



EUROPEAN COMMISSION

Brussels, 2.8.2012
COM(2012) 429 final

REPORT FROM THE COMMISSION

**on the application in 2011 of Regulation (EC) No 1049/2001 regarding public access to
European Parliament, Council and Commission documents**

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FOREWORD

This report, drawn up pursuant to Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, covers the year 2011 and is based on statistical data which are summarised in the annex.

These statistics reflect the number of applications and not of requested documents. In practice, applications may cover a single document or entire files concerning a specific procedure. Applications for access to documents which were publicly accessible at the time of the request, are not included.

1. Revision of Regulation (EC) No 1049/2001
 - 1.1. Two different proposals for the revision of Regulation 1049/2001 tabled by the European Commission are still subject to interinstitutional reflection. The first proposal for a recast of the Regulation, submitted by the Commission on 30 April 2008, introduces a series of substantial amendments, clarifying the interpretation of Regulation 1049/2001. The second proposal was submitted by the Commission on 21 March 2011 with a view to adapt Regulation 1049/2001 to the formal requirements of the Treaty of Lisbon by extending the institutional scope of the Regulation to all the European Union institutions, bodies, offices and agencies, with some restrictions as regards the European Court of Justice, the European Central Bank and the European Investment Bank.
 - 1.2. The European Parliament adopted its position with regard to both proposals in the first reading on 15 December 2011 proposing 63 amendments. The Danish Presidency of the Council has been considering various options for taking the legislative process forward with a view to reach an agreement between the European Parliament, the Council and the Commission.
2. Registers and Internet Sites
 - 2.1. In 2011, 19,956 new documents were added to the register of Commission documents (see table in annex).
 - 2.2. According to Article 17 (1) of Regulation 1049/2001 the Commission has to provide in its annual reports the number of documents in its possession which are “sensitive” in the meaning of Article 9(1) of the Regulation² and have therefore not been

¹ OJ L 145, 31.5.2001, p. 43

² "Documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET",

recorded in the register. The Commission's public register covered until the end of 2011 the documents of the COM, C, OJ, PV and SEC series. No sensitive documents were created or received by the Commission in 2011, that would fall within one of these categories of documents.

- 2.3. The table below shows the statistics for 2011 on consultation of the Openness and Access to Documents website on EUROPA.

	Number of visitors	Number of sessions	Pages viewed
Total	41,408	46,191	425,434
Monthly average	3,451	3,849	35,453

3. Cooperation with the other Institutions subject to the Regulation

The inter-institutional committee set up pursuant to Art. 15(2) of the Regulation was not convened during 2011. The three institutions (European Parliament, Council and Commission) maintained regular contacts at the administrative level with a view to ensure a consistent application of the Regulation.

4. Analysis of Access Applications

- 4.1. In 2011, the flow of access requests at the **initial stage** has remained fairly stable with a very small increase in the number of applications (6447 in 2011 in comparison with 6361 in 2010) and even smaller decrease in a number of replies based on Regulation 1049/2001 (6055 in 2011 in comparison with 6127 in 2010).
- 4.2. As regards the confirmatory stage, the number of the applications received diminished by almost 9 % (165 new confirmatory applications in 2011 against 181 in 2010). The total number of responses to confirmatory applications closely corresponded to the number of applications received (162 cases closed in 2011 in comparison with 150 in 2010). Among those, 144 replies (89 %) have been the **confirmatory decisions** on access to documents under Regulation 1049/2001. Their number increased in 2011 by 18% in comparison with 2010 where 122 such decisions have been issued.
- 4.3. In 2011, the DG for Taxation and Customs Union received the highest number of initial requests (7.80%), very closely followed by the DG Competition with 6.99% of initial applications, and the DG Health and Consumer Protection, with 6.96%. It is worth noting the increase of the interest in the recently reorganised sectors where four new Directorates-General replaced previously existing two: Directorates-General Mobility and Transport together with Energy (former DG Transport and Energy) as well as Directorates-General Environment together with Climate Action (former DG Environment).

"SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters" (Article 9(1)).

Although the external relations of the EU have become the competency of the newly organised European External Action Service, in 2011 this was not yet reflected in the statistics of the Commission, as its registers continued to cover the major part of the respective requests under Regulation 1049/2001.

- 4.4. The academic world proved once again to be the most active category of applicants, accounting for 25.73% of initial applications. As in the previous years it has been followed by the law firms with 11.30% and civil society (NGO's, interest groups) with 8.59% of the total number of applications. For 34.78 % of the applications, the socio-professional profile is undefined.
- 4.5. The geographical breakdown of initial applications also remained similar to previous years with a slight increase as regards the ever largest proportion of applications coming from Belgium (21.42%). An almost equal number of application originated from Italy and from Germany (12.37% and 12.27% respectively). None of the other Member States, exceeded 10% of applications, the largest numbers coming from the highly-populated Member States, i.e. France, Spain, the United Kingdom, the Netherlands and Poland. The shares of applications from the 12 "new" Member States are still slightly below the corresponding shares originating from the "old" Member States.
5. Application of Exceptions to the Right of Access
 - 5.1. In 2011, the proportion of applications that were fully refused in the first instance remained almost identical to the previous year (12.17% in 2011 against 12.47 % in 2010). Full disclosure, has been given in four out of every five cases (80.20% against 82.16% in 2010) whereas, a percentage of documents disclosed partially slightly increased in comparison to the previous years to reach 7.63 % (in comparison with 5.37 % in 2010).
 - 5.2. The number of cases where, following a confirmatory application, the Commission reversed the position taken by its services by fully disclosing previously refused documents, remained fairly stable (14.58% against 15.57% in 2010). However, there were less cases in which a refusal was fully confirmed and significantly more cases where wider access was granted following a confirmatory application.
 - 5.3. Although the protection of the Commission's decision-making process (Article 4(3)) accounted for a slightly diminished percentage of grounds of refusal in comparison with the previous year (25.73% against 26.42% in 2010), it comes first on the list of the most frequently invoked exceptions, overtaking the exception of the protection of the purpose of inspections, investigations and audits (third indent of Article 4(2)), which dropped last year by almost 5 % to reach 21.90% of cases (against 26.63 in 2010).
 - 5.4. The increasing tendency is to be noted as regards the protection of commercial interests (16.83% against 11.84% in 2010) and the protection of international relations (12.02% against 9.83% in 2010)
 - 5.5. The most frequently invoked ground for confirming a refusal of access was, as in the previous years, the protection of the purpose of investigations (32.68% compared with 32% in 2010).

- The protection of the Commission's decision-making process, was invoked in 19.33% of cases (exactly the same as in 2010) but this number is a cumulated result of an increase as regards the cases where the decision-making process was on-going (15.33% against 11.33% in the previous year), and the parallel decrease of cases concerning opinions for internal use, where the decision had already been taken (4 % in comparison with 8% in 2010).
- An important increase is to be noted as regards the protection of privacy and integrity of individuals (20.67% against 9.33% in 2010). On the other hand, the protection of commercial interests was invoked slightly less frequently than in the previous years (14.10% compared with 16.67% in 2010), and the exception of the protection of court proceedings and legal advice even more so (1.33% against 10% in the previous year).

6. Complaints to the European Ombudsman

- 6.1. In 2011 the Ombudsman closed the following 17 complaints against the Commission's handling of requests for access to documents:

1 case closed without a finding of any form of maladministration			
1735/2010/MHZ			
8 cases closed with a critical and/or a further remark			
56/2007/PB	3196/2007/(BEH)VL	1633/2008/DK	1294/2009/TN
271/2010/GG	1403/2010/GG	2073/2010/AN	339/2011/AN
8 cases closed without further action			
715/2009/ANA	1861/2009/(JF)AN	1051/2010/BEH	1109/2010/VL
1577/2010/GG	1581/2010/(FS)GG	2609/2010/BEH	2691/2010/(VL)GG

- 6.2. In the course of the year the Ombudsman opened 10 new inquiries where access to documents was either the main or a subsidiary part of the complaint. This is considerably less than in 2010, when 22 investigations were opened.

7. Judicial Review

As in previous years, significant new case law was delivered in 2011³.

- 7.1. The Court of Justice handed down one important judgment on appeal in the *My Travel* case⁴. The Court reinforced the burden of proof for invoking the exceptions aimed at protecting the decision-making process and legal advice with regard to internal documents related to a non-legislative matter, where a decision has already been adopted.

³ For details of each case referred to below, see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

⁴ Case C-506/08 P *Sweden/MyTravel and Commission*, of 21/7/2011.

7.2. As for the General Court, it has handed down 6 judgments related to the right of access to document:

T-362/08 <i>IFAW v Commission</i> , judgment of 13.1.2011	T-250/08, <i>Batchelor v Commission</i> , judgment of 24.5.2011	Joined cases T-109/05 et T-444/05, <i>Navigazione Libera del Golfo v Commission</i> , judgment of 24.5.2011
T-161/04, <i>V. Jordana v Commission</i> , judgment of 7.7.2011	T-29/08, <i>LPN v Commission</i> , judgment of 9.9.2011	T-437/08 <i>CDC v Commission</i> , judgment of 15.12.2011

In the *Batchelor* and *IFAW II* judgments, the Court has provided important clarifications as regards the assessment of Member States' objections to disclosure of documents originating from them but held by the Commission.

In *Navigazione Libera del Golfo*, the General Court has annulled the Commission's decision taken prior to the *Sweden v Commission (IFAW I)* judgment of the Court of Justice and in which the objection of a Member State was invoked without further motivation for not disclosing a document originating from that Member State.

In its judgment rendered in the *Jordana* case, the Court clarified that Article 4(1)(b) of the Regulation is an indivisible provision requiring that any undermining of the privacy or integrity of the individual must always be examined and assessed in conformity with the EU legislation regarding the protection of personal data, in particular with Regulation 45/2001.

In the *LPN* case, the Court confirmed the existence of a general presumption that disclosure of documents in infringement proceedings in principle undermines the protection of the purpose of investigation activities, as long as these proceedings are ongoing.

Finally, in the *CDC* judgment, the Court ruled that the protection of the purpose of the investigations could not be invoked to refuse access to a list of documents.

Three further cases have to be mentioned which have been removed from the register following the withdrawal by the applicant:

T-88/11 <i>BIA Separations v Commission</i>	T-14/11 <i>Timab Industries and CFPR v Commission</i>	T-399/07, <i>Basell Polyolefine v Commission</i>
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- 7.3. The Court has decided not to adjudicate in five cases and therefore ordered their removal from the register:

T-411/09, <i>Terezakis v Commission</i>	T-291/10, <i>A. Martin v Commission</i>	T-395/10 <i>Stichting Corporate Europe Observatory v Commission</i>
T-120/10 <i>ClientEarth and Others v Commission</i>	T-449/10 <i>ClientEarth and Others v Commission</i>	

- 7.4. 15 new cases were brought in 2010 against Commission decisions under Regulation (EC) No 1049/2001.

T-603/11 <i>Ecologistas en Acción-CODA v Commission</i>	T-545/11 <i>Stichting Greenpeace Nederland and PAN Europe v Commission</i>	T-534/11 <i>Schenker v Commission</i>
T-516/11 <i>MasterCard and Others v Commission</i>	T-480/11 <i>Technion - Israel Institute of Technology and Technion Research & Development v Commission</i>	T-362/11 <i>Stichting Greenpeace Nederland and PAN Europe v Commission</i>
T-341/11 <i>Ecologistas en Acción-CODA v Commission</i>	T-330/11 <i>MasterCard and Others v Commission</i>	T-278/11 <i>ClientEarth and Others v Commission</i>
Case T-211/11 <i>Timab Industries and CFPR v Commission</i>	T-111/11 <i>ClientEarth v Commission</i>	T-93/11 <i>Stichting Corporate Europe Observatory v Commission</i>
T-14/11 <i>Timab Industries and CFPR v Commission</i>	T-88/11 <i>BIA Separations v Commission</i>	T-447/11 <i>Catinis v Commission</i>

- 7.5. Also, three new appeals have been brought to the Court of Justice against order/judgment of the General Court.

C-208/11P <i>Internationaler Hilfsfonds v Commission</i>	C-554/11 P <i>Internationaler Hilfsfonds v Commission</i>	Case C-135/11 P <i>IFAW Internationaler Tierschutz-Fonds v Commission</i>
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8. Conclusions

After nine years of a continuous increase, the number of access requests submitted to the Commission has remained at the same level in 2010 and 2011. With almost 6500 requests per year, the Commission handled by far the largest number of access requests of all institutions and bodies of the European Union.

This stabilisation of the volume of requests is possibly an indication that the right of access to documents has reached a significant level of public recognition among European citizens, civil society and economic operators. In the spirit of the Treaty of Lisbon, such awareness paves the way for increased public debate and their closer participation in shaping European policies.

On the other hand, the need to make requests for access to documents diminishes as the Commission gradually increased pro-active disclosure of documents and information through public registers and websites.

Active transparency has been largely achieved with regard to the legislative activity. A significant amount of access requests and almost all confirmatory applications concern the Commission's activities in the field of monitoring the application of EU law. These requests have to be handled in parallel with the investigations concerned. In such cases the Commission has to strike the right balance between ensuring transparency of its activities and protecting other rights which are guaranteed by law and by case law of the European Courts.

ANNEX

Statistics relating to the application of Regulation (EC) No 1049/2001

1. NUMBER OF DOCUMENTS ENTERED IN THE REGISTER

	COM	C	OJ	PV	SEC	Total
2011	2414	14025	131	93	3293	19956

INITIAL REQUESTS

2. APPLICATIONS RECEIVED AND HANDLED

	2009	2010	2011
Applications received	5401	6361	6477
Replies given ^{5 6}	6636	7148	7075
Replies given based on Regulation 1049/2001	5055	6127	6055

3. RESULT

	2009		2010		2011	
	No	%	No	%	No	%
Access granted	4258	84.23	5034	82.16	4856	80.20
Access refused	589	11.65	764	12.47	737	12.18
Partial access	208	4.11	329	5.37	462	7.62
total	5055	100	6127	100	6055	100

⁵ Please note that a single request can concern several documents and can consequently give rise to several different replies;

⁶ Please note that the category "Replies given" includes the replies given outside the scope of Regulation 1049/2001, for example replies given under Regulation 45/2001;

CONFIRMATORY REQUESTS

4. APPLICATIONS RECEIVED AND HANDLED

	2009	2010	2011
Applications received	140	181	165
Replies to applications	134	152	162
Decisions on confirmatory applications based on Regulation 1049/2001	120	122	144

5. RESULT

	2009		2010		2011	
	No	%	No	%	No	%
Confirmation	27	22.50	61	50	61	42.36
Partial revision	33	27.50	42	34.43	62	43.05
Full revision	60	50	19	15.57	21	14.58
total	120	100	122	100	144	100

(1) BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

6. INITIAL REQUESTS

	2009	2010	2011
4.1.a. 1 st indent – Protection of public security	1.36	1.94	2.40
4.1.a. 2nd indent Protection of defence and military matters	0.54	0.14	0.39
4.1.a. 3rd indent - Protection of international relations	8.17	9.83	12.02
4.1.a. 4th indent – Protection of the financial, monetary or economic policy	2.09	2.15	1.88
4.1.b. Protection of privacy and the integrity of the individual	6.99	9.76	8.90
4.2.1st indent - Protection of commercial interests	13.99	11.84	16.83
4.2 2nd indent - Protection of court proceedings and legal advice	9.81	7.32	6.76
4.2 3rd indent - Protection of the purpose of inspections, investigations and audits	27.61	26.63	21.90
4.3 subparagraph 1– Decision-making process, no decision yet taken	17.80	16.80	17.15
4.3. subparagraph 2- Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	7.81	9.62	8.58
4.5. Refusal by Member State/third author	3.81	3.94	3.18
total	100	100	100

7. CONFIRMATORY REQUESTS

	2009	2010	2011
4.1.a. 1 st indent – Protection of public security	2.55	2,67	1.33
4.1.a. 2nd indent - Protection of defence and military matters	0	0	2.00
4.1.a. 3rd indent - Protection of international relations	4.38	6,67	4.67
4.1.a. 4th indent – Protection of the financial, monetary or economic policy	3.28	3,33	3.34
4.1.b. - Protection of privacy and the integrity of the individual	14.23	9,33	20.67
4.2. 1st indent - Protection of commercial interests	17.52	16.67	14.66
4.2. 2nd indent - Protection of court proceedings and legal advice	5.47	10	1.33
4.2. 3rd indent - Protection of the purpose of inspections, investigations and audits	25.91	32	32.68
4.3 subparagraph 1 – Decision-making process, no decision yet taken	12.77	11,33	15.33
4.3. subparagraph 2 - Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	13.87	8	4.00
4.5. Refusal by Member State	-	-	-
total	100	100	100

BREAKDOWN OF REQUESTS

8. ACCORDING TO SOCIAL AND OCCUPATIONAL PROFILE OF APPLICANTS (%)

	2009	2010	2011
Academics	21.29	23.24	25.73
Lawyers	10.24	10.69	11.30
Civil society (interest groups, industry, NGOs. etc.)	9.85	8.18	8.59
Public authorities (other than the EU institutions)	7.33	13.56	8.20
Other EU institutions	3.77	8.32	8.15
Journalists	2.02	3.35	3.25
Not specified	45.5	32.68	34.78
total	100	100	100

9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)

	2009	2010	2011
Belgium	18.26	17.95	21.42
Italy	7.18	8.85	12.37
Germany	16.61	16.62	12.27
France	8.01	9.05	8.90
United Kingdom	6.23	7.24	8.59
Spain	6.27	6.86	7.16
Netherlands	5.45	4.43	4.18
Poland	2.86	2.76	2.68
Luxembourg	1.71	1.99	2.12
Denmark	1.63	2.02	2.11
Sweden	2.13	2.18	1.81
Finland	0.78	0.81	1.57
Austria	1.98	2.08	1.38
Portugal	1.61	1.16	1.15
Greece	1.06	1.22	1.10
Ireland	0.72	1.49	1.02
Hungary	0.70	0.89	0.96
Czech Republic	1.11	4.23	0.93
Bulgaria	0.56	0.69	0.93
Romania	0.93	1.11	0.87
Slovakia	0.50	0.56	0.56
Lithuania	0.35	0.31	0.42
Slovenia	0.39	0.52	0.31
Cyprus	0.20	0.20	0.25
Estonia	0.17	0.09	0.19
Latvia	0.06	0.13	0.15
Malta	0.30	0.22	0.12
Non-EU European countries	0.83	0.50	0.40
North America	0.37	0.11	0.23
Australia and New Zealand	0.07	0.09	0.03
Africa	0.20	0.05	0.02
South America	0.09	0.05	0.02
Asia	0.19	0.04	0.06
Not specified	10.57	3.49	3.73
total	100	100	100

10. ACCORDING TO AREA OF INTEREST (%)

Directorate-General / Service	2009	2010	2011
SG – Secretariat General	10.10	11.64	10.12
TAXUD – Taxation and Customs Union	6.20	5.30	7.80
COMP – Competition	7.03	9.07	6.99
SANCO – Health and Consumer	4.69	5.44	6.96
ENV – Environment ⁷	8.37	4.86	6.37
ENER – Energy	-	2.91	5.86
MARKT – Internal market and services	7.27	6.14	5.72
ENTR – Enterprise and Industry	4.55	4.48	4.84
HOME - Home Affairs	-	1.63	4.74
TRADE – Trade	2.08	3.06	3.47
DEVCO – Development and Cooperation-EuropeAid (former DEV + AIDCO)	2.75	2.77	3.30
MOVE – Mobility and Transport	-	3.13	3.02
SJ – Legal Service	1.80	2.68	2.76
AGRI – Agriculture and Rural Development	4.07	3.15	2.62
JUST - Justice (former JLS) ⁸	7.74	6.75	2.54
RELEX – External Relations ⁹	2.25	3.29	2.39
HR - Human Resources and Security + OIB + OIL - Offices for Infrastructure and Logistics in Brussels and Luxembourg + PMO – Office for Administration and Payment of Individual Entitlements	3.15	2.29	2.34
REGIO – Regional Policy	3.67	3.06	2.29
CLIMA – Climate Action	-	1.21	2.22
INFSO – Information Society	2.29	1.79	1.98
EMPL – Employment, Social Affairs and Inclusion	3.28	2.74	1.64
ECFIN – Economic and Financial Affairs	1.87	2.32	1.57
RTD – Research and Innovation + JRC – Joint Research Centre	1.74	1.82	1.27
COMM – Communication	0.41	0.74	1.26
EAC – Education and Culture	1.44	1.13	1.05
ELARG – Enlargement	1.74	1.47	1.04
BUDG – Budget	1.07	1.24	1.02
MARE - Maritime Affairs and Fisheries	0.79	0.66	0.95
OP – Publications Office	0.19	0.19	0.37
ECHO – Humanitarian Aid and Civil Protection	0.24	0.28	0.33
OLAF – European Anti-Fraud Office	0.24	0.27	0.25
EPSO – European Personnel Selection Office	0.26	0.14	0.23
ESTAT – Eurostat	0.11	0.31	0.20
DGT – Translation	0.13	0.36	0.14

⁷ Please note that DG ENV split into DG ENV and DG CLIMA in 2010;

⁸ Please note that DG JLS split into DG JUST and DG HOME in 2010;

⁹ Please note that most of DG RELEX activity has been taken over by the European External Action Service as of 1 January 2011;

CAB – Commissioners' Cabinets	0.30	0.28	0.11
BEPA – Bureau of European Policy Advisers	0.06	0.03	0.11
DIGIT – Informatics	0.07	0.09	0.09
IAS – Internal Audit Service	0.02	0.09	0.05
SCIC – Joint Interpreting and Conference Service	0.02	0.08	0.00
TREN ¹⁰	8.02	1.10	-
total	100	100	100

¹⁰ Please note that DG TREN split into DG ENER and DG MOVE in 2010;