



Response

to

Green Paper on the Review of Regulation
1049/2001 on public access to documents

July 2007

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Introduction

ARTICLE 19 is a human rights organisation that works globally to promote the right to freedom of expression and access to information.

ARTICLE 19 welcomes the move to review Regulation 1049/2001 on public access to documents held by the institutions of the European Community.¹ A strong access to information regime is a critical component to establishing a culture of openness and we support efforts to increase the range of information that is available to the public.

However, we are concerned that the proposed amendments do not go far enough. We are particularly concerned at the current poor access to legislative and pre-legislative documents before the Council, access to which is routinely denied on the basis that this institution needs ‘space to think’, and the lack of real proposals to remedy this issue. To NGOs seeking to influence decision-making in the EU, access to these documents is crucial. We are also concerned that the public interest override, which is crucial to the proper functioning of any access regime, does not apply to all categories of documents, and that where it does apply it has been restrictively interpreted. This issue is also insufficiently addressed in the consultation. We urge the Commission to take both issues into serious consideration.

The following paragraphs contain our responses to the specific questions asked in the Commission Green Paper. Our responses are based on international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public’s Right to Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 FOI Principles)² and *A Model Freedom of Information Law* (the ARTICLE 19 Model FOI Law).³ Both publications represent broad international consensus on best practice in the area of access to information and have received wide endorsement, including by the UN, OSCE and OAS special rapporteurs on freedom of expression.⁴

Question 1: Quality of Information Provided Through the Registers

Question 1. Would you qualify the information provided through registers and in the websites of the institution as

- a) Comprehensive and easy to access?
- b) Comprehensive but difficult to find?
- c) Easy to access but insufficient as regards their coverage?
- d) Insufficient and difficult to access?

¹ Review of the rules on access to documents, http://ec.europa.eu/transparency/revision/index_en.htm.

² London: June 1999. Available at www.article19.org.

³ London: July 2001. Available at www.article19.org.

⁴ See, for example, Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

Answer: d) insufficient and difficult to access

We find the online public registers both unnecessarily difficult to navigate and insufficient in scope.

The Commission's website in particular is limited in scope and has the least user-friendly database. For example, it is hard to even locate the register from the main page. Also it offers access to only certain types of document. But the Commission's register is not the only one that is deficient: we have also found Parliament's register hard to navigate, and the Council's register allows access to only very relevant pre-legislative documents.

We would suggest two main improvements:

1. All institutions should have a clear "access to information" link prominently displayed on their homepage. This page should be the one-stop-shop for all matters related to information.
2. Each of the institutions needs to provide far more information proactively. We elaborate on this in the next section.

Question 2: Quality of Information Provided Through the Registers

Question 2: Should more emphasis be put on promoting active dissemination of information, possibly focused on specific areas of particular interest?

Answer: More emphasis should be put on promoting active dissemination of information, not only on specific areas of particular interest, but also on all information that has not been classified as confidential.

In principle, ARTICLE 19 advocates that institutions should actively publish any information of public interest, subject only to reasonable limits based on resources and capacity. At a minimum, we encourage institutions to publish the following categories of information:

- Operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements, and so on, particularly where the body provides direct services to the public;
- Information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- Guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- The types of information the body holds and the form in which the information is held; and

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- The content of any decision or policy affecting the public, along with reasons for the decision and the background material of importance in framing the decision.⁵

In addition, mindful of the Commission’s concern regarding the administrative burden of handling requests for information, we urge the institutions to consider giving direct access to all legislative and pre-legislative documents, as well as any factual information held by them (such as statistical or other reports) save that which is clearly and legitimately confidential. Much of the institutions’ work is of a public nature and therefore, the “more systematic policy” proposed by the Green Paper, would be to publish through their websites, all existing information they hold that is not sensitive. The high percentage of requests that is currently granted – 80% in the case of the Parliament – is on the one hand a positive achievement, but on the other hand indicates that more information could be published on a proactive basis. As noted in the Green Paper, providing more direct access to a greater scope of information would significantly reduce the burden on the administration to deal with individual requests.

Question 3: Single Rule for Access Requests

Question 3: Would a single set of rules for access to documents, including environmental information provide more clarity for citizens?

Answer: Yes, a unified regime will be far easier for citizens to understand and interact with, and for EU institutions and bodies to apply.

As noted in the Green Paper, there is a certain degree of overlap between Regulation 1049 and Regulation 1367 (on the application of the provisions of the Århus Convention of Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions to bodies).

In our view, there is no principled need to distinguish between access to environmental information and other categories of information. Moreover, the existence of two separate regulations may give rise to the following problems:

- A legal regime which is more difficult for non-expert requesters to understand;
- Legal uncertainty which regulation applies when a document contains both environmental and non-environmental information, or when it is not evident whether information is of an environmental character or not;
- Arbitrary distinctions between the scope of the right of access and the procedure for processing requests under either regime.

To avoid inconsistency in implementation and increase ease of access, we strongly support the establishment of a single regime. We recognise that doing so will give rise to a number of questions, and in particular (i) how to deal with those parts of Regulation 1367 which cover issues other than access to information; (ii) how to harmonise the

⁵ *ARTICLE 19 Principles*, note 2, Principle 2: Obligation to Publish

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existing discrepancy between “access to information” under Regulation 1367 and “access to documents” under Regulation 1049; and (iii) how to harmonise the scope of the two Regulations in terms of the bodies covered by them.

In regard to question (i), we would suggest that those parts of Regulation 1367 which deal with public participation and access to justice are left intact, while the provisions on access to information are integrated with Regulation 1049. We see no principled reason why these three elements should be addressed within a single regulation. Alternatively, the two regulations could be fully integrated into a single text, including a general section on access to information and additional section on public participation and access to justice (in environmental matters, but perhaps also in other areas, such as public health and safety).

In regard to question (ii), the distinction between ‘documents’ and ‘information’ may be of significance in three ways:

- Formulation of requests: Regulation 1367 is more generous to the requester in allowing a request for “information” without the need to identify the document in which it is recorded. Regulation 1049 imposes an obligation on the body receiving a request to assist the requester in identifying the document(s) which contain the information s/he is looking for (Article 6(2)), but the final request should identify documents.
- Application to unrecorded information: the term ‘document’ implies a duty only to provide access to information which is available in recorded form whereas, taken by itself, the term ‘information’ could apply to a broader range of material. In practice, however, Regulation 1367 defines environmental information as “any information in written, visual, aural, electronic or any other material form ...” On this point, the difference in terminology should not result in different outcomes.
- Application to information extractable from documents: under Regulation 1049, the question may arise whether an institution is required to provide access to information which is not recorded in one or more discrete documents, but can be derived from them. An example would be a request for an extract from a database, or for the number of files held on a particular issue. Under Regulation 1367 this question would be answered positively, while the situation is more ambiguous under Regulation 1049. We discuss this issue under Question 7, below.

We believe these three points show that insofar as there are differences between the term ‘information’ and the term ‘documents’, the term ‘information’ is to be preferred. Requesters, especially non-expert ones, will have trouble specifying exact documents while they will usually be able to formulate a request for information which is clear enough to process, if need be with appropriate help. The right of access should extend to information recorded in databases and other formats which may not fall within a traditional understanding of ‘document’. Should a decision nevertheless be taken to retain the word ‘document’, it should be defined in such a way as to ensure that such information is subject to access.

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In regard to question (iii), Regulation 1367 has a broader scope in that it covers not only Institutions but also other bodies, offices or agency established by, or on the basis of, the EU Treaty. Our position is that all bodies falling within the EU regime and that have been entrusted with public functions ought to be covered under the access regime, and we accordingly believe that a merged regulation should follow the template set by Regulation 1367 in this regard..

Finally, more generally, it is important that unification of the two regulations does not result in any reduction of the level of openness currently guaranteed; in other words, the merged document should reflect the highest common denominator of its two constituent parts.

Question 4: Protection of Personal Data

Question 4: How should the exception laid down in Article 4(1)(b) of Regulation 1049 be clarified in order to ensure adequate protection of personal data?

A. Granting partial access to documents, expunged for personal data, is a satisfactory way of balancing transparency and the protection of personal data.

B. The disclosure of personal data should always be assessed under the criteria set by the Regulation on the protection of individuals with regard to the processing of personal data (Regulation (EC) No 45/2001)

C. There should be criteria for the disclosure of certain types of personal data in Regulation (EC) No 1049/2001, where the lawfulness of disclosure does not have to be assessed on a case-by-case basis under Regulation (EC) No 45/2001.

We do not believe that any of these options is satisfactory. ARTICLE 19 advocates that all exceptions should be subject to strict “harm” and “public interest” tests.

As it stands, Article 4(1)(b) provides that access to a document “shall” be refused where “disclosure would undermine the protection of ... privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”

International law and best practice⁶ suggest that all exceptions to an access to information regime should be subject to a three-part test:

- 1) the information must related to a legitimate aim listed in the law;
- 2) disclosure must threaten to cause substantial harm to that aim; and
- 3) the harm to the aim must be greater than the public interest in having the information.

⁶ Based on Article 19(3) of the *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

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Requests for all information held by or on behalf of a public body should be subject to this test and assessed on a case-to-case basis. We note that this formula has been recommended by the Council of Europe's Committee of Ministers, in a 2002 Recommendation:⁷

IV. Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- ...
- iv. privacy and other legitimate private interests;
- ...

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, *unless there is an overriding public interest in disclosure* (emphasis added).

A similar wording features in the draft Council of Europe Convention on Access to Official Documents, which may be opened to ratification by the EC.

We are concerned that Article 4(1)(b) falls significantly below this international standard: unlike paragraph 2, it does not establish subject the harm to privacy to a 'public interest override'. We therefore recommend that Article 4 be amended to provide for a public interest override in line with international standards. Additionally, it is important that the freedom of information regime supersede all other legislation in regards to access to information. If necessary, provisions of Regulation 45 on the protection of personal data processing should also be amended in this regard so that it is consistent with the provisions of Regulation 1049.

Question 5: Protection of Commercial and Economic Interests

Question 5: How should the exception laid down in Article 4(2), 1st indent of Regulation (EC) No 1049/2001 be clarified in order to ensure adequate protection of commercial and economic interests of third parties?

A. The current system where the protection of commercial interests is balanced against the public interest in disclosure strikes the right balance.

B. More weight should be given to the interest in disclosure.

C. The current rules do not sufficiently protect commercial and economic interests.

⁷ Adopted by the Committee of Ministers of the Council of Europe on 21 February 2002.

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Answer: B. But it needs to be understood that even when a third party suffers serious harm from disclosure, an overriding public interest may still justify disclosure.

The first indent of Article 4(2) provides that institutions can refuse access when disclosure would undermine the protection of “commercial interests of a natural or legal person, including intellectual property”, unless “there is an overriding public interest in disclosure.”

The obligation of professional secrecy should be duly protected in the access to information regime. However, care should be taken to ensure that this obligation does not impose prior restraint on the disclosure of all information regarding commercial interests. We believe Article 4(2) should be narrowed to apply only to information obtained in confidence from third parties. If the party providing the information did not have a legitimate expectation of confidentiality, the information should be released regardless of its consequences for the party’s commercial interests.

Furthermore, ARTICLE 19’s experience is that commercial exceptions are often wrongly applied at the domestic level in order to withhold information about public procurements, such as the terms of the final contract or basic information about competing bids (after completion of the procurement process). One possibility would be to expressly recall the importance of transparency in procurement processes, by adding the phrase “with due regard to the need for transparency of procurement processes”.

Question 6: Timeframe for Excessive or Improper Requests

Question 6: In the light of experiences made so far, is there a case for specific provisions for handling requests, which are clearly excessive or improper, in particular with regard to time frames?

Answer: No.

In light of the Court of First Instance’s judgment in *Verein für Konsumenteninformation v. Commission*,⁸ we believe that extreme caution should be taken in allowing institutions to limit their workload based on requests which they deem excessive or improper. This would provide implementing officials excessive discretion and open the door to abuse.

We note that Regulation 1049 already provides for procedural flexibility for handling requests for a large number of documents. Article 6(3) provides:

In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

⁸ Case T-2/03, Judgment of 13 April 2005.

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In addition, Article 7(3) provides for the possible extension of the 15 day time frame in exceptional cases.

Consideration might be given to drafting internal guidance (which of course needs to be accessible to the public as well) clarifying these provisions. This would be of some help to implementing officials as well as to potential requesters. However, any such guidance should reflect clearly the spirit of the *Verein für Konsumenteninformation* ruling referred to above.

Question 7: The Concept of ‘Document’

Question 7: With regard to the content of databases, should the concept of “document” cover sets of information that can be extracted using the existing search tools?

Answer: Yes

We believe that the public should have access to all information held by or under the control of an EU institution, and that this should include all records held by a public body, regardless of form, source, date of production, origin or classification. Bearing in mind that a large amount of information is held in databases and that a competent administrator can normally easily formulate the technical ‘query’ necessary to extract the information, we recommend that all information held in databases should be considered as “documents” under Regulation 1049. In the limited number of cases where creating a right search formula would be unreasonably burdensome, the body processing the request should be allowed to use the structures provided under current Articles 6(3) and 7(3).

Question 8: Exceptions

Question 8: Should the Regulation indicate events before and after which exceptions would or would not apply?

Answer: No.

As a rule, all requests for information should be assessed against the exceptions on a case by case basis. There should be no assumption that ‘new’ information falling in a certain category is automatically exempt. Generally, we believe that Article 4(7) of the Regulation is adequate to account for the passing of time on the application of the exceptions regime, although we would recommend a 15 or 20 year period rather than a 30 year one.