



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 21 April 2009

8503/09

**INF 89
API 47
JUR 176**

"I/A" ITEM NOTE

from : Working Party on Information

to : Coreper (Part 2) / Council

No. prev. doc. : 7951/1/09 REV 1 INF 69 API 33 JUR 154 + COR 1

Subject : Seventh annual report of the Council on the implementation of Regulation 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

Delegations will find attached the above-mentioned draft report, as it stands after examination by the Working Party on Information at its meeting on 21 April 2009.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting, record its agreement to the report set out below.

This brochure contains the Council's annual report on the implementation of Regulation (EC) No 1049/2001 regarding public access to documents in 2008.

The report, adopted by the Council in April 2009, presents the regulatory, administrative and practical adjustments made by the Council to ensure compliance with the provisions of Regulation (EC) No 1049/2001.

It also gives information on the Council's public register of documents as well as statistics on public access to documents.

In addition, the report highlights the key developments in the seventh year of implementation of the Regulation and reviews complaints submitted to the European Ombudsman as well as rulings given by the Community Courts in 2008 under Regulation (EC) No 1049/2001 in cases concerning access to Council documents.

Additional information (and previous reports) on access to Council documents and on other transparency issues can be found on the Internet website <http://www.consilium.europa.eu>, under "Documents".

DRAFT

**SEVENTH ANNUAL REPORT OF THE COUNCIL ON THE IMPLEMENTATION
OF REGULATION 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**

CONTENTS

	Page
INTRODUCTION	5
I. REGULATORY, ADMINISTRATIVE AND PRACTICAL ADAPTATIONS	6
1. <i>Public register of Council documents</i>	6
2. <i>Practical adaptations</i>	8
3. <i>Legislative transparency</i>	9
4. <i>In-house instructions, training sessions, staff</i>	10
II. ANALYSIS OF APPLICATIONS FOR ACCESS	11
• Occupations and geographical distribution of applicants	11
• Fields covered by applications	12
• Number of documents examined and refusals of access	13
III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS	14
• Grounds for refusal	14
IV. KEY DEVELOPMENTS	15
1. <i>Proposal for a recast of Regulation (EC) No 1049/2001</i>	15
2. <i>Interinstitutional Committee on Access to Documents</i>	16
V. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN AND LEGAL ACTION TAKEN	17
A. COMPLAINT LODGED WITH THE EUROPEAN OMBUDSMAN	17
B. LEGAL ACTION	18
VI. FINAL REMARKS	20
ANNEX: STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS	22

INTRODUCTION

Article 17(1) of 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 provides that "*Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register*"¹.

This report covers the Council's implementation of Regulation (EC) No 1049/2001 in 2008.

As in the earlier annual reports², Part I of this report sets out the regulatory, administrative and practical adaptations made by the Council in 2008 in order to ensure compliance with the provisions of Regulation (EC) No 1049/2001. Part II analyses the statistics for applications for access during the reference period. Part III relates more specifically to the Council's application of exceptions to the right of access under Article 4 of Regulation (EC) No 1049/2001. Part IV lists the key events of the seventh year of implementation of the Regulation, and Part V deals with complaints made to the European Ombudsman and with legal actions. A final section, Part VI, presents the report's conclusions.

¹ See earlier reports by the Council (7957/03, 8036/04, 8896/05, 13354/1/06 REV 1, 8184/07 and 8475/08) and the Commission (COM(2003) 216 final, COM(2004) 347 final, COM(2005) 348 final, COM(2007) 548 final, COM(2007) 841 final and COM(2008) 630 final). For the European Parliament's reports on the years 2002-2007, see the Notes from the Secretary-General of the European Parliament to the Bureau dated 23 January 2003 (PE 324.992/BUR), 19 February 2004 (PE 338.930/BUR/NT), 7 March 2005 (PE 352.676/BUR./ANN.), 22 March 2006 (PE 371.089/BUR./ANN.), 23 April 2007 (PE 388.097/BUR) and 18 April 2008 (PE 402.460/BUR/ANN). Moreover, in accordance with Article 17(2) of Regulation (EC) No 1049/2001, the Commission published a report on the implementation of the principles of the Regulation on 30 January 2004 (COM(2004) 45 final).

² See documents 7957/03, 8036/04, 8896/05, 13354/1/06 REV 1, 8184/07 and 8475/08.

I. REGULATORY, ADMINISTRATIVE AND PRACTICAL ADAPTATIONS

1. *Public register of Council documents*

Under Article 11 of Regulation (EC) No 1049/2001, the Community institutions are required to make a document register available in electronic form. The public register of Council documents, which has been operational since 1 January 1999, contains references to the Council documents entered in it via an automatic archiving system. Accordingly, all non-sensitive documents submitted to the Council or to one of its preparatory bodies which are to serve as a basis for deliberations, could influence the decision-making process or reflect the progress made on a given subject are automatically listed in the register. In the case of sensitive documents³, the author specifies the references which may be permitted to appear in the register⁴.

The register allows access to the full text of a large number of documents which, pursuant to Article 11 of Annex II to the Council's Rules of Procedure, must be made directly available to the public as soon as they have been circulated⁵. These are documents in the following categories:

- provisional agendas for Council meetings and for its preparatory bodies (with the exception of certain bodies dealing with military and security questions);
- documents submitted to the Council which are listed under an item on its agenda marked with the words "*public deliberation*" or "*public debate*" in accordance with Article 8 of the Rules of Procedure⁶;
- in the legislative field, "I/A" and "A" item notes submitted to Coreper and/or the Council, as well as draft legislative acts, draft common positions and joint texts approved by the Conciliation Committee to which they refer;

³ For the purposes of Regulation (EC) No 1049/2001, "sensitive documents" means documents classified as "CONFIDENTIEL", "SECRET" or "TRÈS SECRET/TOP SECRET". On this subject, see Article 9(1) of that Regulation.

⁴ See Article 9(2) and Article 11(2) of Regulation (EC) No 1049/2001.

⁵ In 2008, 125 126 documents were made available to the public via the register as soon as they had been circulated.

⁶ See Article 11(5)(b) of Annex II to the Council's Rules of Procedure, OJ L 285, 16.10.2006, pp. 62-64. For additional information on this issue, see also point I.3 of this report, pp. 7-8.

- documents regarding a legislative act after a common position has been adopted, a joint text has been approved by the Conciliation Committee or a legislative act has been finally adopted;
- any other text adopted by the Council which is intended for publication in the Official Journal;
- documents originating from a third party which have been made public by the author or with his agreement;
- documents which have been made available in full to a member of the public who made an application.

As of 31 December 2008, the register listed 1 195 509 documents (all languages taken together), of which 883 748 (73,9 % of those registered) were public, i.e. either available in downloadable format (856 261 documents in PDF or HTML format) or on request (27 487 documents in other formats). This represented an increase of 8,5 % on the number of documents appearing in the register in 2007 (1 195 509 at the end of 2008 against 1 010 217 at the end of December 2007) and an increase of 22 % in the number of documents directly accessible via the register (856 261 by the end of 2008 against 700 449 at the end of 2007).

Moreover, as of 31 December 2008 the register contained 20 354 documents bearing the code "P/A" (i.e. partially accessible), including 3 252 which were accessible on-line (in PDF format)⁷. "P/A" documents registered before 1 February 2004 (from when all new documents classified as partially accessible have been directly available to the public via the register) are not usually downloadable but may be made available on request.

In 2008, 482 842 different users logged on to the Council's public document register. The total number of visits in 2008 was 895 299, while consultations (in terms of number of screens viewed) totalled 11 920 634.

751 (original language) sensitive documents were produced in the period concerned, 16 classified as "SECRET UE" and 735 as "CONFIDENTIEL UE". Of these, 2 "SECRET UE" documents and 150 "CONFIDENTIEL UE" documents are mentioned in the register, in accordance with Article 9(2) and Article 11(2) of Regulation (EC) No 1049/2001.

⁷ Partial disclosure is practised in conformity with Article 4(6) of the Regulation.

2. *Practical adaptations*

Under Regulation (EC) No 1049/2001, all applications for access to documents held by the Council concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility must be given consideration, including applications relating to classified documents.

The processing of applications for access to classified documents requires thorough investigation by the relevant departments of the General Secretariat of the Council. In 2008 the Transparency Department examined a total of 520 classified documents including 15 classified as "CONFIDENTIEL UE" and 505 classified as "RESTREINT UE" ⁸.

In order to conduct their examination, Transparency Department officials systematically consult the authors/departments concerned.

Because of the increasingly complex nature of the dossiers which have to be examined, the General Secretariat of the Council was obliged more often than in the past (in 22 % of cases) to have recourse to the possibility of extending the time-limit for examining initial applications, which explains why processing time averaged 16 working days in 2008 (against 14 days in 2007). For confirmatory applications, which are examined by the Working Party on Information before referral to Coreper and the Council for adoption, the average time was 25 working days in 2008 as against 28 working days in 2007 ⁹.

As provided for in Article 4(6) of Regulation (EC) No 1049/2001, the Council routinely considers disclosing parts of requested documents. This makes for greater openness, particularly in the legislative field.

Where a document is still subject to discussions within the Council or its preparatory bodies, and this document reflects the positions of delegations, the situation may arise that full release of the document can interfere with the proper conduct of the negotiations. In such cases, the Council applies, as a general

⁸ The documents in question concerned notably the areas of CFSP (42 %), Justice and Home Affairs (40 %) and ESDP (18 %).

⁹ The time-limit for replying laid down in Regulation (EC) No 1049/2001 is 15 working days, with a possible extension of a further 15 working days in duly justified cases, e.g. where the application concerns a very large number of documents.

rule, Article 4(3) of the Regulation by granting access to the content of the preparatory documents while these are still being discussed, removing only the references to names of delegations. Interested parties can thus follow the progress of discussions without the institution's decision-making process being undermined. This practice does not, however, prejudice the possible application of other exceptions provided for in Article 4 of the Regulation.

3. *Legislative Transparency*

In addition to the documents which are made accessible via the register following a request for access under Regulation (EC) No 1049/2001, a considerable number of legislative documents are made public each year, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure¹⁰. This provision prescribes that, unless one or more of the provisions of Article 4 Regulation (EC) No 1049/2001 are applicable, all preparatory documents relating to a legislative act shall be made available to the public in full after the final adoption of the act¹¹.

Note that in this connection, implementation of the general transparency policy contributed to further widening of access to Council documents, particularly in the field of legislation. As this policy, adopted by the European Council in June 2006, provides for the opening to the public of the Council's deliberations under the codecision procedure as well as the organisation on a regular basis of public debates on important issues affecting the interests of the Union and its citizens¹², documents relating to items discussed in public sessions of the Council are now automatically made public and available in the official languages of the European Union on the Council's Internet website¹³.

¹⁰ It should be recalled in this context that, pursuant to Article 255(3) of the EC Treaty, the Council as well as the Commission and the European Parliament shall elaborate, in their respective rules of procedure, specific provisions regarding access to documents. In the case of the Council, these specific provisions are set out in Annex II to the Rules of Procedure.

It moreover follows from Article 207(3) of the EC Treaty concerning the implementation of Article 255(3) that the Council shall provide for greater access to its documents when it is acting in its *legislative capacity*. The same principle, applicable to the three institutions directly involved in the legislative process, is set out in Article 12(2) of Regulation (EC) No 1049/2001.

¹¹ During the last three years, an average of 600 preparatory documents were made public each year, pursuant to Article 11(6) of Annex II to the Council's Rules of Procedure.

¹² See the Council's annual reports on access to documents for 2006 (pp. 17-18) and 2007 (pp. 20-21).

¹³ See, in particular, Article 11(5) of Annex II to the Council's Rules of Procedure, OJ L 285, 16.10.2006, pp. 63-64.

Parallel to this, the General Secretariat of the Council prepares a monthly summary listing *inter alia* all legislative acts, which have been adopted by the Council during a given month. The summary also includes information on the results of votes, the voting rule applicable as well as statements concerning the legislative acts which have been entered into the minutes of the Council ¹⁴.

4. *In-house instructions, training sessions, staff*

As in previous years, in 2008 the Council Secretariat ran a series of training sessions ¹⁵ for Council staff responsible for document production in order to familiarise them with the procedures and practice to be followed as regards public access to documents.

In 2008, the "Transparency" Unit (covering access to documents and legislative transparency) of the General Secretariat of the Council (DG F III) had a staff of 5 AD officials and 10 AST officials.

¹⁴ The monthly summary can be consulted on the Council's website <http://www.consilium.europa.eu> under "Documents" - "Legislative Transparency" - "Summary of Council acts". The results of voting in Council deliberations on acts adopted by codecision may be consulted at the same address under "Documents" - "Legislative Transparency" - "Public votes".

¹⁵ In all, five training sessions were organised during the reference period (in January, April, May, September and November 2008).

II. ANALYSIS OF APPLICATIONS FOR ACCESS

Requests from the public for access to Council documents are processed in the initial phase by the General Secretariat of the Council. In the event of a total or partial refusal of access by the General Secretariat of the Council to a document, the applicant may submit a confirmatory application asking the institution to reconsider its position. In the event of a total or partial refusal of a confirmatory application, the applicant may lodge a complaint with the European Ombudsman and/or institute proceedings before the Court of First Instance of the European Communities.

The Annex to this report provides statistics on public access to Council documents for the last five years (2004-2008).

During the reference period the Council received 2 238 requests from the public for access to a total of 10 728 documents. The number of documents disclosed in full or in part (following initial or confirmatory applications) totalled 9 146 in 2008.

As the statistics for Internet consultation of the public register of Council documents demonstrate, the Internet register continues to be an important research tool for citizens wishing to keep close track of the activities of the European Union.

Occupations and geographical distribution of applicants

Initial applications came mainly from students and researchers (33,4 %). Lawyers (9,4 %), industry and commerce and pressure groups (18,4 %) were also high on the list of social and professional categories represented. Since applicants are not required to give their identity or provide reasons for their applications, which are usually sent by e-mail, the occupations of a significant proportion (11,1 %) of them is unknown. Most confirmatory applications also originated from students and researchers (31,6 %). However, numbers from industry and commerce and pressure groups increased sharply in 2008 (21 % against 0 % in 2007).

While 10,5 % of the confirmatory requests for access in 2008 were submitted by journalists, this category of applicants only accounted for 2,9 % of the requests at the initial stage. This is mainly due to the fact that the institutions' public document registers represent only one of several possible sources of information for the press. Moreover, the vast majority of journalists are mainly interested in the latest

news. It is therefore not surprising that the few applications for access from journalists came in the main from the field of investigative journalism and were thus similar to applications from academics.

As regards the geographical distribution of applicants, the majority of initial applications came from Belgium (31,1 %), Germany (14,3 %) and the United Kingdom (7,6 %). Applications originating from non-EU countries represented 7,7 % of the total. Confirmatory applications came mainly from Belgium (30 %), Germany (20 %) and the Netherlands (10 %) ¹⁶.

The relatively high number of initial and confirmatory applications originating from Belgium is explained by the fact that several multinational companies and international law firms, as well as numerous associations representing various economic and industrial sectors at European level have their headquarters in Brussels.

Fields covered by applications

As regards the fields covered by the applications, the interest in justice and home affairs remained high (25,4 %) ¹⁷. This was followed, in descending order, by applications for documents on external relations and the CFSP (16,2 %), the environment (10 %), taxation (6,3 %) and agriculture and fisheries (5,7 %).

Applicants' interest in justice and home affairs (25,4 % of applications in 2008 as against 26,7 % in 2007 and 24,5 % in 2006) and in external relations and the CFSP (16,2 % of applications in 2008 as against 18,1 % in 2007 and 14,3 % in 2006) remained fairly steady, whereas applications concerning the environment (10 % in 2008 as against 8,2 % in 2007 and 6,6 % in 2006) and taxation (6,3 % in 2008 as against 2,4 % in 2007) increased remarkably ¹⁸.

It should, however, be noted that while applications relating to "conventional" legislative documents concerning, for example, the internal market, have been falling fairly steadily in recent years (2,9 % in 2007 and 3,4 % in 2008 as against as against 16,3 % in 2003 and 14,2 % in 2004), that is not necessarily

¹⁶ In 2007, most confirmatory applications came from Belgium (37,5 %) and the United Kingdom (25 %).

¹⁷ This figure increased steadily between 2004 and 2007, from 20,1 % in 2004 to 22,5 % in 2005 and 24,5 % in 2006, reaching 26,8 % in 2007.

¹⁸ Of the documents disclosed in full following application for access, 17 % related to justice and home affairs, 13,4 % to the CFSP, 14,6 % to the environment and 6,6 % to taxation. Of the total number of documents disclosed (in full or in part), 19,8 % concerned justice and home affairs, 13,7 % the CFSP, 13 % the environment and 5,8 % taxation.

indicative of a lack of interest in that field on the part of the public but is rather due to the fact that a considerable number of legislative documents are made accessible through the public register of Council documents as soon as they are circulated. In 2008 a total of 125 126 documents (i.e. 67,5 % of the 185 298 produced and listed in the register during the year) were thus circulated as public documents.

Number of documents examined and refusals of access

During the reference period, the General Secretariat examined 10 728 documents, 9 108 of which were made available in the initial stage (reply supplied by the General Secretariat on behalf of the Council). 24 confirmatory applications were made in respect of 69 documents, as a result of which the Council decided to disclose an additional 38 documents (19 in full and 19 in part). Of the 10 728 documents examined during the reference period (initial and confirmatory applications combined), 1 582 were therefore refused, which is an access rate of 72 % (documents requested and fully disclosed) or 86,4 % if documents to which partial access was granted are also taken into account.

III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS

Grounds for refusal

With regard to the initial applications, the grounds for refusal most frequently invoked were the protection of the decision-making process, which accounted for nearly two fifths of all refusals (36,4 %), followed by the protection of the public interest as regards international relations (27 %), public security (6,4 %), and defence and military matters (2,5 %).

In 25,4 % of cases several grounds for refusal were invoked: thus protection of the public interest as regards public security was often given in conjunction with protection of the public interest as regards international relations (55 %), while the protection of the decision-making process of the institution was regularly mentioned together with the protection of the public interest as regards international relations, including negotiations on trade, enlargement, etc. (7,5 %).

As for the confirmatory applications, protection of the public interest as regards international relations was invoked as grounds for 77,4 % of the refusals in 2008 (20 % in 2007), while the protection of the public interest as regards public security was invoked in 16,1 % of cases (6,7 % in 2007). There were no cases in 2008 in which several different reasons for refusal were given.

The protection of court proceedings and legal advice (exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001) was invoked as grounds in the initial phase in 1,6 % of cases in 2008 (against 0,8 % in 2007). At the confirmatory stage, it was never mentioned as grounds for a total refusal, but was invoked in 12,5 % of the cases as grounds for a partial refusal during the period under consideration.

IV. KEY DEVELOPMENTS

1. *Proposal for a recast of Regulation (EC) No 1049/2001*

Following a public consultation to review Regulation (EC) No 1049/2001¹⁹, on 30 April 2008 the Commission adopted a proposal to recast²⁰ the existing Regulation on public access to European Parliament, Council and Commission documents²¹. The main changes proposed by the Commission are:

- clarification of the relationship between "access to documents" and Regulation (EC) No 45/2001 on the processing of personal data by the Community institutions and bodies;
- alignment of the provisions on access to documents on the provisions on access to environmental information²²;
- adaptation of certain provisions in the light of recent case law²³;
- remedying the problems arising from the processing of applications for access to documents produced by the Commission in connection with its inspections, investigations and audits;
- inserting a new exception for documents produced in the context of selection procedures under the Staff Regulations and the Financial Regulation.

The proposed recast has been extensively discussed, in particular in the European Parliament, whose Committee on Civil Liberties, Justice and Home Affairs organised a public hearing on the subject on 2 June 2008. The Council and the Parliament commenced their scrutiny of the proposal in the second half of 2008 and should conclude their first reading some time in 2009.

¹⁹ See the summary of conclusions of this consultation in the Council's annual report for 2007 on access to documents (pp. 18-19).

²⁰ This procedure was chosen so that the unchanged provisions of the existing act could be codified with substantive changes.

²¹ COM (2008) 229 final (9200/08).

²² See Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information in Environmental Matters (OJ L 264, 25.9.2006, p. 13) and the summary of the Regulation in the Council's annual report for 2006 on access to documents (pp. 19-20).

²³ See in particular the CFI's judgment of 8 November 2007 in Case T-194/04, *Bavarian Lager v. Commission*, ECR[2007] p. II-3201, and the Court of Justice's judgment of 18 December 2007 in Case C-64/05 P, *Sweden v Commission*, ECR[2007] p. I-11389.

2. *Interinstitutional Committee on Access to Documents*

An Interinstitutional Committee to examine best practice, address possible conflicts and discuss future developments on public access to documents was established in 2002 under Article 15(2) of Regulation (EC) No 1049/2001.

The Committee did not meet at political level during the reference period. However, the departments of the Council, the Parliament and the Commission responsible for applying Regulation (EC) No 1049/2001 met five times in 2008 to compare and exchange practical experience in applying the Regulation in the light of the recent case law on public access to documents.

V. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN AND LEGAL ACTION TAKEN

A. COMPLAINT LODGED WITH THE EUROPEAN OMBUDSMAN

The following section of this report refers to the only complaint lodged in 2008 concerning the Council's application of Regulation (EC) No 1049/2001.

Complaint 944/2008/OV submitted to the Ombudsman on 2 April 2008

This complaint concerns the Council's decision to refuse access to COREU document CFSP/SEC/1126/06 which contains a detailed summary of the meeting of the Council's Working Party on Public International Law (COJUR) and the Transatlantic Relations Working Party (COTRA) with senior representatives of the US Department of State held in Brussels on 3 May 2006.

In his complaint, sent to the Ombudsman on 2 April 2008, the applicant claimed that the Council should grant him (and the general public) *full access* to document COREU/CFSP/SEC/1126/06. He moreover contested the applicability of Article 4(1) (a) to the document concerned and invoked the existence of an overriding public interest in disclosure, given the specific facts to which the document refers.

In his letter of 22 May, informing the Council of the complaint, the Ombudsman asked the Council to clarify why it had refused to grant access to those parts of the documents which did not set out the position of the United States, but only the position of the European Union. The Ombudsman took the view that the reasoning used by the Council in order to refuse partial access was extremely brief and limited to stating that "*the information contained in the document forms an inseparable whole*".

In its reply to this complaint, the Council stressed, *inter alia*, that the exception laid down in Article 4(1) (a), third indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regards international relations) did apply to the requested document *in its entirety*. Moreover, given that the exceptions provided for in Article 4 (1) (a) are *mandatory*, there was neither any need nor any possibility for balancing the protected interest against any other interests.

As regards the brevity of the statement of reasons for the rejection of a request for public access when relying on one of the mandatory exceptions of Article 4(1) (a), the Council recalled that its practice was fully consistent with the established case-law. In the case at hand, it would not have been possible to provide all information as to why the document could and can not be disclosed without revealing its contents and without thereby *depriving the exception of its very purpose* ²⁴.

This case is still pending.

B. LEGAL ACTION

Ruling given under the rules on access to documents

On 1 July 2008 the Court of Justice handed down its ruling in joined cases C-39/05 P and C-52/05 P (*Kingdom of Sweden, Maurizio Turco v. Council*), whereby it set aside the judgment of the Court of First Instance of 23 November 2004 in Case T-84/03 (*Turco v. Council*) ²⁵ and annulled the Council's decision to refuse access to an opinion of the Council Legal Service (9077/02) concerning a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States.

In its judgment, the Court took the view that Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative proposal, while adding that where a legal service opinion is of a particularly sensitive in nature or has a particularly wide scope going beyond the context of the legislative process, access to such a document may be refused on account of the protection of legal advice. The Court finally stressed the obligation for the institution concerned to give a detailed statement of reasons for such a refusal ²⁶.

Following this judgment, the Council adopted a new decision, granting the applicant full access to the requested document ²⁷.

²⁴ See T-264/04 WWF-EPO v. Council [2007] ECR II-911, pt. 37.

²⁵ See ECR [2004] II-4061 summarised in the Council Annual Report - 2004, pp. 30-31.

²⁶ See notably paragraphs 67-69 of the judgment.

²⁷ See document 11973/08.

One pending Court case concerning a Council decision to refuse access to documents

In Case T- 3/08, *Coedo Suarez v. Council*, the applicant brought proceedings for annulment of the Council's decision of 30 October 2007 refusing public access to a report concerning an incident between the applicant and one of his colleagues on 19 February 2004.

Pending Court cases concerning Commission decisions to refuse access to documents in which the Council is intervening as third party.

The Council intervenes in Case C-28/08, *Commission v. Bavarian Lager Co. Ltd*, in support of the Commission's appeal against the judgment of the Court of First Instance, in which that Court interpreted the relationship between the right of public access to documents and the protection of the privacy and the integrity of the individual, as regards the processing of personal data.

Furthermore, the Council intervenes in Case T-444/05, *S.p.A. Navigazione Libera del Golfo (NLG) v. Commission*, in support of the Commission. In this case, the applicant has brought proceedings for annulment of a decision by the Commission refusing access to documents originating from the Italian Republic concerning a state aids procedure.

VI. FINAL REMARKS

The Council's experience in implementing Regulation (EC) No 1049/2001 in 2008 highlights the importance of its public register as a search tool for members of the public seeking to exercise their right to access to documents.

As we stated in the first part of this report, visits in 2008 totalled 895 299, while total consultations (in numbers of screens viewed) was 11 920 634.

It should be noted that 67,5 % of the Council documents produced in 2008 – i.e. 125 126 of the 185 298 documents listed in the register during the year – were made directly accessible to the public upon circulation. Lastly, since 1 February 2004 any new document to which the Council has provided partial access may be consulted online.

Despite the growing number of documents made directly accessible to the public via the register as soon as they were circulated, there was an increase over the reference period in the number of requests (up by 15,5 %) and, in particular, in the number of documents concerned by the requests (10 728 as against 7 809 in 2007, i.e. an increase of 37,4 %). Note also that requests for access relate mainly to documents listed in the register.

As confirmed by the statistical data provided in the annex to this report, around 45 % of the requests for access to Council documents which were submitted in 2008 refer to the areas of Justice and Home Affairs, External Relations, CFSP and ESDP.

A total of 520 of the documents considered (representing roughly 4,8 % of the documents requested in 2008) were classified (including 15 as CONFIDENTIEL UE and 505 as RESTREINT UE). The often highly complex process of examining such documents represents an additional workload not only for the Council staff dealing with the requests as soon as they are received, but also for officials in the various the departments which produced the documents, who, within the framework of the internal consultation procedures between the "Transparency" Service and the originating services, are regularly called upon to examine the requested documents on the basis of the provisions of Regulation (EC) No 1049/2001.

Because of the increasingly complex nature of the dossiers to be examined, the General Secretariat of the Council was obliged more often than in the past (in 22 % of cases) to have recourse to the possibility of extending the time-limit for examining initial applications, which explains why processing time averaged 16 working days in 2008 (against 14 days in 2007). For confirmatory applications, which are examined by the Working Party on Information before referral to Coreper and the Council for adoption, the average time was 25 working days in 2008 against 28 working days in 2007.

Thorough examination of initial examinations enabled the number of confirmatory applications to be reduced by half, from 51 in 2005 (i.e. 2,4 % of initial applications) to 18 in 2007 and 24 in 2008 (i.e. around 1 % of initial applications). Moreover, the Council was notified of only one complaint to the Ombudsman concerning application of Regulation (EC) No 1049/2001 in 2008, and the number of complaints against Council decisions on access to documents remains very small (four complaints over the last five years).

In this regard, the contribution made by the Working Party on Information to the processing of confirmatory applications and the examination of complaints to the Ombudsman must be noted. The Working Party met on 14 occasions in 2008. Its main tasks include examining documents in respect of which a confirmatory application has been made, and examining and finalising the draft replies to such applications, which in a number of cases deal with complex issues relating to public safety, defence and military affairs, or international relations.

The rate of access to Council documents in 2008 (documents requested and disclosed in full or in part) rose in comparison to 2007: 86,4 % in 2008 as against 78,9 % in 2007. These figures should be taken in conjunction with the increase in the number of documents requested (up by 37,3 %) and with the 15,5 % increase in the number of documents made directly accessible to the public via the register as soon as they were circulated (125 126 in 2008 as against 108 343 in 2007).

The analysis of the processing of requests for access and the public's use of the arrangements made for them to exercise their right of access suggest that the aims set by the Treaties and by Regulation (EC) No 1049/2001 continued to be achieved in 2008.

STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS

1. Number of applications pursuant to Regulation No 1049/2001

2004	2005	2006	2007	2008
2.160	2.100	2.224	1.964	2.238

2. Number of documents requested by initial applications

2004	2005	2006	2007	2008
12.907	9.457	11.353	7.809	10.728

3. Documents released by the General Secretariat of the Council at the initial stage

2004	2005	2006	2007	2008
10.971	7.535	9.606	6.123	9.108
partially/wholly 1.092 9.879	partially/wholly 1.254 6.281	partially/wholly 1.155 8.451	partially/wholly 945 5.178	partially/wholly 1.507 7.601

4. Number of confirmatory applications (confirmatory applications may be made if initial application is refused)

2004	2005	2006	2007	2008
35	51	40	18	24

5. Number of documents considered by the Council following confirmatory applications + number of documents released

2004	2005	2006	2007	2008
198	253	142	30	69
113 partially/wholly 36 77	130 partially/wholly 60 70	99 partially/wholly 53 46	15 partially/wholly 9 6	38 partially/wholly 19 19

6. Rate of document released for the procedure as a whole ¹

2004		2005		2006		2007		2008	
77%	85,7%	67,3%	81,2%	76,8%	87,7%	66,7%	78,9%	72%	86,4%

7. Number of documents referred to in the public Register + number of public/downloadable documents

2004		2005		2006		2007		2008	
569.372	354.421 (62.2%)	691.410	454.473 (65.7%)	727.685	483.577 (66.4%)	1.010.217	724.338 (71,7%)	1.195.509	883.748 (73,9%)

¹ Based on documents released wholly (left column) or wholly + partially (right column).

8. Professional profile of the applicants (initial applications)

		2004		2005		2006		2007		2008	
Civil society	Environmental Lobbies	21,8%		17,2%		17,6%		0,8%	14,2%	1,1%	18,4%
	Other groups of interests							4,7%		4,2%	
	Industrial/Commercial Sector							7%		9,6%	
	NGOs							1,7%		3,5%	
Journalists		2,6%		2,3%		2,3%		2,9%		2,9%	
Lawyers		10,7%		10,2%		9,1%		8,8%		9,4%	
Academic world	University Research	25,5%	27,7%	31%	32,3%	32,2%	34,5%	38,2%	40%	32,3%	33,4%
	Library	2,2%		1,3%		2,3%		1,8%		1,1%	
Public authorities (non-EU institutions, third-country representatives, etc.)		7,3%		6,2%		6,9%		6,1%		7,6%	
Members of the European Parliament and their assistants		2,1%		2,4%		1,5%		1,3%		1,8%	
Others		10,4%		12,6%		14,5%		13,3%		14,4%	
Undeclared professional origin		17,4%		16,8%		13,6%		13,2%		11,1%	

9. Professional profile of the applicants (confirmatory applications)

		2004		2005		2006		2007		2008	
Civil society	Environmental Lobbies	10,4%		9,4%		8,6%		0%	0%	5,2%	21%
	Other groups of interests							0%		5,3%	
	Industrial/Commercial Sector							0%		0%	
	NGOs							0%		10,5%	
Journalists		6,9%		6,3%		5,7%		18,7%		10,5%	
Lawyers		17,2%		9,4%		11,4%		12,5%		10,5%	
Academic world	University Research	34,5%	34,5%	28,1%	28,1%	51,4%	54,3%	50%	56,2%	31,6%	31,6%
	Library	0%		0%		2,9%		6,2%		0%	
Public authorities (non-EU institutions, third-country representatives, etc.)		0%		3,1%		0%		6,3%		0%	
Members of the European Parliament and their assistants		10,4%		3,1%		0%		0%		5,3%	
Others		10,3%		15,6%		11,4%		6,3%		5,3%	
Undeclared professional origin		10,3%		25%		8,6%		0%		15,8%	

10. Geographical spread of the applicants (initial applications)

	2004	2005	2006	2007	2008	
Belgium	27,2%	27,8%	26,2%	26,4%	31,1%	
Bulgaria	0,1%	0,4%	0,6%	0,1%	0,2%	
Czech Republic	0,9%	0,9%	1%	1,4%	0,9%	
Denmark	1,7%	1,2%	1,3%	1,1%	1%	
Germany	14,1%	12,9%	15,5%	16%	14,3%	
Estonia	0,1%	0,1%	0,4%	0%	0%	
Greece	1%	1,2%	1,3%	1,3%	0,7%	
Spain	4,9%	5,3%	5,7%	5%	6,4%	
France	6,7%	7,7%	8,1%	7,1%	7,1%	
Ireland	0,8%	1%	0,9%	0,6%	0,6%	
Italy	6,9%	6,8%	6,6%	6%	6%	
Cyprus	0,3%	0,1%	0,3%	0,3%	0,2%	
Latvia	0,1%	0,1%	0,2%	0%	0,2%	
Lithuania	0,3%	0,4%	0,4%	0,1%	0,1%	
Luxembourg	0,8%	0,6%	0,7%	1%	1,6%	
Hungary	0,6%	0,9%	0,5%	0,7%	0,9%	
Malta	0,3%	0,2%	0,2%	0,3%	0,2%	
Netherlands	5,5%	6,9%	6%	5,8%	5,6%	
Austria	1,7%	2%	1,6%	1,7%	1,3%	
Poland	1,3%	1,4%	1,5%	1,5%	1,5%	
Portugal	0,5%	1%	1,2%	0,9%	0,9%	
Romania	0,1%	0,2%	0,7%	1,1%	0,6%	
Slovenia	0,2%	0,2%	0,4%	0,4%	0,2%	
Slovakia	0,4%	0,3%	0,3%	0,3%	0,3%	
Finland	0,4%	0,4%	0,5%	0,8%	0,6%	
Sweden	1,8%	1,8%	1,6%	1,8%	1,8%	
United Kingdom	8%	8%	7,9%	9,5%	7,6%	
Third countries	Candidate countries	0,3%	1,3%	1,7%	1%	0,4%
	Others	6,7%	6,7%	6,8%	7%	7,3%
Non specified	7,2%	3,2%	1,8%	0,8%	0,4%	

11. Geographical spread of the applicants (confirmatory applications)

	2004	2005	2006	2007	2008
Belgium	48,3%	28,1%	17,1%	37,5%	30%
Bulgaria	0%	0%	0%	0%	0%
Czech Republic	0%	0%	0%	6,3%	5%
Denmark	3,5%	0%	0%	0%	0%
Germany	3,5%	12,5%	22,8%	6,2%	20%
Estonia	0%	0%	0%	0%	0%
Greece	0%	0%	0%	0%	0%
Spain	3,4%	3,1%	0%	0%	5%
France	0%	3,1%	5,7%	6,2%	5%
Ireland	0%	0%	0%	0%	0%
Italy	10,3%	9,4%	8,6%	6,2%	5%
Cyprus	0%	3,1%	0%	0%	0%
Latvia	0%	0%	0%	0%	0%
Lithuania	0%	0%	0%	0%	0%
Luxembourg	0%	0%	0%	0%	0%
Hungary	0%	0%	2,9%	0%	0%
Malta	0%	0%	0%	0%	0%
Netherlands	6,9%	9,4%	8,6%	6,3%	10%
Austria	0%	6,3%	0%	0%	0%
Poland	0%	0%	2,9%	0%	0%
Portugal	0%	0%	0%	0%	5%
Romania	0%	0%	0%	0%	0%
Slovenia	0%	0%	0%	0%	0%
Slovakia	0%	0%	0%	6,3%	0%
Finland	0%	0%	0%	0%	0%
Sweden	0%	3,1%	2,8%	0%	0%
United Kingdom	20,7%	18,8%	22,9%	25%	5%
Third countries	Candidate countries	0%	0%	0%	0%
	Others	3,4%	3,1%	5,7%	0%
Non specified	0%	0%	0%	0%	10%

12. Sector

	2004	2005	2006	2007	2008
Agriculture, Fisheries	4,6%	4,2%	5,9%	6,8%	5,7%
Internal Market	14,2%	6,2%	4,6%	2,9%	3,4%
Research	0,3%	0,3%	0,6%	0,4%	0,1%
Culture	0,2%	0,5%	1,1%	0,5%	0,3%
Education/Youth	1,4%	0,7%	1,2%	1,1%	0,5%
Industry	0,4%	0,4%	0,3%	0,3%	0,7%
Competitiveness	2,2%	5,3%	5,8%	1,1%	2,6%
Energy	1,4%	1,6%	1,1%	2,1%	2%
Transport	4,9%	5,3%	3,8%	3%	2,5%
Environment	6,8%	7,7%	6,6%	8,2%	10%
Health and Consumer Protection	4,3%	3,1%	2,3%	2,1%	1,9%
Economic and Monetary Policy	3,3%	2,9%	2,6%	2,2%	2,6%
Tax Questions – Fiscal Issues	3,2%	4,4%	2,5%	2,4%	6,3%
External Relations – CFSP	14,6%	12,8%	14,3%	18,1%	16,2%
Civilian Protection	0,3%	0,1%	0,1%	0,6%	0,2%
Enlargement	1,8%	2,2%	1,8%	1%	0,7%
Defence and Military matters	2,9%	2,5%	2,4%	6%	3,4%
Assistance for Development	0,3%	0,7%	0,7%	0,2%	0,1%
Regional Policy and Economical/Social Cohesion	0%	0,9%	1,2%	0,1%	0%
Social Policy	2,7%	3%	2,9%	1,9%	3%
Justice and Home Affairs	20,1%	22,5%	24,5%	26,7%	25,4%
Legal questions	2,5%	3,5%	3,8%	3,5%	3,5%
Functioning of the institutions	1,5%	1,3%	1,7%	1,1%	0,9%
Financing of the Union (Budget, Statute)	0,3%	0,2%	0,6%	0,2%	0,1%
Transparency	0,9%	0,3%	0,6%	0,3%	0,1%
General policy questions	1,7%	1%	1%	0,4%	0,6%
Parliamentary Questions	2,9%	5,4%	5,5%	5,4%	4,4%
Various	0,3%	0,4%	0,4%	0,4%	0,7%

13. Reasons for refusal of access (replies provided by the General Secretariat of the Council at the initial stage)

	2004		2005		2006		2007		2008	
	#	%	#	%	#	%	#	%	#	%
Protection of public interest as regards public security	440	21%	302	15,8%	253	17,1%	219	13,3%	91	6,4%
Protection of public interest as regards defence and military matters	218	11%	123	6,4%	67	4,5%	38	2,3%	35	2,5%
Protection of public interest as regards international relations	330	16,2%	395	20,6%	182	12,3%	249	15,1%	382	27%
Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State	21	1,1%	16	0,8%	1	0,1%	0	0%	0	0%
Protection of privacy and the integrity of the individual (protection of personal data)	13	0,7%	4	0,2%	5	0,3%	4	0,2%	7	0,5%
Protection of commercial interests of a natural or legal person, including intellectual property	1	0%	0	0%	0	0%	1	0,1%	0	0%
Protection of court proceedings and legal advice	196	8,8%	34	1,8%	29	2%	14	0,8%	22	1,6%
Protection of the purpose of inspections, investigations and audits	0	0%	1	0%	4	0,3%	0	0%	2	0,1%
Protection of the Institution's decision-making process	665	33,3%	925	48,3%	637	43,2%	627	38%	516	36,4%
Several reasons together or other reasons	158	7,8%	116	6,1%	298	20,2%	498	30,2%	360	25,4%
Document not held by the Council/Other author	1	0,1%	0	0%	0	0%	0	0%	1	0,1%

14. Reasons for refusal of access (replies provided by the General Secretariat of the Council following confirmatory applications)

	2004		2005		2006		2007		2008	
	#	%	#	%	#	%	#	%	#	%
Protection of public interest as regards public security	24	27%	61	49,6%	16	37,2%	1	6,7%	5	16,1%
Protection of public interest as regards defence and military matters	22	25,9%	7	5,7%	7	16,3%	0	0%	0	0%
Protection of public interest as regards international relations	19	21,2%	25	20,3%	6	14%	3	20%	24	77,4%
Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of privacy and the integrity of the individual (protection of personal data)	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of commercial interests of a natural or legal person, including intellectual property	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of court proceedings and legal advice	4	4,7%	0	0%	2	4,6%	0	0%	0	0%
Protection of the purpose of inspections, investigations and audits	0	0%	0	0%	0	0%	0	0%	0	0%
Protection of Institution's decision-making process	10	11,8%	14	11,4%	3	7%	0	0%	2	6,5%
Several reasons together or other reasons	8	9,4%	16	13%	9	20,9%	11	73,3%	0	0%
Document not held by the Council/other author	0	0%	0	0%	0	0%	0	0%	0	0%

15. Average number of working days to reply to an application or to a complaint made to the European Ombudsman

	2004	2005	2006	2007	2008
For the initial applications	9 (2160 closed appl.)	13 (2100 closed appl.)	14 (2224 closed appl.)	13 (1964 closed appl.)	16 (2238 closed appl.)
For the confirmatory applications ¹	24 (35 closed appl.)	26 (51 closed appl.)	24 (40 closed appl.)	28 (18 closed appl.)	25 (24 closed appl.)
Ponderated average (initial + confirmatory)	9,24	13,31	14,17	13,14	16,1
Ombudsman ¹	36	38	57		44

16. Number of applications with prolonged deadline in conformity with Art. 7(3) and 8(2) of Regulation (EC) No 1049/2001

	2004	2005	2006	2007	2008
Initial applications	192 of 2160, being 8,8% of the applications	327 of 2100, being 15,6% of the applications	414 of 2224, being 18,6% of the applications	386 of 1964, being 19,7% of the applications	497 of 2238, being 22,2% of the applications
Confirmatory applications ¹	24 [of 35]	40 [of 51]	32 [of 40]	14 [of 18]	20 [of 24]

¹ Confirmatory applications and complaints to the European Ombudsman are examined by the Council's Working Party on Information and by the Permanent Representatives Committee (Part 2). Replies to the applicants and to the European Ombudsman are adopted by the Council.