EUROPEAN PARLIAMENT

2004 *2009*

Committee on Legal Affairs

2008/0090(COD)

30.1.2009

OPINION

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)
(COM(2008)0229 – C6-0184/2008 – 2008/0090(COD))

Rapporteur: Monica Frassoni

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SHORT JUSTIFICATION

According to Article 1(2) of the Treaty on European Union Community institutions and bodies must take decisions as openly as possible and as closely as possible to the citizens. Transparency and citizens' right to information are widely recognised as the most cost-efficient way of fighting and preventing corruption. In order to enable citizens to effectively participate in the political process and call public authorities to account, citizens should therefore have the widest possible access to documents held by the European institutions.

The European Parliament has constantly reminded the importance of this fundamental principle of democracy, as in the Cashamn Resolution. The consultation on the revision of the Regulation, showed broad support from civil society for the call from the European Parliament for the introduction of a genuine freedom of information act applicable to the institutional framework of the European Union, in accordance with the right to good administration laid down in Article 41 of the Charter of Fundamental Rights.

Your rapporteur regrets that the other Institutions are not following the same committed approach. The actual amendments the Commission has brought to the Regulation are indeed disappointing as in a number of cases the Commission's proposals represent a step backwards in "a drive towards more transparency". Furthermore, you rapporteur considers the Commission's choice to use the re-cast procedure for the revision of the regulation unfortunate and not in conformity with the objectives of the Interinstitutional Agreement (IIA) on the re-cast procedure. The unsuitability of the re-cast procedure for a complex revision, where changes in some elements have implications for other provisions in the text, in practical terms means that Parliament must make extensive use of the derogation provided for in the IIA.

Your rapporteur has in several cases reinstated the current provisions f the Regulation as they offer a definitely higher standard of access and transparency.

Your rapporteur has also referred to the question of the relationship between access to documents and data protection as one of the most controversial issue relating to the application of Regulation 1049/2001. The shared position of the European Ombudsman, the European Data Protection Supervisor and the Court of First Instance (in the Bavarian Lager case) is that data protection may not be used to prevent access to information when such access would not risk harming the right to privacy and personal integrity of an individual and your rapporteur has reminded the Commission of that consolidated position.

Inspired by the Mexican Freedom of Information and bearing in mind that bringing an action before the European Courts can be an unreasonable alternative for citizens in case of refusal of disclosure of a document, your rapporteur suggests that the European Ombudsman should be empowered to take decisions on requests for access to documents with final effect on the administration concerned, while the applicants should retain the right to bring an action before the Court of First Instance against a refusal of disclosure.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate in its report the following amendments along with the enclosed recommendations of the Consultative Working Party of the legal services of the European Parliament, the Council and the Commission:

Amendment 1

Proposal for a regulation
Recital 1

Text proposed by the Commission	*Amendment*
(1) A number of substantive changes are to be made to Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In the interest of clarity, that Regulation should be recast.	(1) A number of substantive changes are to be made to Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In the interests of clarity, that Regulation should be recast***, this being a legislative technique which should be applied in accordance with the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts***[1].

[1] ***OJ C 77, 28.3.2002, p. 1.***

Justification

The Commission's choice to use the re-cast procedure, for the revision of this regulation is inappropriate and not in conformity with the objectives of the Interinstitutional Agreement on the re-cast procedure, which foresees its use under quite different conditions. The unsuitability of the re-cast procedure for a complex revision, where changes in some elements have implications for other provisions in the text, in practical terms means that Parliament must make extensive use of the derogation provided for in the IIA.

Amendment 2

Proposal for a regulation
Recital 3

Text proposed by the Commission	*Amendment*
(3) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy	(3) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy

and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.	and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union. ***Any progress towards opening administrative authorities up to public scrutiny is also likely to advance anti-corruption efforts.***

Justification

Transparency and citizens' right to information are widely recognised as the most cost-efficient way of fighting and preventing corruption.

Amendment 3

Proposal for a regulation
Recital 5 a (new)

Text proposed by the Commission	*Amendment*
	(5a) That consultation has shown that there is broad support within civil society for the European Parliament's call for the introduction, in accordance with the right to good administration laid down in Article 41 of the Charter of Fundamental Rights, of a genuine freedom of information act applicable to the institutional framework of the European Union.

Justification

While the concept of freedom of information is broader than the concept of access to documents it must, first, be noted that, as the Court of Justice has stated (in e.g. Hautal v Council) the content of the right to access to documents is the right to the information contained in documents. The broader concept of freedom of information is also already reflected in Regulation 1367/2006 which implements the Aarhus Convention. Furthermore, citizens' right to good administration must include, as a matter of principle, right to information. This is also clearly laid down in Article 22 of the Code of Good Administrative Behaviour, presented by the European Ombudsman and approved by Parliament.

Amendment 4

Proposal for a regulation
Recital 10

Text proposed by the Commission	*Amendment*
(10) With regard to the disclosure of personal data, a clear relationship should be established between this Regulation and Regulation (EC) No 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.	(10) With regard to the disclosure of personal data, a clear relationship should be established between this Regulation and Regulation (EC) No 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. ***Since the adoption of Regulation (EC) No 1049/2001 the case-law of the Court of Justice and decisions and positions adopted by the European Ombudsman and the European Data Protection Supervisor have clarified the relationship between that Regulation and Regulation (EC) No 45/2001, to the effect that it is the regulation on access to documents which is to be applied to requests for documents containing personal data and that application of the exceptions to the rules allowing access to documents and information for the purpose of protecting personal data must be based on the need to protect the privacy and integrity of an individual.***

Justification

The question of the relationship between access to documents and data protection has been one of the most controversial issue relating to the application of Regulation 1049/2001. The cause of this has been, on the one hand, an unfortunate formulation of the exception for data protection which tends to lead to circular arguments concerning the relationship between the regulations mentioned. However, the shared position of the European Ombudsman, the European Data Protection Supervisor and the Curt of First Instance (in the Bavarian Lager case) is that data protection may not be used to prevent access to information when such access would not risk harming the right to privacy and personal integrity of an individual. However, the Commission's proposal does not take this into account.

Amendment 5

Proposal for a regulation
Recital 11

Text proposed by the Commission	*Amendment*
(11) Clear rules should be established regarding the disclosure of documents originating from the Member States and of documents of third parties which are part of judicial proceedings files or obtained by the institutions by virtue of specific powers of investigation conferred upon them by EC law.	(11) Clear rules should be established regarding the disclosure of documents originating from the Member States and of documents of third parties which are part of judicial proceedings files or obtained by the institutions by virtue of specific powers of investigation conferred upon them by EC law. ***The Court of Justice has made it clear that the obligation to consult Member States as regards requests for access to documents originating from them does not give the Member States a right to veto such access or to invoke national laws or provisions and that the institution to which the request is made may refuse access only on the basis of the exceptions laid down in Regulation (EC) No 1049/2001. However, there is still a need to clarify the status of documents emanating from third parties in order to ensure that, in particular, information relating to legislative procedures is not shared more broadly with the parties, including administrative authorities of third countries, than with the European citizens to whom the legislation will apply.***

Justification

The European Commission, in particular, has interpreted the obligation to consult member states as granting these a right to veto access to documents coming from them. However, this interpretation has been struck down by the Court of Justice in the IFAV case. The Commissions proposal does not, unfortunately, genuinely reflect this jurisprudence and would, if accepted, mean a clear step back from the present legal state of affairs. However, there is still need for clarification of the status of third party documents, in particular, in order to avoid that information relating to legislative dossiers is not shared more broadly with, for instance, foreign administration than with the European citizens concerned and bound by the legislation,

Amendment 6

Proposal for a regulation
Article 2 – paragraph 1

Text proposed by the Commission	*Amendment*
1. Any natural or legal person shall have a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.	1. Any natural or legal person ***or any association of legal or natural persons*** shall have a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

Justification

The reference to the associations is aiming i.e. citizens' groups.

Amendment 7

Proposal for a regulation
Article 3 – point b

Text proposed by the Commission	*Amendment*
(b) "third party" means any natural or legal person, or any entity outside the institution concerned, ***including the Member States,*** other Community or non-Community institutions and bodies and third countries.	(b) "third party" means any natural or legal person, or any entity outside the institution concerned, other Community or non-Community institutions and bodies and third countries.

Justification

Member States should not be considered third parties in their relations with the institutions or their communications on matters relating to the field of activities of the Union.

Amendment 8

Proposal for a regulation
Article 4 – paragraph 1 – point b a (new)

Text proposed by the Commission	*Amendment*
	(ba) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the

protection of personal data;

Justification

Reference to EU legislation on personal data is included. In this context as well, paragraph 3.3 of rule 80a of the rules of procedures should apply.

Amendment 9

Proposal for a regulation
Article 5 – paragraph 1

Text proposed by the Commission	*Amendment*
1. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception referred to in Article 4 is applicable, unless it is clear that the document shall or shall not be disclosed.	1. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception referred to in Article 4 is applicable, unless it is clear that the document shall or shall not be disclosed. ***Documents provided to institutions for the purpose of influencing policy-making should be made public.***

Justification

In order to guarantee transparency of the policy making process, documents provided by third parties and aiming at influencing the political decisions should be made public.

Amendment 10

Proposal for a regulation
Article 9 – paragraph 7

Text proposed by the Commission	*Amendment*
7. The Commission and the Council shall ***inform*** the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.	7. The Commission and the Council shall ***ensure adequate control by*** the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions***, which shall be made public***.

Justification

The arrangements agreed between the institutions regarding sensitive documents should be made public.

Amendment 11

Proposal for a regulation
Article 12 – paragraph 4

Text proposed by the Commission	*Amendment*
4. ***Each institution*** shall ***define in its rules of procedure which other categories*** of documents ***are directly accessible to the public***.	4. ***The institutions*** shall ***establish a common interface for their registers*** of documents***, and shall in particular ensure a single point of access for direct access to documents drawn up or received in the course of procedures for the adoption of Community legislative acts or non-legislative acts of general application***.

Justification

Article 12(4) is amended to include recommendation 5 of the Cashman resolution with a view to improving current standards.

ANNEX

GROUPE CONSULTATIF
DES SERVICES JURIDIQUES

Brussels, 6.11.2008

OPINION

FOR THE ATTENTION OF **THE EUROPEAN PARLIAMENT**
THE COUNCIL
THE COMMISSION

Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents
COM(2008) 229 final of 30.4.2008 - 2008/0090 (COD)

Having regard to the Inter-institutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, and in particular to point 9 thereof, the Consultative Working Party consisting of the respective legal services of the European Parliament, the Council and the Commission met on 20 May 2008 and 4 June for the purpose of examining the aforementioned proposal submitted by the Commission.

At those meetings[1], an examination of the proposal for a regulation of the European Parliament and of the Council recasting Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents resulted in the Consultative Working Party's establishing, by common accord, as follows.

1) In Article 7(1), the reference made to "*paragraph 4 of this Article*" should be adapted so as to read "*paragraph 3 of this Article*".

2) In Article 9(1), the reference made to "*Article 4(1)(a)*" should be adapted so as to read "*Article 4(1)*".

3) In Article 12(1), the adding of the wording "*EU legislative acts or non-legislative acts of general application shall*" should have been identified by using the grey shaded type generally used for identifying substantive changes.

[1] The Consultative Working Party had at its disposal the English, French and German language versions of the proposal and worked on the basis of the English version, being the master-copy language version of the text under discussion.

4) In Article 12(2), the adding of the final words "*in electronic form*" should have been identified by using the grey shaded type generally used for identifying substantive changes.

In consequence, examination of the proposal has enabled the Consultative Working Party to conclude, without dissent, that the proposal does not comprise any substantive amendments other than those identified as such therein or in the present opinion. The Working Party also concluded, as regards the codification of the unchanged provisions of the earlier act with those substantive amendments, that the proposal contains a straightforward codification of the existing texts, without any change in their substance.

C. PENNERA	J.-C. PIRIS	C.-F.DURAND
Jurisconsult	Jurisconsult	actg. Director General

PROCEDURE

Title	Public access to European Parliament, Council and Commission documents
References	COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)
Committee responsible	LIBE
Opinion by Date announced in plenary	JURI 22.5.2008
Drafts(wo)man Date appointed	Monica Frassoni 25.6.2008
Discussed in committee	15.12.2008
Date adopted	20.1.2009
Result of final vote	+: 15 –: 2 0: 4
Members present for the final vote	Carlo Casini, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Neena Gill, Klaus-Heiner Lehne, Katalin Lévai, Antonio López-Istúriz White, Manuel Medina Ortega, Hartmut Nassauer, Aloyzas Sakalas, Eva-Riitta Siitonen, Francesco Enrico Speroni, Diana Wallis, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitute(s) present for the final vote	Brian Crowley, Eva Lichtenberger, József Szájer, Jacques Toubon