



Statewatch Analysis

Revision of the Regulation on access to documents: Comments on the Council's Informal Drafting Note

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See: Council Informal Drafting Note:

<http://www.statewatch.org/news/2012/jun/eu-council-access-reg-technical-note-to-ep.pdf>

and preceding Council positions in: Consolidated text:

<http://www.statewatch.org/news/2012/jun/eu-council-consolidated-4-col-4-6-12.pdf>

Article 1 - this is amended from the previous Council position to incorporate aspects of the EP's position, ie revising the purpose of the Regulation. This is a positive change from the status quo - although it is hard to see how it would have too much impact in practice.

Article 2 - this is amended from the previous Council position to incorporate aspects of the EP's position, ie applications by an association of persons. This is a positive change from the status quo - although presumably such associations were already able to apply for docs.

Article 15(1a) - retained from the previous Council position, which incorporate aspects of the EP's position, ie access to documents officers. This is a positive change from the status quo - although improving the substance of the rules is more important than improving their administration.

Article 4(5) - retained from the previous Council position, which reflects the status quo according to ECJ case law (the IFAW I judgment). It does not raise standards at all - in particular as compared to Article 5(2) of the EP's position, which would remove any MS veto as regards legislative, delegated or implementing acts.

Article 3(b) - retained from the previous Council position. Stating that Member States are not third parties does not really change the status quo, as long as there is a separate provision in the Regulation (as the Council draft suggests) which gives the Member States a veto over release of their documents on the same basis as at present.

Article 2(6) - retained from the previous Council position. No real change from status quo.

Article 4(1) - retained from the previous Council position. Would lower standards from status quo, by adding a new exception.

Article 4(2) - retained from the previous Council position. Would lower standards from status quo, by adding a new exception.

Article 3(a) - retained from the previous Council position. Would arguably increase standards from status quo, by adding the possibility that data files are covered by the Reg.

Article 3a - retained from the previous Council position. Would undoubtedly lower standards massively and unacceptably as compared to the status quo, by providing for a massive new category of documents that would not be covered by the rules. Unlike the Commission's proposal, it would not redefine a 'document' as such - but this is a distinction without a difference, since the end result would be exactly the same. This provision would be a manifest breach of the EU Charter of Fundamental Rights, as a hugely disproportionate and unjustifiable restriction on the right of access to documents, as well as the obligations of openness set out in Article 1 TEU and (as regards legislative documents) Article 15 TFEU. It is also doubtful that Article 15 TFEU provides a valid legal base for providing for any category of documents that is outside the scope of the rules entirely. In the alternative, if Article 15 TFEU does provide such a power, it would be limited by the principle of proportionality and this proposal would manifestly breach that principle given the size of the category of documents excluded.

Article 4(1)(b) - amends the previous Council position, by taking on board the EP's amendments (Art. 4(5)) in part; although the EP text providing for a possible public interest override and partial access would not be taken over (the partial access point is irrelevant, since Article 4.6 anyway provides for a partial access rule as regards all exceptions from the right of access; but the public interest override point is significant). This version would increase standards from status quo, in light of the weak judgment of the ECJ on these issues in the Bavarian Lager II case, although it would increase standards more if the EP's position on a public interest override were also added. A technical point - the first two sentences of this draft of the clause are repetitive.

Article 4.6a - a change from the previous Council position. This is a compromise as compared to the EP position for an amendment to Art. 4.7, which would entirely disapply all of the exceptions in Art. 4 as regards legislative and quasi-legislative documents and lobbyists' documents. The proposal for a new Art. 4.6a would instead create a higher threshold to justify non-release of legislative and quasi-legislative documents (but not lobbyists' documents), applicable to the entirety of Art. 4 (ie, even the mandatory exceptions in Art. 4.1; this in part compensates for not taking on board the second part of the EP's amendments as regards Article 4.1.b, as far as

legislative and quasi-legislative documents are concerned). This new higher threshold would require the institutions to show 'specific reasons' why there is 'particular and serious harm' to an interest in Article 4. Arguably it reflects and generalises the ECJ's judgment in the Turco case (ie legal advice relating to legislative procedures must be released unless there is a specific reason otherwise). This would increase standards compared to the status quo.

Article 12 - amended from the previous Council position, reflecting elements of the EP's proposed Article 5a, as regards both the proposed inter-institutional register and the specific list of documents to be included on it. This would increase standards compared to the status quo. While Article 12(2) would still be subject (as at present) to Articles 4 and 9, ie the exceptions to disclosure of documents in general, it should be noted that the amendments suggested to Article 4 (and to the scope of the Regulation) would have a knock-on effect upon Article 12.2.

Article 4a - amended from the previous Council position, in particular to drop the attempt to overturn the 'Turco' judgment of the ECJ concerning the disclosure of legal advice. The first sub-paragraph of Article 4a.1, as well as Article 4a.2. and arguably Article 4a.3, simply now confirm the status quo appearing in the case law of the ECJ (ie a presumption against releasing certain categories of documents), instead of providing for (as the Commission had proposed) a legally dubious complete exclusion of categories of documents from the scope of the Regulation. Article 4a.4 confirms the status quo as well. If Article 4a is retained, it would be useful to clarify that the rules on partial access and time limits (Articles 4.6 and 4.7) still apply to it.

The second sub-paragraph of Article 4a.1 would, however, completely exclude certain categories of documents from the scope of the rules, and therefore violate the principle of proportionality and exceed the legal powers of the Council and EP.

Article 6.3 - amendment of the previous Council position to change 'should' to 'shall'. This takes on board part of the EP's proposed amendments, and improves the status quo.

Articles 7 and 8 - no change from prior Council position. On the whole, these amendments would lower existing standards by lengthening the deadlines to reply to applications.

Overall assessment

If it were not for the Council retaining its position on excluding whole swathes of preparatory documents from the scope of the Regulation, this text would be an improvement on the current regulation, especially as regards Articles 4.1.b, 4.6a and 12. This improvement would be greater than the lowering of current standards that would result from the amendments as regards new mandatory and optional exceptions and the lengthened deadlines for replies. But in turn, these improvements would be outweighed by the massive lowering of standards that would result from the exclusion of vast numbers of

documents from the scope of the rules. Despite the undoubted improvements to the Council's prior position, the deal on the table should therefore clearly not be accepted by the EP.

Furthermore, in order to ensure a significant increase in current standards, the revised Regulation should contain many, if not all, of the proposals of the European Parliament which would significantly increase standards, as regards - raising the threshold relating to the decision-making exception (Article 4.3); clarifying the concept of a public interest exception (Article 4(4)); applying the public interest override to the personal data exception, and limiting the abuse of that exception by lobbyists (Article 4.1.b; see discussion above); fully exempting legislative, quasi-legislative and lobbyists' documents from any exceptions (see discussion of Article 4.6a above); exempting legislative and quasi-legislative documents from a Member States' veto (see discussion above); giving access to more legislative and quasi-legislative documents (see discussion of Article 12 above); and including a special rule on the openness of EU spending (Article 15(2a) of the EP proposal).

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For full background and documentation see: Statewatch's

Observatory: the Regulation on access to EU documents: 2008-ongoing:
<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>