

Access Info Europe

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Mr Frans Timmermans
Vice President European Commission

Mr Martin Kröger
Head of Unit, Transparency, European Commission

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cc. Michelle Sutton, Deputy Head of Cabinet

17 June 2015

Dear Vice President Timmermans and Mr Martin Kröger,

Thank you for your letters, dated 4 February and 12 March 2015 respectively. Please consider this correspondence a response to both letters.

Access Info welcomes your commitment to greater transparency, highlighted in the Commission's Political Guidelines, and manifested in your Decision covering the transparency of meetings between Commissioners, their cabinets and Directors General and interest representatives, as well as through your policy of refusing to meet with unregistered lobbyists.

Our letter of 10 December 2014 raised a number of points, some of which have been addressed in your responses, whilst others remain pending. We have organised our comments by sub-heading.

Reform of Regulation 1049/2001: In your response it is not clear what the Commission's plans are with respect to the 2008 proposal for reform of Regulation 1049/2001. Could you kindly clarify precisely what the Commission plans to do with respect to this proposal?

With respect to the 2011 "Lisbonisation" proposal, you state that the Commission has called on other bodies to adopt its 2011 proposal. Can we take it from this that the Commission does not propose to take any further action? We would be grateful if you could confirm to us how the Commission plans to proceed on this point.

Access Info has previously raised serious concerns about the Commission's 2008 proposal¹, which we firmly believe was a step backwards. We recommend that Regulation 1049/2001 be strengthened to fully reflect the right of access to documents enshrined in the EU treaties post-Lisbon and to achieve legal clarity on the principles.

This is particularly urgent because some bodies have adopted broader exceptions than those contained in Regulation 1049/2001. This contradicts the treaty requirement to have "*General principles and limits on grounds of public or private interest governing this right of access to documents [which] shall be determined **by the European Parliament and the Council, by means of regulations***" (emphasis added). Furthermore, it adds a layer of confusion for European citizens attempting to get closer to the EU institutions.

We note that two of our key concerns – namely that not all exceptions are subject to a public interest test and that there is a need to strike a clearer and better balance between the right of access to documents and the right to privacy – have not been addressed in your letter. These are two of the issues to which Access Info Europe refers when we assert that the EU access to information rules do not meet the highest international standards and where there is a need for reform of Regulation 1049/2001.

Postal addresses policy dated 1 April 2014: As you are aware, Access Info has publicly criticised this decision, and the matter is included in a complaint currently being considered by the European Ombudsman.

Access Info notes that the European Data Protection Supervisor has indeed found, in Decisions C2014-2058 and 2014-0615, that the policy of asking for personal postal addresses does not violate Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. This does not, however, imply that to collect such information is necessary and proportionate from the perspective of the right of access to documents, something that the EDPS did not assess, as this is not part of its remit.

Article 297 of the Treaty on the Functioning of the European Union simply requires that "*Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.*" This does not specify that all decisions must be sent via registered post. Indeed, prior to 1 April last year, this was not the case. The use of email reduces the administrative burden and the costs for the requester and for the EU institutions themselves.

There are several options for ensuring delivery of email notifications with a high degree of certainty. In addition to email clients providing delivery receipts, there are online platforms for securely transmitting documents. We know that the European Medicines Agency, for example, uses the Eudralink system to transfer documents (though with a limited time frame for downloading them, which is not ideal).

¹ A detailed brief can be found on our website at: http://avada.access-info.org/wp-content/uploads/Overview_EU_Reform_of_Regulation_1049_6_March_2012.pdf

We look forward to hearing from you as to whether the Commission is currently exploring, or might entertain exploring, such electronic delivery systems with a view to bringing the Brussels bureaucracy into the 21st Century.

Distinction between documents and information: Access Info understands that there will be some cases in which general information will not be as easy to retrieve as that stored in documents that are logged in the system.

The right of access to information has, nevertheless, evolved since Regulation 1049/2001 was adopted and currently best practice is to recognise a full right of access to information or to freedom of information. This is the way that the right has been framed by international human rights authorities such as the UN Human Rights Committee (General Comment No. 34) and the European Court of Human Rights (in a series of judgments as of 2009).

Indeed, the European Ombudsman upon closing her [own initiative inquiry](#) OI/6/2013/KM concerning the European Commission, the European Parliament and the Council of the EU, specifically recommended that "Regulation 1049/2001 should be amended and expanded in order to create a more comprehensive access to documents/freedom of information regime."

We hope that the new, transparency-oriented Commission might look into the possibility of reviewing its implementation of the access to documents Regulation in line with an interpretation of "any content" which permits requesters to pose questions and for these to be answered in a manner that permits citizens to appeal if they are not satisfied with the response, provided that the "information" or "content" is indeed held by an EU body. Access Info notes that, at the national level, many European jurisdictions are in practice providing oversight (through ombudsman's offices, information commissioners, and the courts) for a broad right of access to information.

The personal privacy exception: With respect to protection of personal privacy, Access Info Europe's concern is the relatively heavy reliance on this. The current rate of over 16% of refusals is up from an average over the past 10 years of 12.64%, and this is the third most frequently invoked exception.

We are particularly concerned about the application of this exception with respect to the spending of public funds, as evidenced by the Commission's refusal to provide detailed disclosure about spending of taxpayers' funds on expenses by EU Commissioners, something which is highly problematic as it limits appropriate levels of accountability.

Indeed, Regulation (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, to which Mr Kröger refers, establishes transparency requirements for listing the names of recipients where the amounts are over a maximum of € 1,250. These provisions represent a significantly higher level of detail than that currently provided about Commissioners' expenses, where we currently have annual lump sum figures ranging from € 27,695 to € 468,728 with no more detail at all provided. Furthermore, an important difference is that here the issue is about public officials spending public funds on public activities, not private businesspeople receiving

subsidies. We therefore call on the Commission proactively to publish more detailed information about Commissioners' expenditure of EU funds.

As stated above, Access Info welcomes the Commission Decision to publish information proactively about meetings with lobbyists. We are concerned, however, that the names of lobbyists are not generally being made available, only the names of the companies they work for. Access Info would like to ask if consent is actively being sought for the publication of the names of individuals or whether the "default" position is that people's names should be withheld as a matter of practice. We would be grateful if you could clarify what the process currently is when a request for a meeting is presented to a member of the European Commission.

International Relations exception: Access Info would welcome any decrease in the use of the international relations exception although our analysis of the data does not show a clear year-on-year trend, with this exception being invoked in, on average, around 7.7% of refusals.

At a more substantive level, concerns remain about the way in which this exception is applied to matters of high public interest. For example, there is still controversy around the openness of international negotiations with third states, where a culture of secretive diplomacy rather than of democratic transparency seems to persist.

We highlight in this regard the recommendations made by the European Ombudsman in her Decision closing her [own-initiative inquiry OI/10/2014/RA](#) concerning the European Commission and the Transatlantic Trade and Investment Partnership, where she calls on the European Commission to inform the US of the need to justify any request by them not to disclose a given document, and to interpret any exceptions to the fundamental right of public access to documents restrictively.

The Ombudsman makes the important point that "There is a public interest in maintaining the trust and confidence of any international partner of the EU which makes reasonable and well-grounded requests for the non-disclosure of documents, based on the need to protect legitimate interests of the international partner. However, no public interest as regards international relations exists in complying with unreasoned or unreasonable requests not to disclose documents. To consider otherwise would imply that the international partner would have an unfettered veto over the disclosure of *any* such document in the possession of the EU institutions", which would seriously undermine the right of access to documents.

Infringement proceedings: The Commission is certainly making efforts to be transparent about infringement proceedings via its dedicated website, but too often transparency comes after the fact and citizens can only rely on limited press statements to find out that their country is potentially infringing EU law. Access Info notes that requests for information about ongoing infringement proceedings are often refused due to the need to protect the "climate of confidence". Proceedings against Hungary and the Czech Republic with regards to the EU's air quality directive, for example, have not resulted in information being provided despite the high public interest in knowing about the quality of the air in these countries.

Indeed, the protection of ongoing inspections, investigations and audits is the most commonly invoked exception, and over the past ten years it represents an average of 28.1% of all refusals. Access Info believes that a change in culture is required in this respect, and we are hopeful that this European Commission can lead this change towards greater openness, which requires improved transparency *before* decisions are taken.

Triologue negotiations and record-keeping: Currently triologue negotiations are not regulated in any way, meaning that it is difficult for citizens to follow specific decision-making processes as meetings tend to be ad-hoc and informal. Access Info understands that this will be addressed as part of the Inter-Institutional Agreement on Better Law-Making. We would be grateful if you could confirm that this is the case, and we would like to express our support for this initiative.

We recommend that calendars and agendas of triologue meetings be made public in advance, including information about the expected participants; and that minutes be taken of triologue meetings. We also recommend that the Commission put forward some minimum standards for which information should form part of the EU institutions' record-keeping obligations, in order to ensure better and more transparent law making.

Access Info would be happy to provide you with more detailed recommendations; please let us know if you would be open to these.

Proactive transparency and Publicaccess.eu: Access Info is pleased to hear that you are advancing in the area of proactive transparency, which is crucial for an effective and efficient administration, and helps to reduce citizens' need to file official access to documents requests, hence reducing the burden on public officials in turn.

We would be very happy to work with you on the development of this tool, notably on identifying key information that should be published proactively, in line with international standards.² Access Info has already set out a list of some documents that should be made available regularly on a proactive basis. This includes minutes of meetings related to decision-making processes, whether these be internal meetings or meetings with interest representatives. The European Commission should also review to what extent it can make documents submitted by lobbyists proactively available online, or at the very least enter them into the register of documents so that citizens can know that they exist.

Comparative assessment of EU Regulation 1049/2001: With regards to your request for a comparative assessment of EU Regulation 1049/2001 vis-à-vis international standards, I am pleased to enclose a copy of our Right to Information Rating, which includes an analysis of the EU access to documents rules against a set of 61 indicators derived from international standards and comparative analysis of legal frameworks and how they function in practice around the globe (a total of 102 countries now have access to information laws). The EU scores a total of 96 out of a

² You may be interested to read the World Bank paper "[Proactive Transparency: The future of the right to information?](#)" in which I report on research into some best practices from around the world.

possible 150 points. The full analysis may be found on line here: <http://www.rti-rating.org/international-institutions>

As mentioned in our initial letter dated 10 December 2014, and as noted above, one of the gravest weakness of the EU's access to documents regulation is in the fact that the public interest test applies to only some exceptions, whereas the Council of Europe Convention on Access to Official Documents, which lays out the minimum standards, incorporates a public interest test for all the exceptions. Hence the EU scores low on this indicator.

Other areas where Regulation 1049/2001 could be brought more into line with international standards include extending the right to all requesters irrespective of nationality and residence, broadening the definition of what may be requested to information as well as documents, and appointing information officers in each EU body. Access Info Europe would be happy to discuss with you these and other specific recommendations arising from this analysis.

We look forward to hearing from you. Please do not hesitate to contact us to discuss any of the points we have raised in further depth.

Access Info is committed to engaging constructively with the European Commission and to working in partnership to achieve improvements in EU transparency.

Yours Sincerely,



Helen Darbishire
Executive Director
Access Info Europe