



## Statewatch lodges two complaints against the European Commission with the European Ombudsman

- the Commission has failed to maintain a proper public register only a fraction of the documents it produces listed are included
- the Commission failed to produce its annual report on access to documents for 2005 in the year 2006
- Statewatch says both are breaches of the Regulation and therefore cases of maladministration

Press release: EMBARGOED until 12.00 on Thursday 19 April 2007

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Tony Bunyan, Director of Statewatch, comments:

*“The European Commission is not above the law it is the custodian of EU law, responsible for ensuring it is properly implemented. This makes it all the more reprehensible that under the Regulation on access to documents the Commission has failed to maintain a proper register of documents and failed to publish an annual report for 2005.*

*Open, transparent and accountable decision-making is the essence of any democratic system. Secrecy is its enemy and produces distrust, cynicism and apathy among citizens and closed minds among policy makers.*

*The European Commission must be called to account for its actions or rather its failures to act”*

### Commission’s failure to provide a proper public register of documents

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One of the prerequisites of informed debate in a democracy is access to the documents on which measures are adopted. People can then see what influences are at work and which ideas were accepted or rejected and why.

The primary source of EU documents is the public registers of documents set up under the 2001 Regulation (1049/2001 adopted December 2001). The Regulation applies to the three main institutions: the Council of the European Union (the 27 governments), the European Commission and the European Parliament.

The Regulation says that each of these institutions should:

*"establish a register which shall be operational by 3 June 2002" (Article 11.3)*

The Council of the European and the European Parliament have both established public registers that contain references to their documents. While there is room for improvement in the scope of their registers they can be broadly said to have met the requirements of the Regulation.

The same cannot be said of the European Commission.

Its public register of documents only contains legislative texts and adopted Commission reports (COM and SEC documents). It does not include the vast majority of documents produced or received by the Commission.

In its annual reports the Commission has simply spoken tokenistically of gradually "improving" its register.

Article 11 says:

*1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.*

*2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.*

The terms of Article 11 of the Regulation are quite clear:

1. A register of documents, with public access, shall be established by each of the three EU institutions, including the Commission;
2. "references to documents shall be recorded in the register without delay";
3. "each document" shall include a reference number and its subject matter;

Further, Recital 10 of the Regulation states that access covers not only documents produced by the institutions but also those "received by them".

The obligation under Article 11 must also be seen in the context of Article 3 which defines a "document" as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and

decisions falling within the institution's sphere of responsibility"

Overall these obligations must be seen in the context of Article 1 of the Regulation which obliges the institutions "to ensure the widest possible access documents". And Recital 2 says access to documents: "enables citizens to participate more closely in the decision-making process".

*Statewatch* contends that the Commission's register of documents does not fulfil the requirements of Regulation 1049/2001 because it contains only a fraction of the documents produced and received by the Commission in the course of its activities.

Furthermore, as nearly five years have now passed since the deadline set down in the Regulation, *Statewatch* believes that the Commission's failure to implement Community law by ensuring the widest possible access to its documents via a public register is a case of maladministration.

This failure is compounded by the fact that the Commission has internal databases (for example, the "Adonis" database, used by officials everyday) which could provide the basis for a proper public register of documents.

The European Ombudsman accepted *Statewatch's* complaint on 23 October 2006 and it was sent to the Commission asking for their response by "31 December at the latest"

On 25 January 2007 the Ombudsman informed us that the Commission requested an extension until 28 February 2007.

On 12 March 2007 the Ombudsman informed us that the Commission had requested an extension until 31 March 2007.

After more than five months we have received no response from the Commission to the Ombudsman.

In another complaint to the European Ombudsman the President of the European Commission responded to a complaint by Mr Hans-Martin Tillack (ref: 2350/2005/GG). Mr Barroso claims that:

*"As regards the public registers, Regulation 1049/2001 does not require the institutions to set up comprehensive registers of all their documents"*

and goes on to say:

*"Given the very wide definition of "document" in Article 3(a) of the Regulation, it would be impossible to operate comprehensive registers"*

Mr Barroso tries to legitimate this position - which is in clear contradiction to the provisions of Article 11 of the Regulation by reference to the Commission's internal rules of registration (Decision of 23 January 2002, 2002/47/EC).

Article 4 of this Commission Decision on “Registration” says that

*“As soon as a document is received or formally drawn up within a department, in whatever medium, it shall be analysed with a view to determining what is to be done with it and thus whether or not it must be registered.”*

*A document drawn up or received by a Commission department must be registered if it contains important information which is not short-lived and/or may involve action or follow-up by the Commission or one of its departments.”*

The words “which is not short-lived” modify the words “contain important information” while the words “and/or may involve follow-up” are then a second example of cases where the documents should be registered - the Commission is clearly not even following its own rules.

### **The Commission’s failure to produce an annual report for 2005 in 2006**

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The European Commission failed to publish an annual report for 2005 in the year 2006 as specified in Article 17.1 of Regulation (EC) 1049/2001.

Article 17.1 states that:

*“Each institution shall publish annually a report for the preceding year... “*

The European Commission’s annual reports regarding Regulation (EC) 1049/2001 have been previously published as follows:

For the year 2002 published in 29 April 2003 (COM 216, 2003);  
For the year 2003 published in 30 April 2004 (COM 347, 2004);  
For the year 2004 published in 29 July 2005 (COM 348, 2005).

The failure to publish the 2005 annual report in 2006 as required under Article 17.1 is a clear case of maladministration.

Indeed as of 16 April 2007 the Commission still has not published the 2005 report.

The European Commission is well aware of its responsibility under the Regulation to publish an annual report - having already produced three of them. The only way that citizens can learn of the Commission’s response to applications for access to its documents is through its annual report.

### **Background**

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*Statewatch* previously won eight cases lodged against the Council of the European Union with the European Ombudsman. One of these led to a Special Report to the European Parliament. All of these successes led to improved

rights for everyone in the EU.

One of these complaints led to the right of the European Ombudsman to investigate complaints concerning justice and home affairs being inserted into the Amsterdam Treaty.

1998 The Campaign for Freedom of Information gave Statewatch an Award for its work on fighting for EU openness (access to documents)

2001 The European Information Association gave Statewatch the "Chadwyck-Healey Award for achievement in European Information" for its work on openness and the new code of access to EU documents

2001 *European Voice* newspaper, Brussels: Tony Bunyan, Statewatch editor, selected by a distinguished panel as one of the "EV50", one of the fifty most influential people in the European Union over the year for Statewatch's work on access to documents in the EU.

Tony Bunyan is the author of *Secrecy and openness in the EU* (Kogan Page, 1999) and the online version, updated, 2003 on:

<http://www.statewatch.org/secret/freeinfo/index.html>

Statewatch maintains the most comprehensive Observatory of "Freedom of Information" in the EU with news, cases analyses, full documentation on:

<http://www.statewatch.org/foi.htm>

**For further information:**

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Phone: 00 44 208 802 1882 (Statewatch office)

**Tony Bunyan will be in Brussels on Thursday 19 April speaking at the seminar on Thursday 19 April:**

***Should there be an EU Freedom of Information Act?***

**09.15 - 17.30**

**Hotel Silken Berlaymont, 11-19 Boulevard Charlemagne, 1000 Brussels**

**Seminar programme:**

<http://www.statewatch.org/news/2007/mar/eu-foi-seminar-brussels.pdf>