

Access Info Europe v. Council of the European Union, Hellenic Republic and United Kingdom of Great Britain and Northern Ireland - T-233/2009

Introduction

The European Union adopts many rules which become part of national law in the Member States or which govern the functioning of the EU itself.

If members of the public are to be able to engage in the EU's law-making processes, then information is needed about those process, including which Member State is taking which position. Indeed, the EU's equivalent of a constitution, the "Treaty on the Functioning of the European Union" requires openness around the legislative process.

One of the areas where the need for such transparency might be most evident is around the reform of the EU's own transparency rules, the equivalent of an EU access to information or freedom of information law known as "Regulation 1049/2001" which was first adopted in 2001 and safeguards the public's right to know what is occurring in the EU institutions.¹

In 2008, the European Commission published their proposed amendments to Regulation No 1049/2001. As an organisation dedicated to promoting rules which guarantee openness of national and supranational bodies, Access Info Europe had a particular interest in these reforms and wanted to know what position EU Member States were taking.

Concerned that some of the Commission's proposed changes would bring the Regulation 1049/2001 below the prevailing European standards and below the standards of the Council of Europe's newly-adopted Convention on Access to Official Documents², an Access Info team member submitted a request to the Council of the European Union for a copy of document 16338/08, a note from the General Secretariat of the Working Party on Information³ which contained information on the Member States' reactions to the Commission's proposal for the reform of EU Regulation 1049/2001.

¹ Full name: Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents."

² Council of Europe Convention on Access to Official Documents, *Adopted by the Committee of Ministers on 27 November 2008*: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1377737&Site=CM>.

³ The Working Party on Information is composed of representatives of the European Union Member States, and their opinions and amendments to proposals inform and define the final position that the Council will take on the Commission's proposals regarding the reform of EU Regulation 1049/2001.

The request to the Council was submitted on the 3rd December 2008, and was answered on the 17 December. The Council granted Access Info partial access to the documents requested: we were provided with the summary of the discussions but **without the names of the countries which had been for or against any particular amendment.**

Redacted Document Provided by the Council of the European Union

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**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 26 November 2008

**Interinstitutional file:
2008/0090 (COD)**

16338/08

LIMITE

INF 251
API 87
JUR 531
CODEC 1658

**DOCUMENT PARTIALLY
ACCESSIBLE TO THE PUBLIC**

NOTE

From : General Secretariat

To : Working Party on Information

Subject : Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents

Delegations will find at Annex the following documents which were circulated at the meeting of the Working Party on 25 November 2008:

- proposal by **DELETED** for amendment to Article 2(5) and Article 5(2) and insertion of new recital (8)A;
- proposal by **DELETED** for a new Article 4(1)(f);
- proposal by **DELETED** for amendment to Article 4(5);
- proposal by **DELETED** for a new Article 4(2)(d).

16338/08

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In its letter, the General Secretariat of the Council considered this partial access to strike an appropriate balance between the public interest in transparency, and the public interest in the preservation of the effectiveness of the decision-making process within the European Union Institutions.

However, in practice this partial disclosure means that although it is possible to become acquainted with the various arguments put forward in the course of the negotiations, it is impossible to attribute these to any single Member State. This prevents the European public from holding their governments, and the European Union itself, to account.

It also means that citizens are unable to exert any influence over the decision-making process. For an organisation such as Access Info Europe working on open government across the entire EU, it makes our work very difficult as it is impossible to know which governments might be allies in the EU transparency campaign and which should be challenged on their resistance to openness

The Court Case

Convinced that the public has a right to know the precise position that our governments are taking in Brussels, Access Info Europe appealed to the Council of the European Union (via an appeal mechanism known as a "confirmatory application") arguing, in line with European Court of Justice jurisprudence, that openness is particularly important when the Council is acting in its legislative capacity.

In Access Info's confirmatory application we ask "(a) why disclosure of delegations' names in association with their proposals would seriously undermine the decision-making process and (b) why, according to the General Secretariat, there is not an overriding public interest that might nevertheless justify disclosure of the document concerned?"⁴

The Council responded arguing that "delegations would be induced to cease submitting their views in writing, and instead would limit themselves to oral exchanges of views in the Council and its preparatory bodies, which would not require the drawing up of documents. This would cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and it would also be seriously prejudicial to the overall transparency of the Council's decision-making."⁵

In other words, according to the Council, greater transparency requirements would actually lead to less transparency because of the delegations' own reluctance to publish this information. The Council also stated that the public had no need to

⁴ Confirmatory application 01/c/01/09 submitted by Eva Moraga Guerrero on behalf of Access Info Europe, dated 15 January 2009, Ref. 08/2152-jt-cb

⁵ Reply adopted by the Council on 26 february 2009 to confirmatory application 01/c/01/09 made on 16 January 2009. Emphasis added.

access preparatory documents because they could read the final decision once it had been taken: "the Council recalls that this document and any other legislative document relating to the proposed regulation will be made available to the public after the final adoption of the act."

The Council went on to argue that deleting each Member State's name one by one would be "arbitrary", when in fact it would be a perfect indication of which countries are in favour of transparency and which countries are not. The blanket exception therefore serves as a shield for the less-transparent governments, allowing them to maintain their anonymity and possibly even to talk in public about the importance of transparency whilst working within the Council against it.

Convinced that these arguments were insufficient to justify the secrecy surrounding the reform of the EU's transparency rules, Access Info Europe launched an appeal to the General Court of the European Union, the first instance of the European Court of Justice. Following a hearing on 6 October 2010, **a ruling will be issued on 22 March 2011.**

One of the Council's arguments during the Court Case was that it believed that the duty to publish information on each Member State's position was "a matter for the constitutional organisation and practice of each Member State."⁶ The Council also stated that it could not see "how the issue of accountability of the governments towards their own citizens is linked to the openness of the Community institutions' decision-making."⁷

This assertion seemed to Access Info Europe to miss the fact that what is of interest to EU citizens is not only the position of the government of the country in which they were born, were educated, live, or pay taxes (which can all be different in the open space which Europe now is) but the positions of all the governments of the countries which make up the EU, because in the end community law impacts on everyone across the EU.

So Access Info Europe decided to test the Council's suggestion that members of the European public should just ask their governments directly and began asking each of the 27 Member States one by one. **The outcome of these access to information requests will be presented in Brussels on 21 March 2010, in Access Info's report entitled "The Secret State of EU Transparency Reforms".**

⁶ Paragraph 46 of the Council's Statement of Defence (Reg. No 409765) in Case T-233/09 dated 13 October 2009

⁷ Paragraph 45 of the Council's Statement of Defence (Reg. No 409765) in Case T-233/09 dated 13 October 2009