



## Presentation for Statewatch

### European Parliament hearing on proposed amendments to Regulation 1049/2001 on access to EU documents 2 June 2008

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In this presentation I want to make four general points, followed by four specific criticisms of the legislation.

#### **General points**

The first general point is to welcome the appointment of Michael Cashman as the rapporteur on the proposal to amend the access to documents regulation, in particular because of his work as the rapporteur on the 2006 EP resolution which included recommendations to the Commission for suggested amendments to the access to documents regulation. I will be referring back to a number of the details of these recommendations.

The second general point is to urge the Parliament and the Council not to rush negotiations on this proposal, but to wait for the entry into force of the Lisbon Treaty. There are four reasons for this. First of all, the new Treaty would provide for a wider scope of application of the access to documents rules, making them applicable to all EU institutions, bodies and agencies, including for the first time the European Council (the meeting of EU leaders). Secondly, the new Treaty would provide for an obligation for legislation to be adopted following public discussions in the Council and the Parliament, and the access to documents rules should take account of this. Thirdly, the new Treaty would provide for a clarification of the distinction between legislative and non-legislative activity of the EU. This was an issue raised in the 2006 Cashman report and is already anticipated by the Commission's proposal to amend the rules on access to documents. Fourth, Article 298 of the consolidated Treaty, already referred to by Mr. Cashman, would be a new legal base for the adoption of rules on EU administrative law, including

explicitly the rules on 'open' administration. This new legal base would create an opportunity to address issues within the scope of the European Transparency Initiative, such as the regulation of lobbyists and the dissemination of information on the beneficiaries of EU funds, as well as more general issues regarding openness and freedom of *information*, as distinct from access to documents as such. There would be an opportunity to adopt legislation concerning both access<sup>1</sup> to documents and these broader issues by combining the two future legal bases.

My third general point about the issue is that the EU is disconnected with the public. It should be remembered that the EU has often changes its rules to allow for greater openness and transparency in the past at the times when it has faced particular challenges gaining or retaining public support. So there is a clear link between the public perception of the EU and the rules on openness and transparency.

This links to my final general point. There is nothing at all in the Commission's proposal to amend the access to documents rules which would actually enhance openness and transparency. Some of the new provisions would just confirm the status quo, which is fine. But some of them - I count at least seven - would lower standards as compared to the current rules, as they have been applied in practice and interpreted by the Courts.

### **Specific points**

There is already a general *Statewatch* analysis of the new proposal on the *Statewatch* website, and there will soon also be a point-by-point analysis of the new proposal. I want to make four specific points outlining particular concerns about the new proposal.

My first specific point is the revised definition of 'document'. I would agree with what other speakers have said already: the revised definition would restrict the scope of the rules. My colleague Ann Singleton compared this definition to a philosopher's debate over whether a chair exists if we cannot see it. I would compare the definition of 'documents' in the proposal to Bill Clinton's definition of 'sex'. Like that definition, the definition of 'documents' simply invites ridicule because is different from the common understanding of the term. For example, my speaking notes today are obviously a 'document' in the ordinary sense of the word, even though I have not 'received' them, 'formally transmitted' them, or 'otherwise registered' them - just as Bill Clinton's activities with Monica Lewinsky fell within the commonly understood definition of 'sex'. Not using the common meaning of the term invites ridicule - and it is obvious that this also constitutes a significant restriction of the scope of the Regulation.

This revised definition will encourage abuse, since officials might decide not to transmit documents formally or otherwise register them, in order to restrict their circulation to a small group. I have myself received documents from Commission staff that I was told were for the purposes of discussion and consultation and not considered to be documents that might be available to the public, and I have seen similar 'documents' from the other institutions. This practice should not be legalised.

My second specific point is that the proposal's redefinition of the status of Member States' documents would also lower standards as compared to the current rules, as interpreted by the Court of Justice. I agree with earlier speakers' points on this issue. The standards would be lower as regards some documents, because Member States would have the power to apply their national law to refuse access, whereas they cannot do this at present. For other documents, related to legislation or delegated acts, the proposal would only replicate the status quo, but not improve upon it. The Commission's proposal is in contradiction with recommendation no. 4 in the 2006 Cashman resolution of the Parliament.

My third specific point is the lack of any change to the decision-making exception in the current rules. This exception needs amendment at the very least to remove legislative decisions and comitology decisions from the scope of the decision-making exception completely. The proposal on this point is contradiction with recommendation no. 2 in the 2006 Cashman resolution of the Parliament.

As part of this change, the Parliament and the Council should take steps in particular to improve the transparency of the co-decision procedure. For example, there is a recent agreement between the Parliament and the Council on a controversial proposal - the returns directive. This agreement was reached on April 23<sup>rd</sup>, about six weeks ago, but the agreed text has still not been officially released. The document has been leaked to Statewatch and is available on the website, and it has been leaked to other NGOs. But it is not officially available to the public. Also, the Council should be required to publish an official transcript of its public debates, for the benefit of those citizens who do not have the time or facilities to watch a web streaming.

My fourth specific point concerns the changes to the rules requiring the public register of documents. The current rules require all documents to be listed and publicly accessible on the public register, 'as far as possible'. I should point out that *Statewatch* currently has a complaint pending with the Ombudsman about this issue. The Ombudsman has agreed with the complaint. So it seems that the Commission has proposed changes to the rules in order to avoid complying with a pending ruling of the Ombudsman against them. There would no longer be an obligation to list all documents in the register. This is coupled with the change in

the definition of document, which would now become circular - a 'document' would not need to be on the register in the first place unless it had been placed on the register, simply because registration would be part of the definition of 'document'. Together these changes would be a significant restriction in the application of the rules.

As regards legislative and comitology documents, the Regulation would be more precise but would not actually change the current practice as regards these documents, considering also that the restrictions on public accessibility and access set out in the rest of the Regulation would still apply. Again, the proposal on this point is contradiction with recommendation no. 2 in the 2006 Cashman resolution of the Parliament.

## **Conclusion**

I would urge the European Parliament to take the opportunity to improve the Commission's proposal significantly, as there are major problems with it.

**Full background and documentation is available on:**

**Statewatch's Observatory on access to EU documents: 2008-2009:**

**<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>**

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