Council of Europe Convention on Access to Official Documents and the Aarhus Convention, in line with open government data principles.

The reform or recast process should not be used to water it down on a piecemeal basis in response to every ruling from the Court. The European Union is not the political equivalent of a tax-free zone, where the normal rules and obligations do not apply; rather it is – or should be – bound by the same transparency principles as national governments: what they do in Brussels is part of what the European public appointed them and pays them to do and they are accountable for it.

It would also be mistake to focus only on the reforms, and not do much more to ensure that the right of access to documents under the current regulation works in practice.

Legislative transparency must be at the heart of reform of both law and practice. This means opening up the entire legislative process including discussions in the Council. Whether it be in the Council or the Commission or the Parliament, when there is discussion taking place about laws which will affect the 500 million people in the EU region, we have a right to know about those discussions and to make our voices heard.

Thank you for letting me do that here today.