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Delegations will find attached the above-mentioned draft report, as it stands after examination by the Working Party on Information at its meeting on 28 September 2006.

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.



**DRAFT**

**FOURTH 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**

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## INTRODUCTION

Article 17(1) 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 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*"<sup>1</sup>.

This report covers the Council's implementation of Regulation No 1049/2001 in 2005.

As in the earlier annual reports<sup>2</sup>, Part I of this report sets out the regulatory, administrative and practical adaptations made by the Council in 2005 in order to ensure compliance with the provisions of Regulation No 1049/2001. Part II analyses the figures 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 No 1049/2001. Part IV lists the key events of the fourth 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.

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<sup>1</sup> See earlier reports by the Council (7957/03, 8036/04 and 8896/05) and the Commission (COM(2003) 216 final, COM(2004) 347 final and COM(2005) 348 final). For the European Parliament's reports on the years 2002-2005, 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.) and 22 March 2006 (PE 371.089/BUR./ANN.). Moreover, in accordance with Article 17(2) of Regulation 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).

<sup>2</sup> See 7957/03, 8036/04 and 8896/05.

## I. REGULATORY, ADMINISTRATIVE AND PRACTICAL ADAPTATIONS

### 1. *Public register of Council documents*

Under Article 11 of Regulation 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 documents<sup>3</sup>, the author specifies the references which may be permitted to appear in the register<sup>4</sup>.

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 circulated<sup>5</sup>. 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 originating from a third party which have been made public by the author or with his agreement;
- 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;
- any other text adopted by the Council which is intended for publication in the Official Journal;
- 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;
- documents which have been made available in full to a member of the public who made an application.

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<sup>3</sup> 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.

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

<sup>5</sup> In 2005, 77 832 documents were made available to the public via the register as soon as they had been circulated.

As of 19 January 2006, the register listed 697 111 documents (all languages taken together), of which 459 033 (65,8 % of those registered) were public, i.e. either available in downloadable format (422 297 documents in PDF or HTML format) or on request (36 736 documents in other formats). This represented an increase of 19,4 % on the number of documents appearing in the register in 2005 (583 713 in February 2005 against 697 111 at the beginning of 2006) and an increase of 19,3 % in the number directly accessible via the register (354 054 in February 2005 against 422 297 at the beginning of 2006).

Moreover, in January 2006 the register contained 10 076 documents bearing the code "P/A" (i.e. partially accessible), including 1 302 which were accessible on-line (in PDF format)<sup>6</sup>. "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 2005, 259 106 different users logged on to the Council's public document register. The total number of visits increased by 15,7 % (1 064 039 visits in 2005 against 919 584 in 2004), representing more than 2 950 visits per day. Consultations (in terms of number of screens viewed) totalled 5 470 970.

294 (original language) sensitive documents were produced in the period concerned, 48 classified as "SECRET UE" and 246 as "CONFIDENTIEL UE". Of these, one "SECRET UE" document and 49 "CONFIDENTIEL UE" documents are mentioned in the register, in accordance with Article 9(2) and Article 11(2) of Regulation No 1049/2001.

## 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 2005 the Transparency Department received and examined 755 applications for access to 593 such documents, 124 classified as "CONFIDENTIEL UE" and 469 as "RESTREINT UE". In order to conduct their examination Transparency Department officials systematically consult the authors/departments

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<sup>6</sup> Partial disclosure is practised in conformity with Article 4(6) of the Regulation. In 2005, the total number of documents partially released to the public increased 22,5% (please refer to the details on page 10).

concerned. Despite the often highly complex nature of the dossiers which have to be examined, the General Secretariat of the Council has been able to cope with the increasing associated administrative burden and to comply with the conditions and time-limits laid down by Regulation No 1049/2001.

It should be noted in this connection that the time-limit for replying 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.

In 2005 the average time for processing initial applications was 13 working days. The Council Secretariat extended the time-limit in 15,5 % of initial applications but it is forced to use this option more frequently for confirmatory applications, which have to be examined by the Working Party on Information before being submitted to Coreper and the Council for adoption, each of these steps requiring some time.

As provided for in Article 4(6) of Regulation 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 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. *In-house instructions, training sessions, staff*

As in previous years, in 2005 the Council Secretariat ran a series of training sessions<sup>7</sup> 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.

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<sup>7</sup> In all, five training sessions were organised during the reference period (three in the first half of 2005 and two in the second); in addition specific briefing meetings were held between Transparency Department staff, members of the GSC's various departments concerned and members of the Council's preparatory bodies.



In 2005, the "Transparency, access to documents and information to the public" Unit of the General Secretariat of the Council (DG F) had a staff of 14, allocated as follows:

Access to documents: 2 A\*, 2 B\*, 4 C\* and 1 D\*

Information to the public: 1 B\* and 4 C\*.

Staff of the "Information to the public" section handle the requests for information from members of the public under the Code of good administrative behaviour for the General Secretariat of the Council <sup>8</sup>. In 2005, the section dealt with 13 147 requests for information sent by e-mail (11 785) or letter (1 362) <sup>9</sup>.

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<sup>8</sup> Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, OJ C 189, 5.7.2001, p. 1.

<sup>9</sup> In 2004, the figure was 9 227 (8 529 requests for information sent by e-mail and 698 by letter).

## **II. ANALYSIS OF APPLICATIONS FOR ACCESS**

In the initial stage, applications from members of the public for access to Council documents are handled by the General Secretariat of the Council. In the event of total or partial refusal by the Council Secretariat, the applicant may make a confirmatory application asking the Council to reconsider its position. If the confirmatory application is totally or partially refused, the applicant may lodge a complaint with the European Ombudsman 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 first four full years following entry into force of Regulation No 1049/2001.

During the reference period the Council received 2 100 requests from the public for access to a total of 9 457 documents. The number of documents disclosed in full or in part (following initial or confirmatory applications) totalled 7 788 in 2005.

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. This is borne out by the almost 16 % increase in the number of visits (a number which has risen for three years in succession).

### **Occupations and geographical distribution of applicants**

Initial applications came mainly from students and researchers (32,4 %). Lawyers (10,2 %), industry and commerce and pressure groups (17,2 %) 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 (16,8 %) of them is unknown. Most confirmatory applications also originated from students and researchers (28,1 %).

Journalists accounted for only 6,3 % of applicants at the confirmatory stage, mainly because for journalists the institutions' public document registers represent only one of several possible sources of information. 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 hence similar to applications from academics.

As regards the geographical distribution of applicants, the majority of initial applications came from Belgium (27,5 %), Germany (12,7 %) and the United Kingdom (7,9 %). Applications originating from non-EU countries represented 6,7 % of the total. Confirmatory applications came mainly from the following five countries: Belgium (28,1 %), the United Kingdom (18,8 %), Germany (12,5 %), Italy (9,4 %) and the Netherlands (9,4 %) <sup>10</sup>.

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 (22,5 %) <sup>11</sup>. This was followed, in descending order, by applications for documents on external relations and CFSP (12,8 %), the environment (7,7 %), the internal market (6,2 %) and transport (5,3 %).

Applicants' interest in the CFSP (12,8 % of applications in 2005 as against 14,6 % in 2004) and the environment (7,7 % in 2005, 6,8 % in 2004) remained fairly steady, whereas internal-market-related applications were sharply down on the previous year (6,2 % in 2005, 14,2% in 2004) <sup>12</sup>.

### **Number of documents examined and refusals of access**

During the reference period, the General Secretariat examined 9 457 documents, 7 535 of which were made available in the initial stage (reply supplied by the General Secretariat on behalf of the Council). 51 confirmatory applications were made in respect of 253 documents, as a result of which the Council decided to disclose an additional 130 documents (60 in full and 70 in part).

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<sup>10</sup> In 2004, most confirmatory applications came from Belgium (48,3 %), the United Kingdom (20,7 %) and Italy (10,3 %).

<sup>11</sup> This figure is slightly up on the previous year. In 1999 justice and home affairs accounted for 37 % of applications for access, a percentage which fell to 29 % in 2000, 29,5 % in 2001, 24,4 % in 2002 and 22 % in 2003.

<sup>12</sup> Of the documents disclosed in full following application for access, more than 19 % related to justice and home affairs, 12,6 % to the CFSP, 14,2 % to the area of education, youth and culture, 11,3 % to the internal market and 8,9 % to environmental policy. Of the total number of documents disclosed (in full or in part), 22,2 % concerned justice and home affairs 13,3 % CFSP, 12,2 % the area of education, youth and culture, 10,4 % the internal market and 8,3 % environmental policy.

Thus, of the 9 457 documents requested during the reference period, access to 1 669 was refused (initial and confirmatory phases taken together), giving an access percentage of 67,3 % (documents requested and disclosed in full) or 81,2 % if documents approved for partial access are taken into account.

While the rates of access to Council documents in 2005 were lower than in the previous year (85,7 % in 2004), these figures must be viewed in the light of the significant numbers of documents (77 832 in 2005 compared with 68 996 in 2004) which are made directly available via the register as soon as they have been circulated.

The enhanced practice of partial access should also be taken into account. In 2005, 1 096 documents were partially released to the public in reply to initial applications (902 in 2004), 76 following confirmatory applications (47 in 2004) and 2 documents after examination of complaints to the European Ombudsman (1 in 2004).

### III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS

#### Grounds for refusal

With initial applications, the grounds for refusal most frequently invoked were the protection of the decision-making process, which accounted for nearly half of all refusals (48,3 %), followed by the protection of the public interest as regards international relations (20,6 %), public security (15,8 %) and defence and military matters (6,4 %). In 6,1 % of cases several grounds for refusal were invoked: thus protection of the decision-making process was often given in conjunction with protection of the public interest as regards international relations (1,4 %) or public security (0,8 %).

With regard to confirmatory applications, protection of the public interest as regards public security was invoked as grounds for 49,6 % of refusals in 2005 (27 % in 2004). In 2005 protection of the public interest as regards international relations was invoked in 20,3 % of cases (21,2 % in 2004), and protection of the public interest as regards defence and military matters in 5,7 % of cases (25,9 % in 2004). The situation regarding use of the protection of the decision-making process as grounds for refusing access was unchanged compared with the previous year: in 2005 it was used in 11,4 % of cases (11,8 % in 2004). Finally, in 13 % of refusals protection of the decision-making process was associated with other grounds for refusal, such as protection of the public interest as regards public security (3,3 % of cases).

#### Specific exception for legal advice

The protection of court proceedings and legal advice (exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001) was invoked as grounds in the initial phase in a mere 1,8 % of refusals in 2005 (8,8 % in 2004). It was not invoked at all at the confirmatory stage during the period under consideration, whereas it had been the grounds for 4,7 % of refusals in 2004.

While this exception is not the Council's most frequently invoked grounds for refusal, its importance for the proper functioning and effectiveness of the institution's work should nevertheless be stressed<sup>13</sup>.

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<sup>13</sup> The practice is as far as possible to grant partial access, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, to documents containing Council Legal Service opinions and contributions by the Legal Service to the proceedings of the Council and its preparatory bodies. Thus the factual content of such documents is released to the applicants, while the confidentiality of legal opinions as such is safeguarded.

On the basis of case-law established over several years <sup>14</sup>, and confirmed in 2004 by the Court of First Instance in its judgment in the Turco case <sup>15</sup>, the Council considers that the independent advice provided for the Council by the Legal Service allows the Council to ensure that its acts comply with Community law and to pursue the discussion on the legal aspects of a dossier. If the Council were to lose that instrument, the efficiency of its work would be compromised. This is why it is in the public interest that the Council should have access to independent legal advice.

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<sup>14</sup> In this connection, see the order of the Court of First Instance of 3 March 1998 in Case T-610/97 R, Carlsen and others v. Council, ECR 1998, p. II-485, paragraphs 45 to 47, and its ruling of 8 November 2000 in case T-44/97, Ghignone and others v. Council, ECR 2000, p. II-1023, paragraphs 47 and 48. This case-law was cited by the Court in its order of 23 October 2002 in case C-445/00, Austria v. Council, paragraph 12.

<sup>15</sup> See judgment by the Court of First Instance of 23 November 2004 in Case T-84/03 Maurizio Turco v. Council (not yet published in the ECR), paragraphs 62 et seq. This judgement is currently under appeal (Cases C-39/05 P and C-52/05 P).

## IV. KEY DEVELOPMENTS

### 1. *Interinstitutional Committee*

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 Interinstitutional Committee met once at Secretary-General level (Council, Parliament and Commission) during the reference period. Several meetings between the Council, Parliament and Commission departments responsible for applying Regulation (EC) No 1049/2001 were also held in 2005.

The main items discussed at the meeting of the Secretaries-General of the three institutions on 11 November 2005 were: the future revision of Regulation No 1049/2001 in the light of the Commission's evaluation report (COM(2004) 45), the establishment of the new Commission register of comitology, and the scope for improving the institutions' document registers in order to make them more user-friendly and accessible to the general public.

At the end of its meeting the Interinstitutional Committee decided to endorse the Commission's evaluation report (COM(2004) 45) and to set up a technical working party charged with looking critically at the sites of the three registers, with the remit to explore possible improvements to and the harmonisation and interlinking of the three sites.

### 2. *Interinstitutional dialogue on the various aspects of transparency*

As part of the interinstitutional dialogue on the various aspects of transparency a meeting was held on 23 November 2005 between the Secretaries-Generals of the European institutions and the members of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

At that meeting, the Secretaries-General took stock of the measures taken by their institutions with regard to document access and to public access to the decision-making process and the related issues. Mention was also made of a series of practical measures (taken or planned) designed to enable the public to identify readily online the preparatory documents of the Community institutions, where these are acting in a legislative capacity.

3. *Council conclusions of 21 December 2005 on improving openness and transparency in the Council*

The question of public access to the Council's deliberations on legislative acts was central to the interinstitutional dialogue throughout 2005. The measures taken by the Council and listed in its conclusions of 21 December 2005<sup>16</sup> and the overall policy on transparency adopted by the European Council in June 2006<sup>17</sup> reflect the importance that the Community institutions henceforward attach to the principle of public access to the decision-making process.

Under the measures adopted by the Council in December 2005 and by the European Council in June 2006 all Council deliberations on legislative acts to be adopted by co-decision are open to the public, as are the votes and the explanation of votes by Council members. This means that all documents mentioned on the agenda for a Council meeting open to the public are published before that Council meeting is held<sup>18</sup>.

In addition, in order to ensure that the general public has as wide an access as possible, from the summer of 2006 all public debates and deliberations, as well as public votes on co-decision items, will be broadcast in all languages through video-streaming on the Council's internet website.

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<sup>16</sup> See document 15834/05.

<sup>17</sup> See documents 10633/06, pp. 23 and 24, and 10926/06, pp. 11-14.

<sup>18</sup> See document 100926/06, Annex II, p.7.



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

### A. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN

The following section of this report refers to a number of complaints lodged with the European Ombudsman in cases where Regulation No 1049/2001 was applied. Of the complaints already examined in the Council's annual report on 2004, two cases are mentioned on which the Ombudsman had not yet decided when the previous Council's annual report was published <sup>19</sup>. Moreover, this report examines at some length the only complaint lodged in 2005 concerning the Council's application of Regulation No 1049/2001.

#### 1. *Complaint 2395/2003/GG, submitted to the Ombudsman in December 2003*

This complaint did not concern the right of access to documents in the strict sense, but rather the public nature of the Council's decision-making process in the broad sense of the term <sup>20</sup>.

By letter dated 18 September 2003 addressed to the Secretary-General/High Representative, the complainants suggested that the Council's Rules of Procedure be amended, in order to ensure that sessions of the Council, when it convened in its capacity as legislator, were held in public.

In his reply dated 19 November 2003, the Secretary-General recalled that the provisions laid down in Article 8 of the Council's Rules of Procedure reflected the compromise reached by the Heads of State or Government at the Seville European Council meeting in the framework of a reform process which represented a substantial change to the existing procedures, the purpose of which was to enhance the efficiency of the Council's work prior to the enlargement of the European Union in 2004.

In their complaint to the Ombudsman, the complainants pointed out that the principle of holding Council sessions in public, when the Council was acting as legislator, was provided for in the Treaty establishing a Constitution for Europe. They also argued that the principle that decisions must be taken as openly as possible, which they read into Article 1(2) of the EU Treaty, was a general principle of law, which should be reflected in the Council's Rules of Procedure.

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<sup>19</sup> See the Council's annual report on access to documents – 2004, pp. 27-29.

<sup>20</sup> See the above-mentioned annual report, p. 27.

Following this complaint, the Council essentially took the position that the matter was of a political and constitutional rather than of an administrative nature. Therefore, it had reservations whether it constituted "maladministration" to begin with. The Council's Rules of Procedure are, in its view, fully in conformity with the Treaties. Moreover the Council maintained throughout the procedure that it had correctly applied the rules in force, which fact was not contested by the complainants.

On 4 October 2005 the Ombudsman submitted a special report to the European Parliament repeating his recommendation. On 4 April 2006, the European Parliament adopted a resolution, based upon a report drawn up by its Committee on Petitions, in which it supported the Ombudsman's recommendations <sup>21</sup>.

## 2. *Complaint 2366/2004/OV of 28 July 2004*

This complaint, which was already mentioned in the Annual Report covering the year 2004<sup>22</sup>, concerns alleged refused access to a document concerning the application of the principle "ne bis in idem" in competition law. On 4 July 2006 the Ombudsman closed the case without finding any maladministration. The Ombudsman considered that the Council's position as reflected in its decision of 8 July 2004 on the initial request for access to documents and in its decision of 13 July 2004 on the confirmatory request for access to documents appeared to be reasonable.

## 3. *Complaint 1875/2005/GG of 17 May 2005*

This complaint relates to an alleged failure by the Council to grant access to any documents in its possession concerning the negotiation and signature of the EU Status of Forces Agreement of 17 November 2003 (EU SOFA) <sup>23</sup>, including documents relating to the organisation of the negotiations.

In its reply of 21 March 2005 to the initial application, the General Secretariat of the Council had informed the complainant that two kinds of preparatory documents existed: (a) a number of documents already available on the Council's website as part of the Council's register of documents; and (b) SN documents 4438/01, 4438/1/01 REV 1, 4438/4/01 REV 4 and 4438/5/01 REV 5. As regards the second group of documents, the General Secretariat granted only partial access, withholding those parts of the documents which contained legal advice.

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<sup>21</sup> Cf. the European Parliament resolution on the Special Report from the European Ombudsman following the draft recommendation to the Council of the European Union in complaint 2395/2003/GG concerning the openness of the meetings of the Council when acting in its legislative capacity (2005/2243(INI)) ([T6-0121/2006](#)) and the own initiative report ([A6-0056/2006](#)) tabled by the European Parliament's Committee on Petitions on 3 March 2006.

<sup>22</sup> See the Council's annual report on access to documents – 2004, p. 29.

<sup>23</sup> OJ C 321, 31.12.2003, p. 6.

On 24 March 2005 the complainant submitted a confirmatory application to the Council, arguing that in view of the Agreement's scope and of the fact that the drafting process had taken over two years to complete, it was to be presumed that the Council held more than just those four documents. Moreover, the very numbering of these documents suggested that other relevant documents existed.

In its reply to the applicant of 11 May 2005, the Council declared that no further documents concerning the negotiation and signature of the EU SOFA had been identified, and that the gap in the numbering sequence was due to the fact that SN documents 4438/2/01 REV 2 and 4438/3/01 REV 3 had been declared void and annulled during production.

In his application of 10 March 2005, the complainant had also asked for a full and complete list of all those documents to which the Council might decide to refuse access, including "sensitive documents" within the meaning of Article 9 of Regulation No 1049/2001. Given that this issue had not been addressed by the General Secretariat in its initial reply to the complainant, the latter repeated this request in his confirmatory application.

In its reply of 11 May 2005, the Council pointed out that, in conformity with Article 9 of the Regulation, the institution was neither obliged to divulge any detail concerning a sensitive document nor to release it to the public, unless its originator decided otherwise. According to the Council, the only obligation for the institution in this context was to indicate at the end of each calendar year the total number of documents classified as "Confidential", "Secret" and "Top Secret" during the year, in conformity with Article 17(1) of Regulation No 1049/2001.

In his complaint to the Ombudsman of 17 May 2005, the complainant alleged that by failing either to grant total or partial access to all the documents requested, or to give reasons for refusing access to these documents, the Council had not fully complied with its obligations under Regulation No 1049/2001. He moreover alleged that the Council had failed to consider whether it had to give total or partial access to any sensitive documents, and to give reasons why it had decided to deny access to any such documents. By not addressing the specific arguments submitted to it, the Council had acted in bad faith and had failed to give proper consideration to the initial request and the confirmatory application.

In its opinion on this complaint of 27 July 2005, the Council pointed out that under the current rules, all texts submitted to the Council or to one of its preparatory bodies which (a) are to serve as a basis for deliberations, (b) influence the decision-making process, or (c) reflect the progress made on a given subject, must be distributed as "standard" ("ST") documents. Consequently, they are automatically tracked in the Council's document production system and (unless they are not

registered in accordance with Article 9(3) of Regulation No 1049/2001) will be listed automatically on the Council's Register.

Under the current rules, so-called "unnumbered" ("SN") documents may thus no longer be used for such purposes. Such documents are reserved exclusively for internal use within the General Secretariat for administrative purposes, such as translation. They are not to be distributed to members of the Council or to members of its preparatory bodies.

However, this system was not in force at the time when the different versions of document SN 4438/01 had been produced. In 2001, it was still possible to produce "SN" documents for distribution to delegations. Such "SN" documents were distributed by the department which authored them rather than by the centralised document management department.

Following renewed research, the Council had discovered that, contrary to initial evidence, more revisions of document SN 4438/01, had been produced and distributed within Council's preparatory bodies.

These versions had not been loaded onto the automated circuit which enables all Council documents to be registered and saved in the electronic archive of the institution. Therefore, in the absence of evidence that such revisions had been electronically recorded and validated, they were considered void.

The Council apologised to the complainant for this clerical error. It granted full access to the revised versions REV 6 to REV 10 and partial access to versions REV 2 and REV 3 of document SN 4438/01.

As regards the alleged failure to grant access to sensitive documents, the Council confirmed that no relevant sensitive documents existed.

On 9 November 2005, the Ombudsman closed the case, making a critical remark about the way the complainant's request for access to documents had been dealt with in the first place, but also establishing that there was no evidence to support the complainant's view that the Council had acted in bad faith.

As for the alleged failure to grant access to sensitive documents, the Ombudsman considered that the complainant had not submitted any evidence to rebut the Council's statement that no sensitive documents of relevance to the subject matter concerned by the complainant's request did exist, and that there were therefore no grounds for further inquiries into this aspect of the case.

## B. LEGAL ACTION

### *Rulings given in 2005 under the rules on access to documents*

In 2005, three rulings were given by the Court of First Instance in cases concerning access to Council documents. On 26 April 2005, the Court of First Instance handed down its judgment in the joint cases T-110/03, T-150/03 and T-405/03, *José María Sison v. Council*<sup>24</sup>. The two remaining rulings of 5 April and 14 July 2005 were given in cases T-376/03 and T-371/03, which both relate to the application of Article 6 of Annex III to the Staff Regulations of the Community institutions. The applicants had submitted, *inter alia*, that the principles of transparency and access to documents laid down in Article 255(1) of the EC Treaty had been violated<sup>25</sup>.

As regards those parts of the rulings in cases T-376/03 and T-371/03, which are of particular relevance to the interpretation of Article 18 of Regulation No 1049/2001, the Court took the view that that the right of access to Council documents laid down in Article 255(1) of the EC Treaty and Regulation No 1049/2001 may be limited or excluded – according to the principle by which the special rule derogates from the general rule (*lex specialis derogat legi generali*) – where there are special rules governing specific matters.

The above-mentioned provisions on transparency and access to documents could therefore not be opposed to the principle laid down in Article 6 of Annex III to the Staff Regulations, which states that "*the proceedings of the Selection Board shall be secret*". This principle had been established with a view to guaranteeing the independence of selection boards and the objectivity of their proceedings<sup>26</sup>.

### *Pending Court cases concerning Council decisions to refuse access to documents*

Four cases in which the legality of Council decisions refusing access on the basis of Regulation No 1049/2001 is contested are currently pending before the Community Courts, two of which were already mentioned in the Council's previous report on access to documents, to which the reader is referred<sup>27</sup>.

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<sup>24</sup> Since the judgment in joint cases T-110/03, T-150/03 and T-405/03 was already dealt with at some length in the Council's previous report on access to documents, the reader is referred to the summary of this ruling set out on pages 31 and 32 of the Council Annual report - 2004. It should be noted, however, that this case is currently the subject of an appeal to the Court of Justice (Case C-266/05 P).

<sup>25</sup> See the rulings in cases T-376/03, *Hendrickx v. Council*, and T-371/03, *Le Voci v. Council*.

<sup>26</sup> See judgment in case T-376/03, paragraphs 55-57, and in case T-371/03, paragraphs 120-124.

<sup>27</sup> See the summary of pending cases T-3/00, *Pitsiorlas v. Council and ECB*, and T-264/94, *WWF-EPO v. Council*, in the Council's Annual Report on access to documents – 2004, pp. 32 and 33.

In cases C-39/05 P, *Kingdom of Sweden v. Council*, and C-52/05 P, *Maurizio Turco v. Council*, the applicants appealed the judgment of the Court of First Instance of 23 November 2004 in Case T-84/03 (*Maurizio Turco v. Council*)<sup>28</sup>.

In the fifth case, C-266/05 P, José María Sison has brought an appeal against the judgment of the Court of First Instance of 26 April 2005 in Joined Cases T-110/03, T-150/03 and T-405/03, referred to above<sup>29</sup>.

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

Lastly, the Council intervened in two cases, T-5/05, *Verband der Internationale Caterer in Deutschland e.V. v. Commission*, and T-444/05, *S.p.A. Navigazione Libera del Golfo v. Commission*, where the applicants have introduced actions for the annulment of Commission decisions refusing access to documents.

In both cases, access was refused on the basis of Article 4(5) of Regulation No 1049/2001, according to which a Member State may request an institution not to disclose a document originating from that Member State without its prior agreement, and in both cases the applicants suggested that this provision is illegal. Since this claim calls the validity of an act of the Council into question, it necessitates the Council's intervention as third party.

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<sup>28</sup> See judgment in case T-84/03 (mentioned in the Council's Annual Report for 2004, pp. 30-31), paragraphs 62 and following. In his application in appeal, Mr Turco argues, *inter alia*, that the Court of First Instance misinterpreted and misapplied the term "legal advice" in Article 4(2) of Regulation No 1049/2001 and that the Court erred in qualifying the legal opinion at issue as "legal advice", whereas the Kingdom of Sweden argues in its application that the Court of First Instance erred in finding that there is a "general secrecy requirement" for legal service opinions in legislative matters.

<sup>29</sup> In this case, Mr Sison notably argues that the Court of First Instance unduly limited the scope of its review of the legality of the Council decision refusing access to the requested documents without responding to the applicant's arguments and his particular situation. The opinion of the Advocate-General of the Court concerning this case was delivered on 22 June 2006.

## VI. FINAL REMARKS

The Council's experience in implementing Regulation No 1049/2001 in 2005 highlights the importance of its public register as a search tool for members of the public seeking to keep abreast of developments at Community level.

As stated in the first part of this report the number of visits rose by nearly 16 % in 2005 (1 064 039 visits in 2005 against 919 584 in 2004); this was the third successive annual increase. 68,6 % of the Council documents produced in 2005 – i.e. 77 832 of the 113 398 new documents listed in the register – were made directly accessible to the public as soon as they were circulated. Moreover, since 1 February 2004 any new document to which the Council has provided partial access may be consulted online.

It should come as no surprise, therefore, to learn that, after rising steadily between 1999 (when the Council's public register was introduced) and 2003, the number of requests for access fell substantially in 2004 and 2005<sup>30</sup>.

It should also be noted that requests for access relate almost exclusively to documents which are listed but not directly accessible via the register. Quite a few of the documents requested in 2005 were classified (124 as CONFIDENTIEL UE and 469 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 departments which produced the documents, who in many cases must themselves examine the requested documents on the basis of Regulation No 1049/2001.

That said, despite the increasingly complex nature of the dossiers to be examined, the General Secretariat of the Council is coping with the ensuing growing administrative burden, while meeting the time-limits laid down in Regulation (EC) No 1049/2001. By way of illustration, in 2005 processing time for initial requests was on average 13 working days<sup>31</sup>. In respect of confirmatory applications, which are examined by the Working Party on Information before being submitted to Coreper and the Council for adoption, the average was 26 working days in 2005, compared to 24 working days in 2004.

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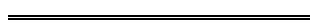
<sup>30</sup> However, in the first half of 2006 there was again a sharp increase in the number of applications for access and the number of documents requested (over 1 350 applications relating to more than 5 000 documents over the six month period).

<sup>31</sup> Following an increase in staff numbers in the Transparency, Access to Documents and Information to the Public Department at the beginning of 2006, the average processing time has been brought down to 11 days despite the sharp rise in the number of applications in the first six months of 2006.

In this regard, the contribution made by the Working Party on Information to the processing of confirmatory applications must be noted. The Working Party met on 20 occasions in 2005. 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 2005 fell in comparison to 2004 (80,6 % in 2005 as against 85,7 % in 2004). However, this must be seen in the light of the fact that a large number of documents (77 832 in 2005 against 68 996 in 2004) were made directly accessible to the public via the register as soon as they were circulated.

In conclusion, both the analysis of the processing of requests for access and the public's use of the register of Council documents suggest that the aims set by the Treaties and by Regulation No 1049/2001 continued to be achieved in 2005.





**STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS**

**Situation on 11/07/2006**

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

2002	2003	2004	2005
2.391	2.830	2.160	2.100

**2. Number of documents requested by initial applications**

2002	2003	2004	2005
9.349	12.565	12.907	9.457

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

2002	2003	2004	2005
8.158	10.912	10.971	7.535
partially/wholly	partially/wholly	partially/wholly	partially/wholly
	1.928 8.984	1.092 9.879	1.254 6.281

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

2002	2003	2004	2005
43	45	35	51

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

2002	2003	2004	2005
144	162	198	253
89	64	113	130
partially/wholly	partially/wholly	partially/wholly	partially/wholly
65 24	42 22	36 77	60 70

**6. Rate of document released for the procedure as a whole <sup>1</sup>**

2002		2003		2004		2005	
76,4%	88,6%	71,7%	87,4%	77%	85,7%	67,3%	81,2%

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

2002		2003		2004		2005	
448.236	257.052 (57.3%)	569.372	354.421 (62.2%)	691.410	454.473 (65.7%)	727.685	483.577 (66.4%)

<sup>1</sup> Based on documents released wholly (left column) or wholly + partially (right column).

## 8. Professional profile of the applicants (initial applications)

		2002		2003		2004		2005	
Civil society	Environmental Lobbies	26,7%		21,4%		21,8%		1,1%	17,2%
	Other groups of interests							4,5%	
	Industrial/Commercial Sector							10,4%	
	NGOs							1,2%	
Journalists		2%		2,1%		2,6%		2,3%	
Lawyers		11%		13%		10,7%		10,2%	
Academic world	University Research	23,4%	26%	24%	26,5%	25,5%	27,7%	31%	32,4%
	Library	2,6%		2,5%		2,2%		1,4%	
Public authorities (non-EU institutions, third-country representatives, etc.)		4,9%		8,4%		7,3%		6,1%	
Members of the European Parliament and their assistants		2,5%		2,3%		2,1%		2,4%	
Others		5,9%		9,3%		10,4%		12,6%	
Undeclared professional origin		21%		17%		17,4%		16,8%	

## 9. Professional profile of the applicants (confirmatory applications)

		2002		2003		2004		2005	
Civil society	Environmental Lobbies	16%		7,9%		10,4%		0%	9,4%
	Other groups of interests							3,2%	
	Industrial/Commercial Sector							3,1%	
	NGOs							3,1%	
Journalists		12%		5,3%		6,9%		6,3%	
Lawyers		12%		23,7%		17,2%		9,4%	
Academic world	University Research	28%	28%	34,2%	34,2%	34,5%	34,5%	28,1%	28,1%
	Library	0%		0%		0%		0%	
Public authorities (non-EU institutions, third-country representatives, etc.)		0%		2,6%		0%		3,1%	
Members of the European Parliament and their assistants		12%		10,5%		10,4%		3,1%	
Others		4%		2,6%		10,3%		15,6%	
Undeclared professional origin		16%		13,2%		10,3%		25%	

## 10. Geographical spread of the applicants (initial applications)

		2002	2003	2004	2005
Belgium		27,5%	24,5%	27%	27,5%
Czech Republic		0,1%	0,5%	0,9%	0,8%
Denmark		2%	1,8%	1,7%	1,2%
Germany		12,9%	14,4%	14,2%	12,7%
Estonia		0%	0,1%	0,1%	0,1%
Greece		1,2%	0,9%	0,9%	1,2%
Spain		6,4%	6,4%	4,7%	5,3%
France		7,2%	6,1%	6,5%	7,7%
Ireland		1,3%	1,1%	0,8%	1%
Italy		4,7%	5,2%	6,6%	7%
Cyprus		0%	0,3%	0,3%	0,1%
Latvia		0%	0%	0,1%	0,1%
Lithuania		0,1%	0,3%	0,3%	0,4%
Luxembourg		0,8%	2%	0,8%	0,6%
Hungary		0%	0,8%	0,7%	0,8%
Malta		0%	0,2%	0,3%	0,2%
Netherlands		4,7%	4,9%	5,6%	7%
Austria		1,9%	2%	1,7%	2,1%
Poland		0,2%	1,5%	1,2%	1,5%
Portugal		1,8%	1,5%	0,6%	1%
Slovenia		0%	0,4%	0,2%	0,2%
Slovakia		0%	0,2%	0,4%	0,3%
Finland		0,5%	0,8%	0,4%	0,4%
Sweden		2%	1,3%	1,7%	1,7%
United Kingdom		9,9%	9,5%	8,1%	7,9%
Third countries	Candidate countries	0%	0,3%	0,3%	1,3%
	Others	6,3%	5,1%	6,7%	6,7%
Non specified		8,5%	7,9%	7,2%	3,2%

## 11. Geographical spread of the applicants (confirmatory applications)

		2002	2003	2004	2005
Belgium		20%	26,3%	48,3%	28,1%
Czech Republic		0%	0%	0%	0%
Denmark		8%	0%	3,5%	0%
Germany		20%	15,8%	3,5%	12,5%
Estonia		0%	0%	0%	0%
Greece		0%	0%	0%	0%
Spain		4%	0%	3,4%	3,1%
France		8%	5,3%	0%	3,1%
Ireland		0%	0%	0%	0%
Italy		4%	0%	10,3%	9,4%
Cyprus		0%	0%	0%	3,1%
Latvia		0%	0%	0%	0%
Lithuania		0%	0%	0%	0%
Luxembourg		0%	0%	0%	0%
Hungary		0%	0%	0%	0%
Malta		0%	0%	0%	0%
Netherlands		8%	29%	6,9%	9,4%
Austria		0%	0%	0%	6,3%
Poland		0%	2,6%	0%	0%
Portugal		0%	0%	0%	0%
Slovenia		0%	0%	0%	0%
Slovakia		0%	0%	0%	0%
Finland		0%	0%	0%	0%
Sweden		4%	0%	0%	3,1%
United Kingdom		20%	18,4%	20,7%	18,8%
Third countries	Candidate countries	0%	0%	0%	0%
	Others	0%	2,6%	3,4%	3,1%
Non specified		4%	0%	0%	0%

## 12. Sector

	2002	2003	2004	2005
Agriculture, Fisheries	4,6%	4,7%	4,6%	4,2%
Internal Market	14,7%	16,3%	14,2%	6,2%
Research	0,3%	0,1%	0,3%	0,3%
Culture	0,8%	0,5%	0,2%	0,5%
Education/Youth	0,9%	0,8%	1,4%	0,7%
Industry	1,8%	0,5%	0,4%	0,4%
Competitiveness	0%	0,2%	2,2%	5,3%
Energy	2,9%	2,9%	1,4%	1,6%
Transport	5,1%	4,4%	4,9%	5,3%
Environment	7,9%	5,2%	6,8%	7,7%
Health and Consumer Protection	2,5%	4%	4,3%	3,1%
Economic and Monetary Policy	10,7%	9,1%	3,3%	2,9%
Tax Questions – Fiscal Issues	0%	6%	3,2%	4,4%
External Relations – CFSP	8,6%	9,1%	14,6%	12,8%
Civilian Protection	0,4%	0%	0,3%	0,1%
Enlargement	2,2%	2,4%	1,8%	2,2%
Defence and Military matters	0%	0,7%	2,9%	2,5%
Assistance for Development	0,4%	0,2%	0,3%	0,7%
Regional Policy and Economical/Social Cohesion	0,3%	0,1%	0%	0,9%
Social Policy	3,3%	3,5%	2,7%	3%
Justice and Home Affairs	24,4%	22%	20,1%	22,5%
Legal questions	2%	1,6%	2,5%	3,5%
Functioning of the institutions	1,6%	1,2%	1,5%	1,3%
Financing of the Union (Budget, Statute)	0,9%	1%	0,3%	0,2%
Transparency	0,9%	0,8%	0,9%	0,3%
General policy questions	1,6%	1,2%	1,7%	1%
Parliamentary Questions	0%	1,1%	2,9%	5,4%
Various (more than five areas)	0%	0%	0,3%	0,4%

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

	2002		2003		2004		2005	
	#	%	#	%	#	%	#	%
Protection of public interest as regards public security	268	23,1 %	270	16%	440	21%	302	15,8 %
Protection of public interest as regards defence and military matters	1	0,1%	62	3,8%	218	11%	123	6,4%
Protection of public interest as regards international relations	299	24,6 %	482	28,7 %	330	16,2%	395	20,6 %
Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State	10	0,7%	13	0,7%	21	1,1%	16	0,8%
Protection of privacy and the integrity of the individual (protection of personal data)	2	0,2%	5	0,3%	13	0,7%	4	0,2%
Protection of commercial interests of a natural or legal person, including intellectual property	0	0%	0	0%	1	0%	0	0%
Protection of court proceedings and legal advice	136	11,4 %	190	10,9 %	196	8,8%	34	1,8%
Protection of the purpose of inspections, investigations and audits	0	0%	0	0%	0	0%	1	0%
Protection of the Institution's decision-making process	341	28,1 %	546	31,2 %	697	33,3%	925	48,3 %
Several reasons together or other reasons	131	11,3 %	141	8,4%	158	7,8%	116	6,1%
Document not held by the Council/Other author	6	0,5%	0	0%	1	0,1%	0	0%

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

	2002		2003		2004		2005	
	#	%	#	%	#	%	#	%
Protection of the public interest as regards public security	3	5,4%	4	4%	24	27%	61	49,6%
Protection of the public interest as regards defence and military matters	0	0%	2	2%	22	25,9%	7	5,7%
Protection of the public interest as regards international relations	4	7,3%	61	61,6%	19	21,2%	25	20,3%
Protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State	0	0%	7	7,1%	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%
Protection of commercial interests of a natural or legal person, including intellectual property	0	0%	0	0%	0	0%	0	0%
Protection of court proceedings and legal advice	14	23,6%	7	7,1%	4	4,7%	0	0%
Protection of the purpose of inspections, investigations and audits	0	0%	0	0%	0	0%	0	0%
Protection of Institution's decision-making process	21	38,2%	14	14,2%	10	11,8%	14	11,4%
Several reasons together or other reasons	14	25,5%	4	4%	8	9,4%	16	13%
Document not held by the Council/other author	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**

	2002	2003	2004	2005
For the initial applications	10 (2391 appl.)	7 (2830 appl.)	9 (2160 appl.)	13 (2100 appl.)
For the confirmatory applications <sup>2</sup>	24 (43 appl.)	23 (45 appl.)	24 (35 appl.)	26 (51 appl.)
Ponderated average (initial + confirmatory)	10,25	7,25	9,24	13,31
Ombudsman <sup>1</sup>	63	46	36	38

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

	2002	2003	2004	2005
Initial applications	148 of 2391, being 6,2% of the applications	134 of 2830, being 4,7% of the applications	192 of 2160, being 8,8% of the applications	326 of 2100, being 15,5% of the applications
Confirmatory applications <sup>1</sup>	29 [of 43]	37 [of 45]	24 [of 35]	40 [of 51]

<sup>1</sup> 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.