

EU Civil Society Contact Group

EU Civil Society Contact Group response to the public consultation on the green paper on the review of regulation 1049/2001 on access to documents

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The EU Civil Society Contact Group brings together eight large European NGO platforms in the following fields: culture (EFAH), development (CONCORD), environment (Green 10), human rights (HRDN), lifelong learning (EUCIS), public health (EPHA), social (Social Platform) and women (EWL). Together we work to develop the dialogue between civil society organisations and the EU institutions as an essential part of strengthening participatory democracy. www.act4europe.org

Introduction - *On the way to a genuine culture of openness*

The EU Civil Society Contact Group welcomes that the institutions of the European Union are gradually becoming more open to the public. We congratulate the European Commission for seeking ways of adding value to the debate on the European Transparency Initiative launched in November 2005 in order to further a culture of openness between the EU institutions and the citizens of Europe.

However we note with disappointment that the tone of the green paper on public access to documents in wide parts is protective of the Commission's interests, as opposed to welcoming a broad range of responses. The questions chosen for consultation do not give the impression of opening up the field for discussion and debate. On the contrary, it shows that in spite of the progress made there is still a long way to go before the Commission can claim to have a real culture of openness.

It is also important to keep in mind that access to documents is not an aim in itself but it is about reinforcing citizen's trust in the European institutions. Therefore it should not be forgotten that that the right of access to documents is only one aspect of the European Transparency Initiative.

Despite the above comments, we welcome the opportunity to comment on the regime for obtaining access to documents of the European institutions and the possibility to react to the options set out in the green paper.

Question 1 – *More coherence within and between European institutions, bodies and member states*

Would you qualify the information provided through registers and on the websites of the institutions 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?

The comprehensiveness of the information provided varies considerably between and within the institutions.

With regards to the European Commission, the register of documents is not comprehensive enough. It would help if the documents relevant to the work of the *different* Directorate Generals were included in the register in a meaningful timeframe. This would add coherence to the process and make it easier for applicants to find what they are looking for. Specific rules concerning the duty of EU institutions to register documents should be developed and applied.

The Directorate Generals' websites feature very different levels of comprehensiveness. Some provide easily accessible and up-to-date information, while others are badly designed and/or out-of-date. Improving consistency and organizing the information in a better way seems crucial in order to allow the public to actually find the information provided online.

The stage of the legislative process of a particular document should be mentioned very clearly on the document itself and in the register. This is not always the case at present. In addition an effort should be made to better link the registers and documents of the different institutions. Both elements would greatly improve the ability of the stakeholders to contribute at appropriate stages of the decision-making process.

In order to improve the disclosure of documents held by the Council, all documents held by the Council could be considered as of importance to the European level. This would allow that the regulation also applied for all documents held by the Council regardless of who provided them.

Not all EU bodies fall under regulation 1049/2001. Extending the application to all EU institutions and bodies would be important to ensure proper access to all relevant information. Such extension has been also envisaged in the regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community. In point 12 the regulation reads: 'Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. It lays down rules for these institutions that comply to a great extent with the rules laid down in the Aarhus Convention. It is necessary to extend the application of Regulation (EC) No 1049/2001 to all other Community institutions and bodies.'

The regulation on access to documents must also apply to the terms of reference and the working documents of all high-level expert groups and other working groups especially in the Council but also in the Commission. This would be a big progress in terms of transparency, better regulation, good governance and accountability.

Questions 2 – A proactive information strategy

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

Yes.

The Regulation 1049/2001's stated objective is to "give the fullest possible effect to the right of public access to documents". The institutions should be commended for the improvements in the dissemination of information that stakeholders have seen in recent years.

There is still space for improvement. Access to documents is only one part of an information strategy that should of course include the proactive dissemination of as much information as possible of relevance to citizens in general and to specific groups. Each

institution as well as the agencies should develop and implement a proactive information strategy as well as a clear publication scheme.

A proactive information strategy including the publication of documents by all EU institutions and agencies would contribute to reducing the number of requests under this access to documents scheme and therefore minimize the workload of the concerned services.

Thinking of civil society organisations around the world concerned by EU policies in one way or the other and claiming access to documents, the question of the language of a document is crucial. Many local NGOs may not have the capacity to work in English or French. This is true also for many smaller organisations within the European Union.

A similar concern relates to the format of the document. A document that is only available on paper, can pose serious problems in terms of information sharing and the analysis of the document. On the other side the exclusive availability of documents in an electronic format can pose problems in regions where internet access is not well developed.

We invite the Commission to tailor - in cooperation with the concerned civil society actors - adequate systems to address these issues.

Last but not least active communication of the right of access to documents itself seems of great importance. More resources should be allocated to informing the public of their right in this respect.

Question 3 – Coherence between rules applicable within different policy areas

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

Yes.

The subject of the Aarhus Convention goes to the heart of the relationship between citizens and their governments. It is not only an environmental agreement, but also a convention about government accountability, transparency and responsiveness.

We welcome the fact that the access to environmental information held by the public authorities is a prerequisite for stepping up the application and monitoring of Community environment law. We note that both the Aarhus Declaration and the Directive 2003/4 restrict member states from preventing the disclosure of documents at EU level, in relation to the environment.

Although we recognize that denying access to certain documents can be justified in specific cases we believe that that the regulation should abandon the exceptions, which are neither found in the Directive 2003/4 nor in the Aarhus Convention:

- The exception for 'the financial, monetary or economic policy of the Community or a Member State'.

Explanation: Neither the directive 2003/4 nor the Aarhus Convention foresees this exception.

- The exception for 'commercial interests' and the exception to the right to information on emissions.

Explanation: Directive 2003/4 protects 'the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest'. Moreover, 'Member States may not ... provide for a request to be refused where the request relates to information on emissions into the environment'. The Directive closely tracks the Aarhus Convention's language regarding the exception for commercial confidentiality and the 'exception to the exception' for information on emissions.

- The exception for 'court proceedings and legal advice'.

Explanation: Directive 2003/4 includes no exception for 'legal advice'. Instead of a sweeping protection for all 'court proceedings', directive 2003/4 protects 'the course of justice [and] the ability of any person to receive a fair trial. The directive 2003/4 is virtually identical to the Aarhus Convention on this point.

- 1049 should not require consultation with the third party if a third-party's document is requested.

Explanation: this differs from and goes further than the directive. 2003/4 protects 'the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless the person has consented to the release of the information concerned'. 2003/4 again closely follows the Aarhus Convention provision on this point.

The regulation should require that the exceptions 'be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure'. Until now regulation 1049/2001 does not provide for a restrictive interpretation of the exceptions. The possibility of an overriding public interest in disclosure is recognized for only some of the exceptions. The directive 2003/4 however does require that the exceptions 'shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure'. Again, 2003/4 closely follows the Aarhus Convention requirements on this point.

In addition it should be noted that disparities between the laws in force in the member states can create inequality within the Community as regards access to information. The European Commission could develop recommendations for a set of minimum standards for the publication of EU-related documents in the member states in an attempt to limit these disparities.

We believe that the members state veto as it is foreseen in regulation 1049/2001 should be limited to as little areas as possible. Where the possibility for member states to deny the access to a document held by the EU institutions remains, member states should be asked to specify the grounds on which they refuse the disclosure. A principle of reasoned justification for denial should be introduced into the regulation.

Furthermore as until now not all EU bodies fall under regulation 1049/2001, extending the application to all EU institutions and bodies would be important to ensure proper access to all relevant information. Such extension has been also envisaged in the regulation 1367/2006 on the application of the provisions of the Aarhus Convention.

Question 4 – No personal data protection when acting in official capacity

How should the exception laid down in Article 4(1) (b) of Regulation 1049/2001 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 45/2001).
- C) There should be criteria for the disclosure of certain types of personal data in Regulation 1049/2001, where the lawfulness of disclosure does not have to be assessed on a case-by-case basis under Regulation 45/2001.**

The exceptions in Article 4 were criticised by civil society organisations in the run-up to the adoption of the regulation and we are still unhappy with the way the exceptions have been used in practice. We demand the institutions to show their commitment to improving transparency by restricting the exceptions in Article 4 to a strict minimum.

It should be clarified that the protection of privacy does not mean that all personal data is protected. For instance, the European Environmental Bureau (EEB) has been refused access to the names of the members of an official body (a committee established and taking decisions under Community law) on the grounds of protection of privacy. The members of this committee were all representatives of member state governments and acting in an official capacity. As the green paper suggests, where persons are acting in an official capacity, the personal data exception should not apply to their names.

In order to ensure a democratic process allowing for debate and contestation, a motivation should be given for each refused request.

Question 5 – Less room for exemptions

How should the exception laid down in Article 4(2), 1st indent of Regulation 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.

Disclosing information in the interest of the public good should be the norm with exemptions only being made in limited and well-defined circumstances. The current criteria for exemptions is too broad in scope and should be further refined.

Commercial interests at present seem to be overly protected by the regulation. The question of what constitutes an “overriding public interest” needs to be clarified. It should not be left up to the Court to define the public interest. Standards or guidelines should be developed and made available, in order to make the process more transparent. Civil society organisations wanting to use the overriding public interest to access documents could then have a better chance of knowing whether their request was likely to be successful. Applicants should not have to state their reasons for application. Also they should not have to prove the public interest override, as this seems very difficult without holding the document concerned. If an applicant outlines why he or she considers that there is overriding public interest, the applicant’s considerations should be taken into account by the institutions.

If access to a certain document is refused, there should be an obligation for the EU institutions to outline the reasons for the denial.

Questions 6 – Better registers, less requests

Would it be acceptable to derogate from the normal rules on access, in particular the time frames where access requests are clearly excessive or improper?

No.

If all the EU institutions maintained proper public registers containing up to date easily accessible and more transparent information then the number of requests would be reduced.

The problem of voluminous or excessive requests should be dealt with through communication between the institutions and the applicant. Access to documents should not be seen as a battle between applicants and institutions.

In addition member states should be willing to contribute to the culture of openness in the better regulation process and should not deny access to documents unless they do specify in detail the grounds on which they deny access to a document.

Question 7 – Access to information instead of access to documents

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?

This question should help illuminate the difference between an access to documents system and an access to information system. The latter is preferable since public authorities, including the EU's institutions, may hold information that can be readily 'extracted' even though it is not collected in a 'document'. A recent judgment of the Court of First Instance addresses the distinction between the two approaches. See *World Wide Fund (WWF) European Policy Programme v. Council of the European Union*, Case T-264/04, 25 April 2007, paras. 75-80. In that case, the Court upheld the Council's refusal to provide WWF with information on the contents of discussions that had not been minuted. The information was available but not in the form of minutes, a 'document'. The Court refused to take either the Aarhus Convention or the proposed regulation implementing the convention for the EU institutions into account on the grounds that the convention was not yet in force (for the EU, at any rate) and the regulation had yet to take effect. This situation has now changed. The Community is party to the convention and regulation 1367/2006 is in force.

The revision of Regulation 1049/2001 offers an excellent opportunity to clarify that the EU has chosen for a system of access to information.

Question 8 – *Disclosure within meaningful timeframe*

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

Yes.

As a general rule, we believe that the regulation should specify after which time documents withheld from the public can become available. As outlined in answer 5 to this consultation, the withholding of documents to the public under special circumstances should be the exemption rather than the norm.

However we would like to strongly reiterate that documents specifically relating to public consultations and legislative initiative should not be withheld so that the public can effectively participate in the EU decision-making process. Once a piece of legislation has been adopted, everything that led up to the decision should be made accessible, so as to enable the public to understand the processes by which decisions concerning them were made.

Conclusion - *Theory and practice*

Future consultation exercises should have a preliminary exchange with stakeholders in order to ensure that the questionnaire is as balanced as possible. This is particularly important in order to ensure that the questions raised for consultation are not too narrow or biased.

We would like to emphasise that questions such as *who gets Community funding, what influence lobbies have* and *what rules of conduct do those in charge of the European institutions have to follow*, remain at the heart of the debate on transparency. This is why we take this opportunity to remind the Commission of the common positions presented by the Civil Society Contact Group¹ on the three key dimensions covered by the Green paper on Transparency launched by EU Commissioner Kallas:

- **Transparency and interest representation**², calls for equal rules to be applied to all lobbyists, while stressing their diversity and keeping an open door to less established organisations. In particular, the paper calls for enhanced ethical rules and reinforced information on the background of lobbyists.
- **Minimum Standards for Consultation**³, list some recommendations on how to improve the way EU institutions, and in particular the European Commission, consults with civil society.
- **Transparency over the recipients of EU funds**⁴, calls for full transparency over the use of EU funds, as a way to strengthen citizens' trust in the EU.

In the framework of the review of the regulation 1049/2001 we consider it of outmost importance to not only look at the text of the regulation but to develop a strategy of improving the practice. We believe that the information and training of Commission officials on the regulation's provisions is an important way in improving the transparency of European institutions.

¹ To find out more about the Civil Society Contact Group please go to

<http://www.act4europe.org/code/en/about.asp?Page=2&menuPage=2>

² <http://act4europe.horus.be/module/FileLib/CSCG%20contribution%20ETI%20part%20I.pdf>

³ <http://act4europe.horus.be/module/FileLib/CSCG%20contribution%20ETI%20part%20II.pdf>

⁴ <http://act4europe.horus.be/module/FileLib/CSCG%20contribution%20ETI%20part%20III.pdf>