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from: Secretary-General of the European Commission,  
signed by Ms Patricia BUGNOT, Director

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to: Mr Javier SOLANA, Secretary-General/High Representative

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Subject: Commission Staff Working Paper - Annex to the Report on the  
application in 2004 of Regulation (EC) No 1049/2001 regarding public  
access to European Parliament, Council and Commission documents

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Delegations will find attached Commission document SEC(2005) 1025.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.7.2005  
SEC(2005) 1025

**COMMISSION STAFF WORKING PAPER**

**Annex to the:**

**Report on the application in 2004 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents**

{COM(2005)348 final}

## FOREWORD

Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>, applicable since 3 December 2001, stipulates that each institution must publish an annual report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the public register.

This working paper complements the third report, which covers 2004, presented by the Commission under that Article. It analyses in detail the various aspects of the implementation of the Regulation. The first chapter deals with specific measures relating to application of the Regulation, the second with developments in respect of the registers and information for the public, and the third with interinstitutional cooperation, the fourth analyses the requests for access, the fifth focuses on the application of exceptions to the right of access, the sixth deals with the complaints examined by the Ombudsman and the seventh gives details of legal action.

The tables of statistics at the end of the paper make it possible to monitor implementation of the Regulation from the outset. It should be emphasised that the statistics refer solely to requests for access to unpublished documents and do not include orders for documents already published or requests for information.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

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## **1. SPECIFIC MEASURES RELATING TO APPLICATION OF THE REGULATION**

### **1.1. Adoption of a report on the implementation of the principles of the Regulation**

Article 17(2) of Regulation (EC) No 1049/2001 provides that, at the latest by 31 January 2004, the Commission must publish a report on the implementation of the principles of the Regulation.

In 2003, with a view to preparing this report, the Commission carried out an initial evaluation of the implementation of the Regulation. In the absence of any significant body of case law, the evaluation was based mainly on the practical experience of implementing the Regulation gained by the departments concerned in the three institutions.

After its adoption on 30 January 2004, the evaluation report was published<sup>2</sup>. The Commission concluded in the report that the application of the Regulation had not met problems which would give grounds for an amendment in the short term. It felt that a review of the Regulation should be carried out in relation to the entry into force of the Constitutional Treaty and should be based on wider experience and a more substantial body of case law. Lastly, it recommended that a public debate be launched before formulating any proposal to amend or replace the Regulation.

The Commission report was discussed in the Council Information Group, but has not yet been debated in the European Parliament.

### **1.2. Application of the Regulation to the Community agencies**

On 1 October 2003 Regulation No 1049/2001 became applicable to the Community agencies existing on that date, which adopted the rules for implementing it in 2004. Provision is made to apply the Regulation systematically to newly created agencies under a provision of the basic act setting them up.

The agencies are free to apply the Regulation as they see fit. However, the Commission offers them assistance in preparing the implementing rules and interpreting the provisions of the Regulation.

### **1.3. Proposals relating to access to information on the environment**

On 24 October 2003 the Commission presented a proposal for a Regulation relating to the application of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies<sup>3</sup>.

This proposal makes provision for extending the scope of Regulation No 1049/2001 to all Community institutions and bodies as regards access to environmental information. However, these provisions will apply to the Court of Justice only in cases where it does not act as a judicial body.

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<sup>2</sup> COM(2004) 45 final.

<sup>3</sup> COM(2003) 622 final.

Parliament adopted its opinion at first reading at the part-session from 28 March to 1 April 2004. And the Council agreed the proposal on 20 December 2004.

## **2. REGISTERS AND INFORMATION FOR THE PUBLIC**

### **2.1. Development of the register of internal Commission documents**

The internal document register mainly covers the Commission's legislative activity, i.e. proposals for acts presented to Parliament and the Council (COM series) as well as autonomous Commission acts (C series). In addition, it indicates the working papers linked to legislative work as well as basic administrative documents (SEC series). Lastly, the agendas and minutes make it possible to follow Commission activity over time.

Following enlargement of the European Union on 1 May 2004, the register was adapted in order to cover the twenty official languages.

Final COM documents, as well as agendas and minutes of Commission meetings, are directly accessible in full. Technical work has continued with a view to adapting the register to make other document series directly accessible.

### **2.2. Development of the register concerning committee work**

A large number of acts adopted by the Commission fall within the implementing powers conferred on it by the Council. In the exercise of these powers the Commission is assisted by committees composed of representatives of the Member States ("comitology" procedure)<sup>4</sup>.

In December 2003, in order to provide the public with more information on the work of these committees, the Commission created a specific register covering documents relating to the work of these committees for transmission to the European Parliament under the "comitology" decision referred to above. This register complements the internal documents register, which contains acts adopted by the Commission.

The "comitology" register contains the agendas of committee meetings, the draft implementing measures relating to acts adopted under the codecision procedure, the results of voting, summary records of meetings, including lists of the authorities and bodies to which the persons representing the Member States belong. Almost all these documents are directly accessible in full. The draft implementing measures are in principle accessible to the public once the committee has delivered its opinion.

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<sup>4</sup> Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), OJ L 184, 17.7.1999, p. 23.

### **2.3. Special treatment for sensitive documents**

Article 9 of the Regulation provides for special treatment for sensitive documents<sup>5</sup>. Under Article 9(3) sensitive documents are recorded in the register only with the consent of the originator.

In 2004, no document covered by the register was sensitive within the meaning of Article 9 of Regulation No 1049/2001.

### **2.4. The "access to documents" site on the Internet**

In 2004, the Openness and access to documents site on the EUROPA server registered a total of 1 384 108 consultations, calculated on the number of screens displayed, i.e. an average per working day of around 5 250 consultations, a threefold increase over 2003.

This site includes:

- a guide explaining to citizens how to exercise their right of access and how to obtain documents accessible to the public (still for the moment in the eleven official languages before enlargement);
- a screen giving access to the various registers and other sources of information;
- the text of the Regulation and the implementing rules (still for the moment in the eleven official languages before enlargement);
- links to judgments by the Court of Justice and the Court of First Instance concerning transparency;
- links to the sites of Parliament and the Council;
- information on national legislation concerning transparency.

### **2.5. Interinstitutional information brochure**

The brochure common to the three institutions, published in 2002 in the eleven Community languages at the time<sup>6</sup>, has been translated into the nine new Community languages. These brochures will be available in representations, delegations, relays and networks.

### **2.6. Pilot project on information in the field of justice**

In 2003 the three institutions agreed to launch a feasibility study on the creation of an information tool in the area of justice, freedom and security. This activity area,

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<sup>5</sup> "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', 'SECRET' or 'CONFIDENTIAL' 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 in Article 4(1)(a), notably security, defence and military matters" (Article 9(1)).

<sup>6</sup> Catalogue No KA-41-01-187-FR-C ISBN 92-894-1904-0.



which, in part, falls within intergovernmental cooperation, is not adequately covered by the databases relating to Community legislation. A prototype should be developed in 2005. This new information tool should increase transparency in an area of particular interest to the public.

### **3. COOPERATION WITH THE OTHER INSTITUTIONS AND THE MEMBER STATES**

#### **3.1. Interinstitutional cooperation**

Article 15(2) of Regulation No 1049/2001 provides for the establishment of an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents. This committee, which was set up on 13 March 2002, held three working sessions at political level. It did not meet at that level in 2004. However, the services responsible for implementing Regulation 1049/2001 in the Secretariats-General of Parliament, the Council and the Commission continued to exchange information and experiences in order to identify best practices and to ensure that the Regulation was applied consistently.

To that end, a Memorandum of Understanding concluded by the departments of the three institutions provides for them to consult each other when they receive a request for access to a document originating in one of the other two institutions. Consultation of this kind is quite frequent since requests for access regularly concern documents originating, in whole or in part, in one of the other two institutions.

#### **3.2. *Transparency in Europe II* Conference in The Hague, November 2004**

On 25 and 26 November 2004 the Dutch Presidency organised a second conference on transparency in Europe in The Hague for the purpose of reviewing for the first time how Regulation No 1049/2001 was being applied at the time of accession of the ten new Member States. A first conference on the same theme had taken place on 15 and 16 February 2001, at the time when negotiations on the adoption of the Regulation had entered a critical stage.

The main themes of the Conference were as follows<sup>7</sup>:

- transparency as crucial to the drawing-up of a "new social contract" between the citizens and the Union;
- transparency in the Constitutional Treaty;
- public access to documents in the new Member States;
- striking a balance between transparency and public security;
- advisability of harmonising Community and national legislation on access to documents.

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<sup>7</sup> See Proceedings of the Conference published by the Ministry of the Interior under the title *Transparency in Europe II, Public Access to Documents in the EU and its Member States*, ISBN 90541 40925.

The conclusions were that:

- considerable progress had been made in recent years in the matter of transparency;
- Regulation No 1049/2001 had operated very satisfactorily;
- the legislation of the Member States is relatively similar, but is still applied differently.

At the conference, the European Law Section of the Faculty of Law of Leiden University presented a comparative analysis of the legislation of the 25 Member States on access to information.

#### **4. ANALYSIS OF REQUESTS FOR ACCESS**

##### **4.1. Volume of demand**

The continuing increase in the number of requests for access since the Regulation was adopted was repeated last year:

- between 2002 and 2003, the number of initial requests rose from 991 to 1 523, i.e. an increase of 53.7%;
- in 2004, 2 600 initial requests were registered, i.e. 1 077 more than in 2003, or an increase of 70.72%.

Processing of these initial requests resulted in 4 051 individual documents being examined (compared to 2 936 in 2003). 954 of these documents had already been disclosed; the other 3 097 were examined to see what damage would be done by disclosing them. However, requests for access, in fact, related to a far greater number of documents than 4 051 because this figure does not include the growing number of requests involving vast numbers of unspecified documents, as in general in the case of applications for access to complete files relating, for example, to state aid or cartels, or applications for "*all documents concerning*" a given subject. These requests can involve hundreds of documents totalling up to several tens of thousands of pages. In such cases it is not always possible to draw up a detailed list of all the individual documents and the file is analysed by categories of identical document.

The increase in confirmatory requests was less marked:

- between 2002 and 2003, the number rose from 96 to 143, i.e. an increase of 48.96%;
- in 2004, the number of confirmatory requests rose to 162, i.e. 19 more than in 2003, or an increase of 13.29%.

The increase in the number of confirmatory applications was considerably lower than the increase in the number of initial requests, while the proportion of negative replies to initial requests remained stable. It follows that the proportion of refusals at the initial stage resulting in confirmatory requests dropped. This could be explained by

the more detailed grounds given for refusal of access at the stage of the initial request.

#### **4.2. Areas of major interest**

The breakdown of requests by area of interest remained more or less the same as in previous years. However, it should be emphasised that, given the considerable increase in the total number of requests, even areas where the percentage dropped slightly registered an increase in demand in absolute terms. Thus, the stable percentage of requests in the area of external trade (up from 2.03% to 2.27%) corresponds in reality to a doubling of the number of requests. The percentage of requests in the area of indirect taxation fell from 10.82% to 7.5%, but the number of requests nevertheless increased by 18.9%.

Competition, customs, indirect taxation, the internal market and the environment continue to rouse most interest, accounting for almost 40% of applications. The percentage of requests relating to the competition policy even increased, from 13.7% in 2003 to 14.58% in 2004. The percentage of requests fell slightly in the other three areas. The percentage of requests for access to general documents treated by the Secretariat-General is also on the decline.

Note should be taken of the growing interest in the area of transport and energy, where the percentage rose from 3.54% in 2003 to 5.54% in 2004; likewise for the area of freedom, security and justice, where the percentage increased from 2.3% to 3.81%. In both cases, the increase corresponds to a tripling of the number of requests for access.

#### **4.3. Professional profile of applicants**

The breakdown of applications by socio-professional category was not changed significantly. Almost a third of the requests come from persons whose professional profile is not specified. Most of them are sent by e-mail or by using an electronic form on the Internet.

Interest groups of various kinds, NGOs and companies account for over a quarter of the requests. The percentage of requests from law firms has dropped sharply. However, it should be pointed out that the requests from lawyers are the most voluminous and complex and frequently relate to complete files, mainly in the area of competition policy. The number of requests from students and research workers is steady, at approximately 10%, while the already very low figures for journalists have fallen sharply, from 3% to 0.5%.

#### **4.4. Geographical distribution of requests**

More than a quarter of requests (26.42%) come from persons or bodies established in Belgium because of the number of multinational companies, international law firms and associations or NGOs operating at European level with an office in Brussels. Otherwise, the majority of requests come from Germany (12.77%), Italy (10.35%), France (8.62%), the United Kingdom (8%), Spain (5.69%) and the Netherlands (4.96%). Just over half of all requests came from these six countries. The new Member States' share remains modest (4.31%). It is worth noting that the percentage

of cases in which the geographical origin of the request could not be identified has fallen by over a half, from 12.59% to 5.65%.

## **5. EXCEPTIONS TO THE RIGHT OF ACCESS**

### **5.1. Rate of positive replies**

#### *5.1.1. Initial requests*

The percentage of positive replies in the initial request stage is roughly the same as in 1993, with a slight drop from 69.31% to 68.19%. In 64.8% of cases the whole document was disclosed, and in 3.39% of cases requesters were granted partial access.

The percentage of positive replies does not include the large number of requests for access to documents which had already been disclosed (close to one in five). It should also be noted that in approximately 2% of cases the document in question did not exist.

#### *5.1.2. Confirmatory requests*

The percentage of confirmations of initial decisions increased significantly, from 61.57% to 73.21% of cases.

The percentage of entirely positive replies after an initial refusal fell from 30.13% to 9.09%. The percentage of decisions granting partial access after an initial refusal more than doubled, from 8.29% to 17.7%.

These substantial changes appear to be the result of several factors:

- The relatively large number of documents disclosed in response to initial requests. The proportion of positive replies has in fact remained steady despite the substantial increase in the number of requests for access, and the volume and complexity of these requests. This has led to a reduction in the number of refusals without grounds.
- The significant increase in the number of documents to which partial access was given.
- The provision of more detailed reasons for negative decisions. The grounds for the refusal are explained in greater detail at the initial stage by the Directorates-General dealing with requests. This could explain both the relative fall in the number of confirmatory requests in relation to initial requests (cf. point 4.1. above) and the significant reduction in the percentage of entirely positive replies in the confirmatory stage.

It should be pointed out in this respect that an increasing number of confirmatory requests concern access to documents relating to infringements, state aid, merger control procedures or cartels. They are often made by law firms with a view to obtaining documents that can be used as part of judicial proceedings. Requests which meet a need for public information are normally granted in the initial phase.

Following completion of the process for handling requests, the rate of positive replies stands at 70% (compared with 72.82% in 2003); in 65.45% of cases the whole document was disclosed and in 4.58% of cases partial access was granted.

## **5.2. Reasons for refusal**

### *5.2.1. At the initial stage*

On the whole, the breakdown of negative decisions by reason for refusal has not changed significantly. There has, however, been a clear increase in the number of refusals based on the exception relating to the protection of financial, monetary or economic policy (fourth indent of Article 4(1)(a) of Regulation No 1049/2001). The percentage has risen from 1.0% to 8.06%. This is due to the very keen interest shown in the application of the growth and stability pact. On the other hand, the percentage of requests refused because of objections by the originating Member State to the disclosure of a document sent by it to the Commission (Article 4(5)) has fallen by half, from 5.96% to 2.6%.

The main reason for refusal is still the desire to protect the purpose of inspections, investigations and audits (third indent of Article 48(2)), though the percentage of refusals on those grounds has fallen slightly, from 37.55% to 31.81%. In most cases the refusals relate to requests for access to letters of formal notice, reasoned opinions or other documents relating to ongoing infringement procedures or documents relating to investigations concerning competition policy.

The second reason for refusal concerns protection of the Commission's decision-making process (Article 4(3)). The percentage of refusals based on this exception went up from 20.92% to 25.44%. The increase is mainly due to the number of refusals relating to documents containing opinions intended for internal deliberations (second subparagraph of Article 4(3)).

### *5.2.2. At the confirmatory stage*

The main reasons for confirming refusal of access were the same as for the initial stage:

- protection of the purpose of investigations (26.32%); this percentage is however slightly lower than in 2003 (30.14%);
- protection of the decision-making process (21.75%); this exception was invoked more often than in 2003 (18.26%).

However, it is worth highlighting the diametrically opposite trends for the two categories of protection of the decision-making process:

- the percentage of refusals to disclose documents relating to decisions that have not yet been adopted has increased sharply from 3.65% to 12.98%;
- in contrast, the percentage of refusals relating to documents containing opinions intended for use in internal deliberations after a decision has been taken has fallen from 14.61% to 8.77%.

It should also be noted that the protection of commercial interests was used to justify a significantly higher number of refusals at the confirmatory stage than in 2003 (rising from 11.87% to 15.79%). The percentage of refusals based on this exception is substantially higher at this stage than at the initial stage (8.33%).

A more detailed analysis shows that these cases mainly concern applications for access to documents relating to state aid, cartel investigations or merger control procedures. In a sizeable number of cases more than one exception criterion was invoked (38 out of 162 confirmatory requests).

## **6. COMPLAINTS SUBMITTED TO THE EUROPEAN OMBUDSMAN**

### **6.1. Complaints which have been closed**

In 2004 the Ombudsman closed thirteen complaints against the Commission relating to refusals to disclose documents. In five cases he concluded that there was no evidence of maladministration. In five other cases, an amicable solution had been found or the dispute settled in mid-procedure. And in three cases the Ombudsman made critical remarks.

Complaints 415/2003/(IJH)TN, 900/2003/(IJH)TN and 2183/2003/(TN)(IJH)TN, which were closed at the beginning of 2004, were included in the 2003 report.

#### *6.1.1. Complaint 322/2003/IP of 13.12.2002 (confidential)*

This complaint, lodged by a lawyer, was concerned in part with the failure to provide a substantive reply to a request for access submitted in 2001 under the terms of the code of conduct on access to documents. The Ombudsman did not give an opinion on the refusal to disclose the documents requested by the complainant, since the refusal to disclose these same documents to one of his clients was the subject of an appeal pending before the Court of First Instance. But he did criticise the Commission, on the grounds that even though the absence of a reply is equivalent to a negative reply and allows the applicant to institute court proceedings, he is not then able to understand the grounds for the refusal.

#### *6.1.2. Complaint 1286/2003/JMA of 15.7.2003*

This complaint, made on behalf of an environmental NGO, concerned the refusal to grant access to documents relating to negotiations on trade in services (GATS) with third country members of the World Trade Organisation (WTO). The reason given for this refusal was the protection of international relations, since disclosure of these documents would have compromised ongoing negotiations. The Ombudsman considered that the Commission had applied the Regulation correctly. He nevertheless felt it would be advisable for WTO negotiations to be made more transparent for the public.

#### *6.1.3. Complaint 1304/2003/(ADB)PB of 16.7.2003*

An NGO active in the field of animal welfare had requested full access to a Commission mission report. It had obtained the passages relating to the export of live animals from Romania to the Community but the parts of the report relating to the

implementation of the Community acquis with an eye to accession had been censored. The Ombudsman concluded that the Commission decision was in conformity with Regulation No 1049/2001.

*6.1.4. Complaint 1481/2003/OV of 25.7.2003*

The complaint related to the refusal to grant full access to a report on a control mission concerning projects subsidised by the European Social Fund. The report had been submitted to the national management authority, which had sent the project managers the parts of relevance to them for comment. The complainant, a lawyer acting for one of the project managers, wanted the report to be sent to him in full. The Commission rejected this application on the basis of the exception relating to the protection of the purpose of audits. The Ombudsman upheld this decision.

*6.1.5. Complaint 1874/2003/GG of 6.10.2003*

This complaint was submitted by an NGO working in the field of international aid; it is linked to another complaint concerning the termination of a contract. The complainant wished to obtain access to the entire dossier relating to management of the contract. The Commission departments sent the complainant an inventory of the documents on its file and invited him to consult most of them on its premises, the only exception being the correspondence between the bodies responsible for the management and supervision of the contract and the Commission departments.

The Ombudsman addressed a draft recommendation to the Commission in which he stated that it reconsider its position and grant full access to the documents unless it could show that some of them were covered by one of the exceptions provided for by Regulation No 1049/2001. The Commission drew up a more detailed inventory of the documents to which it had refused access and explained, by category of document, the reasons why it felt it could not disclose them. The Ombudsman closed the file, making a critical remark to the effect that the reasons invoked by the Commission were insufficient to justify its refusal to grant access to the entire file. The Commission stood by its position, however, and replied to this effect to the Ombudsman.

*6.1.6. Complaint 2229/2003/MHZ of 21.11.2003*

The complaint originated with an environmental NGO which had submitted a complaint to the Commission concerning a project for the construction of a waste processing plant. The NGO's original request for a copy of the letter of formal notice had been rejected on the basis of the exception relating to the protection of investigations. As a result of an administrative error, the ONG's confirmatory request had not been identified as such and had gone astray. The Commission re-examined the request for access and confirmed to the Ombudsman that the letter of formal notice could not be disclosed at that stage of the infringement procedure; however, it did not rule out the possibility of making it public at a later date. The Ombudsman did not consider that the refusal to disclose the letter of formal notice constituted maladministration. He did, however, make a critical remark, taking the view that the Commission had not provided a specific explanation as to why the procedure in this infringement case had taken almost three years.

6.1.7. *Complaint 2277/2003/MF of 28.11.2003*

The complainant, at the time a Member of the European Parliament, had requested access to the annual reports forwarded by Italy to the Commission on implementation of the Regulation laying down detailed rules for the supply of food from intervention stocks for the benefit of the most deprived persons. When he had not received the documents after 15 working days, the MEP approached the Ombudsman. However, the Commission had informed the MEP that it would have to consult the Italian authorities regarding his request. The documents were disclosed to him one month later. The Ombudsman closed the case, as he felt that it had been settled to the complainant's satisfaction.

6.1.8. *Complaint 520/2004/TN of 8.2.2004*

This complaint followed on from complaint 2183/2003/(TN)(IJH)TN, and was from the same environmental NGO. It concerned access to the documents on which the Commission's favourable opinion on the construction of a railway in a protected site in Northern Sweden was based. The Ombudsman had closed the case in March 2004 without finding any maladministration because the Commission had in the meantime sent the documents requested. However, the complainant considered that the Commission had not provided him with the most relevant documents and submitted a new complaint. The Commission sent the additional documents to the complainant, who declared himself satisfied, and the Ombudsman closed the case.

6.1.9. *Complaint 1044/2004/GG of 5.4.2004*

The complainant is a researcher at a centre for policy studies. He requested access to the recommendation for a Council decision giving notice to Germany to take measures to reduce its deficit under Article 104(9) of the Treaty. The Commission had refused access to the document, invoking the protection of the economic policy of the Member State concerned; moreover, it was a preparatory text for a decision that the Council had not adopted. The Commission also took the view that a great deal of information had already been made public in a press release. The Ombudsman closed the case without finding that there had been maladministration.

6.1.10. *Complaint 1790/2004/GG of 26.4.2004*

This complaint is linked to a closed complaint concerning a dispute between the Commission and a person claiming additional payment for the production of a film about European Union aid to the Palestinians. The new complaint, lodged by a lawyer acting for the complainant, referred to the refusal by the Commission to provide a document which he felt would support his client's case in the contractual dispute. The document requested had been quoted in an e-mail which was among the files inspected by the Ombudsman in connection with the initial complaint. However, the document itself was not in the Commission file but had been found in the Commission Representation for the Palestinian territories. It was written on unheaded paper, undated, unsigned and with no indication of the author. A member of local staff at the Representation had signed "for receipt" but could not be regarded as the author of the document. The Commission sent the document to the Ombudsman, who closed the case.



## 6.2. New complaints

The Ombudsman received eleven new complaints in the course of 2004:

- four of them concerned the refusal to provide documents drawn up or received in connection with an infringement procedure (letters of formal notice, reasoned opinions, Member States' replies, etc.);
- two complaints were linked to a dispute involving staff policy: one concerned access to certain documents relating to the career development review, the other concerned documents relating to a decision on starting grade;
- one complaint concerned a contract management file in connection with development aid;
- one complaint concerned the refusal to provide part of a document originating from a Member State where the Member State had requested the Commission not to disclose the part in question;
- one complaint involved a call for proposals and was lodged by an unsuccessful candidate who was not satisfied with the information he had been sent in relation to the evaluation of his tender but requested full access to the file;
- one complaint concerned the failure by the Commission, during a public consultation procedure, to publish ex officio all the documents related to the text on which the consultation was being held;
- one complaint concerned the failure to reply within the time allowed under the Regulation following a request for access to a draft report before its adoption by the Commission; the report had been made public first as the complainant was formulating a confirmatory request, thereby making the confirmatory request inapplicable.

## 7. LEGAL ACTION

### 7.1. Judgments rendered in 2004

The Court of First Instance handed down two judgments rejecting an appeal against a decision refusing to disclose a document. In a third case, annulment by the Court of Justice of a ruling by the Court of First Instance resulted in the amendment of a negative decision by the Council and the Commission.

#### 7.1.1. *Judgment of the Court of First Instance of 23 November 2004, Case T 84/03 Turco v Council*

This case is mentioned in the Council's annual report.

7.1.2. *Judgment of the Court of First Instance of 30 November 2004, Case T-168/02 Internationaler Tierschutzfonds v Commission*

This case is specifically concerned with Article 4(5) of the Regulation, which enables a Member State to request the institution not to disclose a document originating from it without its prior agreement. The applicant, an NGO active in the field of animal welfare, had requested access to an exchange of letters between the Commission and the German authorities in connection with a project involving the declassification of a protected site. The Commission disclosed to the applicant all the documents requested with the exception of those from the German authorities, who had opposed their disclosure. The applicant considered that Article 4(5) could not be interpreted as conferring a "right of veto" on the Member States. The Commission maintained that it established specific arrangements for Member States' documents, different from the general rules applicable to third-party documents set out in Article 4(4). The Court of First Instance agreed with this argument and accordingly confirmed its earlier ruling (judgment of 17 September 2003, Case T-76/02 *Mara Messina v Commission*). It should be noted that an appeal has been lodged with the Court of Justice against this decision by the Court of First Instance.

7.1.3. *Judgment of the Court of Justice of 22 January 2004, Case C-353/01 P Mattila v Council and Commission*

Ruling on an appeal lodged by the applicant, the Court annulled a judgment by the Court of First Instance in relation to a request handled under the code of conduct concerning public access to Council and Commission documents. The Council and the Commission had not considered the possibility of partial access during the administrative stage of the request. The Court of First Instance had taken the view that this error of law did not require annulment of the contested decisions in the light of the explanations proffered in the course of proceedings. The Court of Justice, on the other hand, citing *Hautala* as a precedent, disagreed and ruled that the contested decisions be annulled. The Council and the Commission adopted a new decision granting extensive partial access to the documents requested, since they had come to the conclusion that, in view of the time that had elapsed, the exceptions to the right of access no longer applied to all the documents. In that partial access is expressly provided for in Article 4(6) of the Regulation, the practical consequences of the Court of Justice's judgment are limited.

**7.2. New appeals lodged in 2004**

Nine new appeals were lodged in 2004 against Commission decisions under Regulation No 1049/2001.

7.2.1. *Case T-36/04 International Press Association v Commission*

This appeal is for the annulment of a decision to refuse to disclose submissions made by the Commission in a number of cases pending before the Court of Justice and the Court of First Instance.

7.2.2. *Case T-194/04 Bavarian Lager v Commission*

This case concerns the interaction between the rules on public access to documents and the rules on the protection of individuals in relation to the processing of personal data. The applicant is challenging the refusal to disclose the minutes of a meeting in full, the Commission having blanked out the names of five people who had objected to the disclosure of their identity.

7.2.3. *Case T-446/04 Co-Frutta v Commission*

The applicant is contesting the refusal to disclose certain documents relating to the European banana import market.

7.2.4. *Case T-70/04 Franchet-Byk v Commission*

The applicants are challenging the refusal to disclose the final report of the Commission's Internal Audit Service on the examination of the contracts and grants awarded by Eurostat in the period 1999-2002 and the annexes to its first interim report.

7.2.5. *Case T-319/04 Port Support Customs v Commission*

This case concerns the refusal to provide certain documents annexed to an Anti-Fraud Office mission report.

7.2.6. *Case T-380/04 Terezakis v Commission*

The applicant is challenging the refusal to provide him with documents submitted by the Greek authorities in connection with the cofinancing of the new Athens airport by the Cohesion Fund, as well as documents that are not in the Commission's possession.

7.2.7. *Case T-237/04 Ultradent v Commission*

The applicant maintains that the Commission has failed to identify all the documents to which its request related and thus implicitly refused access to them.

7.2.8. *Case T-284/04 UPS v Commission*

In this case, the applicant is requesting access to information submitted to the Commission by a competitor as part of the process of monitoring its commitments made by the latter. The company in question considers the information to be covered by business confidentiality. The Commission did not refuse access, but felt it should conduct a meticulous analysis of the information concerned and this could not be done within the deadline laid down in Regulation No 1049/2001. Invoking Article 6(3) of the Regulation, the Commission tried to reach a "fair solution" with the applicant, who nevertheless preferred to lodge an appeal.

7.2.9. *Case T-161/04 Valero Jordana v Commission*

This case also concerns the interaction between the rules on access to documents and the rules on the protection of personal data. The applicant is requesting access to the

reserve list for a recruitment competition and to certain individual decisions appointing officials.

**ANNEX**

**Statistics relating to the application of Regulation No 1049/2001**

**2002-04**

Contents of the Register

	<b>COM</b>	<b>C</b>	<b>OJ</b>	<b>PV</b>	<b>SEC</b>	<b>Total</b>
2001	1 956	5 389	-	-	4 773	12 118
2002	2 095	6 478	134	116	3 066	11 889
2003	2 338	6 823	135	113	2 467	11 876
2004	2 327	7 484	134	145	2 718	12 808
Total	8 716	26 174	403	374	13 024	48 691

## INITIAL REQUESTS

### 1. Number of initial requests

2002	2003	2004
991	1 523	2 600

### 2. Number of identifiable documents taken into consideration

2002	2003	2004
2 150	2 936	4051

### 3. Number of initial requests for which partial access was granted

2002	2003	2004
44	64	105

### 4. Rate of positive replies during the initial stage

	2002	2003	2004
Full access		66.83	64.8
Partial access		2.48	3.39
Total	66.5	69.31	68.19

## CONFIRMATORY REQUESTS

### 5. Number of confirmatory requests

2002	2003	2004
96	143	162

### 6. Breakdown of decisions on confirmatory requests (%)

	2002	2003	2004
Confirmation of the initial decision	66.9	61.57	73.21
Partial revision	9.2	8.29	17.70
Full revision	23.9	30.13	9.09

### 7. Rate of positive replies for the procedure as a whole

	2002	2003	2004
Full access	62.4	69.5	X
Partial access	8.3	3.32	X
Total	70.7	72.82	X

## BREAKDOWN OF REQUESTS

### 8. According to professional profile of requesters (%)

	2002	2003	2004
Members of the public whose professional profile was not indicated	31.8	30.16	32.15
Civil society (interest groups, industry, NGOs, etc.)	17.8	23.48	27.31
Lawyers	22.4	20.46	13.65
Academics	12.3	11.15	11.23
Other EU institutions	3.1	6.16	5
Public authorities (other than the EU institutions)	8.6	5.57	10.15
Journalists	3.8	3.02	0.5



9. According to geographical origin (%)

	2002	2003	2004
Belgium	23	25.05	26.42
Germany	10.9	12	12.77
Italy	9.6	8.85	10.35
France	10.3	7.80	8.62
United Kingdom	8.8	7.87	8
Spain	5.4	5.25	5.69
Not specified	12.3	12.59	5.65
Netherlands	6.4	6.30	4.96
Denmark	1.6	2.36	2.08
Austria	2.1	0.98	1.73
Poland			1.58
Greece	1.2	1.97	1.54
Portugal	1.2	0.59	1.38
Ireland	2	1.38	1.19
Sweden	1.3	1.18	1.19
United States			0.92
Hungary			0.73
Finland	0.5	0.59	0.69
Luxembourg	0.4	1.11	0.65
Switzerland			0.62
Czech Republic			0.5
Norway			0.35
Cyprus			0.31
Malta			0.27

Slovakia			0.27
Slovenia			0.23
Lithuania			0.19
Estonia			0.15
Liechtenstein			0.15
Canada			0.12
Romania			0.12
Russia			0.12
Turkey			0.12
Latvia			0.08
Bulgaria			0.04
Croatia			0.04
Japan			0.04
Macedonia (FYROM)			0.04
New Zealand			0.04

	2002	2003	2004
EU countries	84.7	83.35	91.58
Not specified	12.3	12.59	5.65
European countries not members of the EU (including candidate countries)	1.7	0.93	1.24
Non-European countries	1.3	0.99	1.24
Candidate countries		2.14	0.27

**10. According to areas of interest (%)**

	2002	2003	2004
Competition	12.7	13.7	14.58
Secretariat-General	15.9	10.62	8.66
Internal market	10.3	8.79	8.5
Taxation and customs union	10.6	10.82	7.5
Environment	6.2	7.41	7.23
Transport and energy	2.9	3.54	5.54
Agriculture	4.8	4.59	5.15
Employment and social affairs	3.2	3.48	4.15
Justice, freedom and security	2.2	2.3	3.81
Enterprise policy	3.9	3.08	3.31
Regional policy	0.8	2.16	2.96
Legal questions	3	2.3	2.81
External relations	2.1	2.16	2.5
Health and consumer protection	4.4	4	2.38
External aid and development	0.9	2.56	2.39
External trade	1.1	2.03	2.27
Fraud protection	2.4	2.23	2.12
Budget and internal audit	2.9	2.82	2.19
Administration and personnel	3.2	3.21	2.35
Economic and financial affairs	1.1	1.57	1.92
Research and technology	1.7	1.97	1.92
Education and culture	0.5	1.18	1.38
Enlargement	1	1.25	1.31
Fisheries	0.6	0.72	1

Information society			0.88
Press and communication	0.8	1.05	0.69
Interpretation and translation	0.8	-	0.31
Statistics	0.1	0.39	0.15
Official publications	-	0.07	0.04

**BREAKDOWN OF REFUSALS OF ACCESS ACCORDING TO THE EXCEPTION APPLIED**

**11. Initial requests (%)**

	2002	2003	2004
Public security	-	0.21	0.36
Defence and military matters	0.46	0.31	0.72
International relations	1.8	5.33	4.84
Financial, monetary or economic policy	0.46	1.05	8.06
Personal data	5.2	4.39	5.20
Commercial interests	3.7	8.89	8.33
Court proceedings and legal advice	3.7	9	8.15
Inspections, investigations and audits	35.9	37.55	31.81
Protection of the decision-making process	8.6	11.82	10.57
		9.10	14.87
Confidentiality requested by the Member State from which the document originates	2.1	5.96	2.6
No reply or insufficient cause	19.6	6.07	4.48

**Note:** In the table for 2002, the cases in which several exceptions were applied are not included in the breakdown according to the exception applied; in the tables for 2003 and 2004, all the exceptions are identified.

## 12. Confirmatory requests (%)

	2002	2003	2004
Public security	-	-	0.35
Defence and military matters	-	-	
International relations	7.2	7.76	4.21
Financial, monetary or economic policy	-	-	8.07
Personal data	0.6	6.85	9.12
Commercial interests	3.3	11.87	15.79
Court proceedings and legal advice	4.4	14.61	5.61
Inspections, investigations and audits	29.4	30.14	26.32
Protection of the decision-making process	1.6	3.65 14.61	12.98 8.77
Confidentiality requested by the Member State from which the document originates	4.4	10.5	8.77

**Note:** In the table for 2002, the cases in which several exceptions were applied are not included in the breakdown according to the exception applied; in the tables for 2003 and 2004, all the exceptions are identified.