



**Health & Environment Alliance response
to the Consultation on the review of
Regulation 1049/2001
regarding public access to European Parliament, Council and Commission documents**

Q1. Would you qualify the information provided through registers and on the websites of the institutions as:

- (A) comprehensive and easy to access,
- (B) comprehensive but difficult to find,
- (C) easy to access but insufficient as regards their coverage,
- (D) insufficient and difficult to access?**

Although the institutions have made a lot of progress over the past years in making documents and information available on their websites, there are considerable differences among the websites of the institutions, in terms of their comprehensiveness, user-friendliness, and the speed with which information and documentation is placed on the web pages. Improving consistency between the different websites would add value.

On the other side, registers are still far from complete and access to information is insufficient and difficult to access in as far as comitology is concerned. With regards to the European Commission, the register is not always comprehensive. It would help if all the documents relating to the work of the different DGs were included in the register as this would add coherence to the process and would make it easier for applicants to find what they are looking for.

Q2. Should more emphasis be put on promoting active dissemination of information, possibly focussed on specific areas of particular interest?

Yes

The access to documents Regulation is primarily concerned with what is known as 'passive' information supply, which means information supplied in response to a request. The review of the Regulation should ensure a maximum degree of openness and accountability while respecting narrowly defined (and applied) exceptions for legitimate interests (including, indeed, commercial confidentiality or the functioning of the institutions). The review should also ensure that the EU institutions and bodies adopt **a more proactive approach** to the dissemination of information, eg by sending e-mail notifications of new documents posted on the Europa website to stakeholders or citizens that have expressed interest in one or more areas through the CONNECS database or by responding to consultation processes. A more proactive approach would also reduce the number of requests by the public.

Q3. Would a single set of rules for access to documents, including environmental information provide more clarity for citizens?

The EU is a Party to the Aarhus Convention (on access to environmental information, among other rights) and therefore the EU is required to include the Aarhus Convention's provisions fully in its own law. The choice the EU must therefore make is between generalizing the Aarhus provisions to the Regulation on access to documents, which would ensure a more open and transparent system, or maintaining a separate set of rules specifically for environmental information. What we do not want to see are weaker general rules overruling the specific provisions for environmental information.

Therefore, the answer to the question would be "yes" if the specific rules for access to environmental information were generalized, and "no" if the current weaker general rules were allowed to overrule the specific rules for environmental information.

The focus on separate rules for environmental information ignores the existence of other EU rules that also concern access to documents, among them the rules on protection of personal data and confidentiality in competition cases. It would be preferable to have the EU develop a single overall system or structure for access to its documents, a structure within which there is room for specific provisions to address specific requirements.

It should also be noted that both the Aarhus Declaration and Directive 2003/4 on public access to environmental information restrict Member States from preventing the disclosure of documents at EU level, in relation to the environment, which they would have to disclose under national law. Disparities between the laws in force in the Member States can create inequality within the Community as regards access to information and/or as regards conditions of competition. We believe that this principle should be extended to cover the majority of EU subject areas not just the environment.

We share the recommendations of the European Public Health Alliance that:

- **Member States should be asked to specify in more detail the grounds on which they currently deny access to documents. Documents specifically relating to public consultations and on-going legislative initiatives should not be withheld so that the public is not at a disadvantage and can effectively participate in the EU decision-making process.**
- **We recommend that the Regulation 1049/2001 on access to documents changes its mandatory language with the discretionary language used in the Directive 2003/4 .**

Explanation: 1049 says 'the institutions shall refuse'. 2003/4 says 'Member states may provide for a request to be refused if.' The language of the Directive is closer to the wording of the Aarhus Convention: 'a request for environmental information may be refused if the disclosure would adversely affect:'.

- **We recommend that the Regulation abandons the exceptions which are not found in the Directive or in the Convention:**
- 1049 should abandon the exception for 'the financial, monetary or economic policy of the Community or a Member State'.

Explanation: The Directive does not have this exception. The Aarhus Convention does not provide for this exception either.

- **1049 should not protect 'commercial interests' more broadly than the Directive or the Convention and should no longer make an 'exception to the exception' for information on emissions.**

Explanation: 2003/4 protects 'the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest'. Moreover, 'Member States may not ... provide for a request to be refused where the requests relates to information on emissions into the environment'. The Directive closely tracks the Aarhus Convention's language regarding the exception for commercial confidentiality and the 'exception to the exception' for information on emissions.

- **1049 should not protect 'court proceedings and legal advice'.**

Explanation: 2003/4 has no exception for 'legal advice'. Instead of a sweeping protection for all 'court proceedings', 2003/4 protects 'the course of justice [and] the ability of any person to receive a fair trial. 2003/4 is virtually identical to the Aarhus Convention on this point.

- **1049 should not require consultation with the third party if a third-party's document is requested.**

Explanation: this differs from and goes further than the Directive. 2003/4 protects 'the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless the person has consented to the release of the information concerned'. 2003/4 again closely follows the Aarhus Convention provision on this point.

- **The Regulation should require that the exceptions 'be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure'.**

Explanation: 1049 does not provide for a restrictive interpretation of the exceptions. The possibility of an overriding public interest in disclosure is recognized for only some of the exceptions. 2003/4 does require that the exceptions 'shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure'. Again, 2003/4 closely follows the Aarhus Convention requirements on this point.

Q4. How should the exception laid down in Article 4(1) (b) of Regulation 1049/2001 be clarified in order to ensure adequate protection of personal data?

C) There should be criteria for the disclosure of certain types of personal data in Regulation 1049/2001, where the lawfulness of disclosure does not have to be assessed on a case-by-case basis under Regulation 45/2001.

The exceptions in Article 4 were criticised by civil society organisations in the run-up to the adoption of the regulation and we are still unhappy with the way the exceptions have been used in practice. We hope that the institutions will improve Article 4 in the review of access to documents, showing their commitment to improving transparency.

It should be clarified that the protection of privacy does not mean that all personal data needs to be protected. For example, as the Green Paper suggests, where persons are acting in an official capacity, the personal data exception should not apply to their names.

The defining question should not be: Is this personal data? Rather, the question to ask is: Is there a privacy interest in the personal data and does that privacy interest override the public interest in disclosure?

Q5. How should the exception laid down in Article 4(2), 1st indent of Regulation 1049/2001 be clarified in order to ensure adequate protection of commercial and economic interests of third parties?

B) More weight should be given to the interest in disclosure.

Disclosing information in the interest of the public good should be the norm with exemptions only being made in limited and well defined circumstances. The current criteria for exemptions is too broad in scope and should be further refined.

Commercial interests seem to be over protected by the regulation at present. The question of what constitutes an “overriding public interest” needs clarifying and it should not be left up to the Court to define the “public interest” on those occasions when a case is brought. Standards or guidelines should be made available, in order to make the process more transparent. Civil society organisations wanting to use the overriding public interest to access documents could then have a better chance of knowing whether their request was likely to be successful. Applicants should not have to state their reasons for application but it could be useful to know why an applicant consider that there is an overriding public interest in disclosure; this should be taken into account by the institutions.

As far as environmental information is concerned, the requirements of the Aarhus Convention control should be followed more precisely. The language of Regulation 1367/2006 insufficiently reflects the Aarhus Convention’s limitations on the use of the exception for commercial confidentiality.

Q6. Would it be acceptable to derogate from the normal rules on access, in particular the times frames where access request are clearly excessive or improper?

No.

Articles 3 and 4 of Directive 2003/4 on public access to environmental information include acceptable provisions for dealing with voluminous, complex or unreasonable requests. See article 3(2)(b) and article 3(3) and article 4(1)(b) and (c).

If all the EU institutions maintained proper public registers containing up to date easily accessible and more transparent information then the number of requests would be reduced. Member States should be willing to contribute to the culture of openness in the better regulation process and should not deny access to documents unless they do specify in detail the grounds on which they deny access to a document.

The problem of voluminous or excessive requests should be dealt with through communication between the institutions and the applicant. Access to documents should not be seen as a battle between applicants and institutions. The objective should be to create a system from which both sides, the EU institutions and the stakeholders, benefit.

Q7. With regard to the content of databases, should the concept of ‘document’ cover sets of information that can be extracted using the existing search tools?

This question should help illuminate the difference between an **access to documents** system and an **access to information** system. The latter is preferable since public authorities, including the EU’s institutions, may hold information that can be readily ‘extracted’ even though it is not collected in a ‘document’. A recent judgment of the Court of First Instance addresses the distinction between the two approaches. See WWF European Policy Programme v. Council of the European Union, Case T-264/04, 25 April 2007, paras. 75-80. In that case, the Court upheld the Council’s refusal to provide WWF with information on the contents of discussions that had not been minuted. The information was available but not in the form of minutes, a ‘document’. The Court refused to take either the Aarhus Convention or the proposed Regulation implementing the Convention for the EU institutions into account on the grounds that the Convention was not yet in force (for the EU, at any rate) and the Regulation had yet to take effect. This situation has now changed. The Community is Party to the Convention and Regulation 1367/2006 is in force. The revision of Regulation 1049/2001 offers an excellent opportunity to clarify that the EU has chosen for a system of access to information.

Q8. Should the Regulation indicate events before and after which exceptions would or would not apply?

Yes.

We believe that the Regulation should specify after which time documents withheld to the public can become available. However, the withholding of documents to the public under special circumstances should be the exemption rather than the norm. For instance, access denied on the grounds of protection of the institution’s decision-making process, a frequently-invoked exception, appears to be less necessary once the decision-making process is concluded.

The Health & Environment Alliance (HEAL) is an international non-governmental organisation that aims to improve health through public policy that promotes a cleaner and safer environment. Our work draws on the findings of the environmental health science revolution, which is revealing the impact of environmental degradation on health in an ever-widening range of diseases and conditions. We represent a diverse network of more than 50 citizens’, patients’, women’s, health professionals’ and environmental organisations across Europe with a strong track record in bringing environmental health science and policy to an increasing number of fora. Our vision is that of a healthy planet for healthy people.