

# EUROPEAN PARLIAMENT

2004



2009

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*Session document*

**A6-0459/2008**

20.11.2008

## **REPORT**

on public access to European Parliament, Council and Commission documents  
(implementation of Regulation (EC) No 1049/2001)  
(2007/2154(INI))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Marco Cappato

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### **on public access to European Parliament, Council and Commission documents (implementation of Regulation (EC) No 1049/2001) (2007/2154(INI))**

*The European Parliament,*

- having regard to the EC Treaty, and in particular to Article 254 on the obligation to publish acts and Article 255(2) on EU citizens' and residents' right to access European Parliament, Council and Commission documents,
- having regard to the EC Treaty, and in particular to Article 207(3) on the Council's obligation to specify in its rules of procedure the conditions under which the public shall have access to Council documents,
- having regard to the EU Treaty, and notably to Article 1 (principle of openness as one of the general principles of the Union), Article 6 (democracy), Article 28(1) and Article 41(1) (application of the right of access to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters),
- having regard to Articles 10 and 16 of the Treaty on European Union as it is due to be amended by the Treaty of Lisbon and to Articles 15 and 298 of the Treaty on the Functioning of the European Union,
- having regard to the Charter of Fundamental Rights of the European Union, and notably to its Articles 41 (right to good administration) and 42 (right of access to documents),
- having regard to 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<sup>1</sup>,
- having regard to Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community<sup>2</sup>,
- having regard to the case-law of the Court of Justice of the European Communities (ECJ) and of the Court of First Instance on access to documents, and notably to the recent judgments of the Court of First Instance in *Bavarian Lager Co. Ltd v Commission of the European Communities* (Case T-194/04) and of the ECJ in *Kingdom of Sweden and Maurizio Turco vs Council of the European Union* (joined cases C-39/05 P and C-52/05 P, the "ECJ Judgment in the Turco case"),
- having regard to the activities and documents produced by the European Ombudsman on the issue of access to documents, as well as by the European Data Protection Supervisor,

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> OJ L 243, 27.9.2003, p. 1.

- having regard to the Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy<sup>1</sup>,
  - having regard to the Commission proposal of 30 April 2008 for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM(2008)0229),
  - having regard to the Draft Council of Europe Convention on Access to Official Documents,
  - having regard to its Oral Questions to the Council and the Commission on the implementation of the ECJ Judgment in the Turco case,
  - having regard to the Annual Reports for 2006 from the Council, the Commission and the European Parliament on access to documents, as well as to Article 17 of Regulation (EC) No 1049/2001,
  - having regard to Rule 45 and Rule 97(7) of its Rules of Procedure,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0459/2008),
- A. whereas democracies based on the rule of law are bound by the principle of publicity of the rules that affect citizens, which implies a duty of openness and transparency for the EU institutions and notably of their decision-making processes, so that democratic legislative bodies hold their meetings, discussions and votes in public, while draft laws and related texts are also available,
- B. whereas, in order to ensure the accountability and legitimacy of a democratic political system, citizens have a right to know:
- how their representatives act, once elected or appointed to public bodies or representing the Member State at the European or international level (principle of accountability),
  - how the decision-making process works (including documents, amendments, timetable, players involved, votes cast, etc),
  - how public money is allocated, spent and with which results (principle of traceability of funds),
- C. whereas the international community and the European Union, on the basis of the experience of its Member States, have progressively come to recognize a true “right of access to documents” and a “right to information” based on the principles of democracy, publicity, transparency and openness,

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<sup>1</sup> OJ C 298, 30.11.2002, p. 1.

- D. whereas quantitative data contained in the Annual Reports in relation to the application of Regulation (EC) No 1049/2001 by the EU institutions suggest that access to documents has been granted in a higher number of cases (general decrease in the number and rate of refusals), while reasons for refusal vary among EU institutions (the first one being the protection of the decision-making process) and that as regards sensitive documents, the Commission and Parliament did not enter any such document in their registers, while the Council entered 79 sensitive documents out of 409 in its register; whereas from a qualitative analysis it appears clearly that a number of provisions of that Regulation gave rise to divergent interpretations as to the correct way to apply it, which led citizens to address the European Ombudsman and the ECJ,
- E. whereas the Council inserts the interinstitutional reference number only in a limited number of documents, contrary to Article 11(2) of Regulation (EC) No 1049/2001, thereby making it difficult to associate a document with a procedure, while it also either downgrades documents to "room documents" that are not registered, or treats them as "diplomatic" documents, hereby nullifying citizens' right of access to documents,
- F. whereas according to Recital 6 of Regulation (EC) No 1049/2001, access should also be granted to documents produced under the delegated powers procedure (comitology) and whereas nine-tenths of the legislation produced is adopted under that procedure and, accordingly, proper and transparent Parliamentary and democratic scrutiny should be fully guaranteed within that framework,
- G. whereas the Internet has become the main way for citizens to consult EU documents, while the number of documents made available by EU institutions on-line has increased, which creates a need now to further improve the user-friendliness of EU institutions and documents websites, their interconnection and the creation of a single EU portal to access all EU documents, procedures and institutions,
- H. whereas the EU institutions should now take further steps towards greater transparency, openness and democracy by moving towards an "EU Freedom of Information Act", as in the application of Regulation (EC) No 1049/2001 a series of shortcomings have been brought to public attention, recent judgments need to be analysed and implemented urgently by the EU institutions, while the Commission has issued its proposal for a revision of Regulation (EC) No 1049/2001,
1. Stresses that the landmark ECJ Judgment in the Turco case concluded that "Regulation (EC) No 1049/2001 imposes, in principle, an obligation to disclose the opinion of the Council's legal service relating to a legislative process"<sup>1</sup> and that in that judgment, the Court reached the following conclusions:
- the public right of access to the documents of the EU institutions derives from the democratic character of those institutions, as provided for in Recital 4 and Article 1 of Regulation (EC) No 1049/2001,
  - the exceptions contained in that Regulation (such as the protection of the decision-making process) must be strictly interpreted and balanced against the overriding public

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<sup>1</sup> Paragraph. 68 of the ECJ Judgment in the Turco case.

- interest in disclosure, as it is linked to democracy, participation of citizens more closely in the decision-making process, legitimacy of the administration, effectiveness and accountability to citizens<sup>1</sup>,
- these conclusions are even more important when EU institutions act in their legislative capacity<sup>2</sup>,
  - openness with regard to different views concerning an act (and its legality) "contributes to conferring greater legitimacy on the institutions in the eyes of the European citizens and improving their confidence in them by allowing divergences between various points of view to be openly debated"<sup>3</sup>,
  - detailed statement of reasons for a refusal must be given by the institution<sup>4</sup>;
  - the exception can only apply for the period during which protection is justified on the basis of the content of the document<sup>5</sup>;
2. Emphasises that the ECJ Judgment in the Turco case further strengthens in the EU the principle by which democratic institutions have a duty to ensure publicity of their activities, documents and decisions, which is a condition of their legality, legitimacy and accountability, on the basis of Article 6 of the EU Treaty and of Articles 254 and 255 of the EC Treaty, and that consequently documents must be published and in any event accessible and that any exception to this principle should be limited and interpreted strictly;
3. Urgently calls on all EU institutions to apply Regulation (EC) No 1049/2001 in the light of the recent case-law and notably of the ECJ Judgment in the Turco case in all its implications, notably in the legislative procedures (publication of legal service opinions, strict interpretation of exceptions, obligation to provide a detailed statement of reasons for refusal, etc) and calls on the Council also to review its rules to ensure publicity of all discussions, documents and information, including the identity of the Member States' delegations in the Council, as well as in its working groups and expert groups, and to draw up a transcript of its public meetings, since the ECJ conclusions concerning the fact that the exception on the protection of the decision-making process is outweighed by the

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<sup>1</sup> A document that could be covered by an exception (such as a "legal opinion") should be examined as to its content to evaluate which parts of it are covered by the exception; the risks linked to disclosure must be "reasonably foreseeable and not purely hypothetical"; a balancing between such a risk and "the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in that enabled citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system".

<sup>2</sup> As "the possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights" (Paragraph 46 of the ECJ Judgment in the Turco case) and an overriding public interest underlined in Regulation (EC) No 1049/2001 is that of "disclosure of documents [...] arising when legislative initiatives are debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens" (Paragraph 67 of the ECJ Judgment in the Turco case).

<sup>3</sup> Paragraph 59 of the ECJ Judgment in the Turco case.

<sup>4</sup> Paragraph 69 of the ECJ Judgment in the Turco case.

<sup>5</sup> Paragraph 70 of the ECJ Judgment in the Turco case.

public interest in openness - as different views on a legislative act allow for a greater legitimacy for the institutions - apply also in this case;

4. Calls on the EU institutions to define common rules on the way in which administrative procedures should be carried out and administrative documents should be tabled, classified, declassified, registered and disseminated inside and outside the EU institutions, bearing in mind that the transparency principle is indissociable from the principle of good administration as proclaimed by the European Parliament, Council and Commission in Article 41 of the Charter of Fundamental Rights of the European Union; in the same perspective, Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community<sup>1</sup> should be merged as part of the revision of Regulation (EC) No 1049/2001 to include definitions of common rules on live, intermediate and historical archives in order to avoid the current inconsistencies between the practices of the EU institutions and the Member States;
5. Believes that Parliament should be at the forefront of publicity, transparency and openness in the EU, and that before the Parliamentary elections of 2009, it should launch an extraordinary action plan, for instance within the framework of the e-Parliament initiative, to ensure that more and easily accessible information is made available on its website, on:
  - MEPs' activities, participation in and attendance at Parliamentary work, in absolute, relative and percentage terms, available and accessible to citizens also through search criteria<sup>2</sup>,
  - Parliament's activities in plenary, committee, delegations and internal bodies: the Legislative Observatory should be improved by including references and links to all relevant documents<sup>3</sup>; committee and delegation work should be streamed on Parliament's website as plenary work is, and also recorded, and made available and accessible to citizens through search criteria; internal bodies (such as the Conference of Presidents, the Bureau, the Quaestors, the Working Party on Parliamentary Reform, etc) should promote and ensure the highest level of transparency of their work vis-a-vis other members and citizens by making all their documents available,
  - MEPs' allowances and spending, in conformity with the position taken by the European Ombudsman in relation to the fact that access to information should apply also to such data<sup>4</sup>, as well as all declarations of financial interests for all MEPs, and

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<sup>1</sup> OJ L 43, 15.2.1983, p. 1.

<sup>2</sup> Such as: how many days each MEP has been present in the EP and where he has signed and/or voted, as well how when roll call votes take place, in plenary and in committee; to which institutional bodies' meetings he has participated, plenary and/or committee and/or delegation, etc; data should be available also through search criteria, such as name of the MEP / plenary / committee / delegation / votes / presence / day / month / year / legislative term / etc, and links to this webpage should be included in MEPs webpages and in other relevant websites; MEPs webpages should include this information as well as the name of the assistants, opinions made, amendments tabled in committee and plenary to reports and other acts, explanations of vote, audio-video interventions, written declarations signed, including the list of all signatories, etc;

<sup>3</sup> Procedures and documents in committee such as first report and amendments, opinions from other committees, legal service opinions, amendments tabled in plenary, roll call votes, inter-institutional letters, notably those related to legislative procedures, at committee and plenary level, etc.

<sup>4</sup> Draft recommendation of the European Ombudsman to the European Parliament in complaint 3643/2005/(GK)WP.

that such information should be available in all EU official languages,  
and calls on Member States, national parliaments as well as other elected bodies to do the same by establishing a Register of parliaments' and parliamentarians' activities;

6. Urges the Commission to follow the recommendation of the European Ombudsman (Complaint 3208/2006/GG) on the Commission register as regards its obligation to "include references to all documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of [Regulation (EC) No 1049/2001], to the extent that this has not yet been done";
7. Considers that retrieving documents and information would be easier if the documents themselves were tabled, registered and re-used by other legislative institutions in compliance with common standards (for instance for references to different versions of the same document, its amendments, annexes and corrigenda)<sup>1</sup> by using open-source word processors, effective multilingualism and technologies that also allow persons with disabilities to gain access to information and documents, as suggested by the Commission to the Member States in its Communication on interoperability solutions for European public administrations (ISA) (COM (2008)0583) and as provided for in Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information<sup>2</sup>);
8. Believes that accessing information relating to the EU institutions still remains an obstacle-strewn path for ordinary citizens due to the lack of an effective citizen-oriented inter-institutional policy of transparency and communication; considers that regardless of the point of access, EU citizens should be able to track a given legislative or administrative procedure and access all the documents relating to it<sup>3</sup>; as called for as early as in 2001, an inter-institutional road-map should be defined to improve, simplify and complete the EU institutions' registers and web pages and make them interoperable; EU institutions that aim to lead the development of e-government techniques should be able and willing to create a true inter-institutional search engine which would make access to documents and information more user-friendly for the public;
9. Deeply regrets that, contrary to what is provided for in Article 12 of Regulation (EC) No 1049/2001, many preparatory legislative documents are still not registered (such as the "room documents" mainly discussed within the Council working groups set up by Coreper 1) and when registered, they are missing the inter-institutional code so that it has proved impossible to merge them in a common inter-institutional record as part of the pilot inter-institutional project "Transparency in the Area of Freedom, Security and Justice" (Trans-Jai) launched as far back as in 2004 for legislative procedures in the Area of Freedom, Security and Justice (AFSJ); takes note of the new deadline (2010) announced in plenary by Vice-President Wallström, and considers therefore that this deadline will also be missed if the EU institutions do not immediately make available a liaison officer who could insert the inter-institutional code when it is missing in the original document; the

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<sup>1</sup> This is not currently the case as the Commission, Parliament and Council follow different practices.

<sup>2</sup> OJ L 345, 31.12.2003, p. 90.

<sup>3</sup> Such as the original proposal, minutes of meetings, reports, amendments, votes, result of votes, debates, text into force, implementation in Member States, evaluation reports, etc.

current situation is not only a waste of public money but also a way to keep citizens at arm's length from daily legislative work in very sensitive areas such the AFSJ; urges the Commission to anticipate the entry into force of such a tool for the beginning of the next Parliamentary term;

10. Believes that the EU institutions should create a single EU register/portal of information and documents, that should allow citizens to follow a certain procedure and access all the documents relating to it<sup>1</sup>; such plan should go from simplifying and completing their registers and webpages and interconnecting them between EU institutions, to integrating them in a EU single portal; calls for the creation of an inter-institutional daily follow-up bulletin collecting information and documents related to EU legislative and non-legislative activities and agendas, as was planned with the Trans-Jai project founded on an inter-institutional agreement in 2004 and unfortunately not yet operational, before the beginning of the next Parliamentary term;
11. Calls on the EU institutions to ensure that, at least before the beginning of the next Parliamentary term:
  - all the preparatory documents mention the legislative procedure reference,
  - all the agendas and outcome of the proceedings of the Council and preparatory bodies make clear reference to the background documents and are registered in good time and published in the Council Register (included the so called "room documents"),
  - they make clear to citizens in a fair and transparent way their organisational chart by indicating the remit of their internal units, the internal workflow and indicative deadlines of the dossier falling within their remit, to which services should citizens refer to obtain support, information or administrative redress,
  - all legislative proposals are accompanied by an impact assessment available to the public;
12. Calls on the EU institutions to ensure improved transparency in relation to comitology procedures, as well as to first-reading agreements negotiated between EU institutions in co-decision procedures (so-called "trilogues"), to make sure that inter-institutional agreements are fully in line with the duties of publicity, transparency and openness in legislative procedures, involving a parliamentary assembly that has a statutory duty to hold meetings in public and to publish the documents examined;
13. Underlines the fact that the existing procedures for delegated legislation (the so-called "comitology acts") which cover nine-tenths of the legally binding acts adopted every year by the EU institutions should be reviewed and applied in such a way as to ensure that democratic principles and transparency are guaranteed, that the members, proceedings and votes of the comitology committees should be made public and that national and European parliamentarians as well as citizens should have immediate access to the documents in comitology register as soon as they are sent to the members of comitology committees (as

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<sup>1</sup> Such as the original proposal, minutes of meetings, reports, amendments, votes, result of votes, debates, text into force, implementation in Member States, evaluation reports, etc.

promised in 2001 by former Commissioner Barnier); considers that enhanced transparency should apply in particular to draft regulations, while Parliament should organise the processing of such proposals in the most open and transparent way, thereby avoiding opaque situations such as those which arose in connection with the regulations on aviation security in relation to liquids and body scanners;

14. Believes that the principle of loyal cooperation between institutions implies an obligation on the EU institutions, notably when working on legislative dossiers or on international treaties (for instance, EU-US cooperation in the JHA area, PNR and data protection) or appointment procedures (for instance, the appointment of the Director of the European Union Agency for Fundamental Rights), to exchange all the relevant documents and information, even if sensitive or confidential, and that current practices should be urgently improved;
15. Praises the work of the European Ombudsman to ensure greater transparency on the part of the EU institutions, and shares the views expressed together with the European Data Protection Supervisor on the balance between data protection and the right to privacy covered by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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<sup>1</sup> and Regulation (EC) No 1049/2001; asks the European Ombudsman to prepare a report on access to documents for the newly elected Parliament addressing the issues raised in this report;
16. Calls on the EU institutions and Member States to promote a common administrative culture of transparency founded on the principles outlined in Article 41 of the Charter of Fundamental Rights of the European Union, by the case-law of the ECJ, the recommendations of the European Ombudsman and the best practices of the Member States; considers that, as is already the case for data protection officers, each Directorate General of the EU institutions should ensure that documents are tabled, registered, classified, declassified and disseminated consistently with the principle of good administration, Regulation (EC) No 1049/2001 and the rules of procedure of the EU institutions concerned;
17. Calls for the launch of a European Year of Transparency and for a European transparency campaign to be promoted in 2009 on the occasion of the European elections, so that citizens are aware of their rights of access to EU documents and of EU standards regarding publicity, openness and transparency, as well as in the Member States;
18. Considers that transparency at EU level should be mirrored by Member States when transposing EU legislation into national law and invites national parliaments and the Conference of Community and European Affairs Committees of Parliaments of the European Union to examine the proposals contained in this resolution and to promote an EU register of parliaments' and parliamentarians' activities which could serve to ensure and increase mutual cooperation and consultation between the EU, Parliament and national parliaments, drawing also on best practice in terms of e-Parliament and e-government transparency;

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<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

19. Calls on political parties and parliamentary political groups to promote transparency and openness internally and in parliaments, for instance by broadcasting their meetings and making programmes and documents available on the Internet;
20. Takes note of the concerns expressed with regard to the Draft Council of Europe Convention on Access to Official Documents by the Parliamentary Assembly of the Council of Europe in its Opinion No. 270 (2008), and calls on Member States to include in the Draft Convention at least the amendments put forward by the members of that Assembly;
21. Calls on the European Council and the ECJ (the latter as far as its administrative tasks are concerned), which are the only two bodies still not applying Regulation (EC) No 1049/2001 to their documents, to reflect and to take appropriate action to remedy that situation;
22. Calls on the EU institutions to work towards an ambitious European "Freedom of Information Act", on the basis of the current proposed revision of Regulation (EC) No 1049/2001;
23. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the European Ombudsman, the European Data Protection Supervisor and the Council of Europe.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	17.11.2008
<b>Result of final vote</b>	+: 43 -: 0 0: 1
<b>Members present for the final vote</b>	Alexander Alvaro, Catherine Boursier, Emine Bozkurt, Kathalijne Maria Buitenweg, Maddalena Calia, Giusto Catania, Jean-Marie Cavada, Fabio Ciani, Carlos Coelho, Elly de Groen-Kouwenhoven, Panayiotis Demetriou, Gérard Deprez, Agustín Díaz de Mera García Consuegra, Claudio Fava, Armando França, Kinga Gál, Patrick Gaubert, Jeanine Hennis-Plasschaert, Wolfgang Kreissl-Dörfler, Stavros Lambrinidis, Roselyne Lefrançois, Baroness Sarah Ludford, Javier Moreno Sánchez, Maria Grazia Pagano, Martine Roure, Inger Segelström, Vladimir Urutchev, Ioannis Varvitsiotis, Manfred Weber, Tatjana Ždanoka
<b>Substitute(s) present for the final vote</b>	Marco Cappato, Carlo Casini, Elisabetta Gardini, Monica Giuntini, Genowefa Grabowska, Luis Herrero-Tejedor, Sophia in 't Veld, Ona Juknevičienė, Sylvia-Yvonne Kaufmann, Jörg Leichtfried, Nicolae Vlad Popa, Luca Romagnoli, Stefano Zappalà
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Inés Ayala Sender