

Parliament of Finland

**THE PROPOSED REGULATION REGARDING
PUBLIC ACCESS TO EUROPEAN PARLIAMENT,
COUNCIL AND COMMISSION DOCUMENTS
COM (2008) 229
U 38/2008**

**Resolution of the Grand Committee and opinions of the sector
committees**

October 2008



Contents

Resolution Of The Grand Committee	3
Opinion Of The Constitution Committee 22/2008.....	4
Opinion Of The Law Committee 14/2008.....	9
Opinion Of The Administration Committee 23/2008	13

Editor's note.

In the Finnish system for EU Scrutiny, proposed EU legal acts are examined by the specialist committees that are responsible for the sector affected by the proposal. The opinions of these committees are delivered to the Grand Committee, which determines the Eduskunta's position, usually in a resolution. The opinion of the Grand Committee is normative for the government.

For reasons of economy and convenience, only the actual findings of the specialist committees have been translated. The committees' summaries of the Commission's proposal and the government's assessment can be read in the original Finnish and Swedish language documents.

RESOLUTION OF THE GRAND COMMITTEE

*Extract from the minutes of the
Grand Committee, 17 October 2008*

8 § **U 38/2008** *the proposed regulation regarding public access to European Parliament, Council and Commission documents (recasting of the transparency regulation)*

Reference documents:

Government communication U 38/2008

Opinion of the Constitution Committee PeVL 22/2008

Opinion of the Law Committee LaVL 14/2008

Opinion of the Administration Committee HaVL 23/2008

The Grand Committee approved the following resolution (SuVX 111/2008):

The Grand Committee, in concurrence with the opinions of the sector committees, agrees with the government's position.

The Grand Committee emphasizes that if approved, the Commission's proposal would lead to a major reversal of the Union's transparency and the public's access to documents. The proposal is thus in contradiction to goals that have been repeatedly affirmed by the European Council.

The Grand Committee considers it worrying and reproachable that the Commission has advanced in support of its proposal justifications that must be considered untrue and misleading. Such conduct is liable to weaken the Commission's public credibility.

17 October 2008

OPINION OF THE CONSTITUTION COMMITTEE PEVL 22/2008

The Government's communication U 38/2008 on the proposed regulation regarding public access to European Parliament, Council and Commission documents

To the Grand Committee

Findings of the Constitution Committee

Introductory remarks

Article 255 of the EC Treaty contains the general rule that EU citizens and residents of EU member states have a right of access to European Parliament, Council and Commission documents. The principles and exceptions applied to this right of access are regulated in detail in the transparency regulation of 2001. The right of access to documents is recognised as a fundamental right in Article 42 of the EU's Charter of Fundamental Rights. Also, the jurisprudence of the European Court of Justice has underscored that the purpose of the transparency regulation is to give the greatest possible effect to the public's right to access documents in the possession of the European institutions. In this connection, the Court has emphasised that exceptions from the principle of public access to documents must be given a narrow interpretation and application, as they are derogations from the afore-mentioned principle (cf. C-266-05 P Sison; paragraphs 61 – 63).

The committee agrees with the government that the current transparency regulation has, on the whole, been satisfactory. Basic constructions of the current regulation include the broad application of the regulation, the comprehensive definition of the term "document" and the submission of exceptions from the principle of access to documents to strictly defined *in casu* consideration. These and other basic constructions that were designed to reinforce the principles of openness and transparency need to be preserved when recasting the regulation. The committee believes that it is important to accept the premise that any amendments to the transparency regulation should advance transparency, good administration and the right of citizens to be informed and to participate. Also, the transparency regulation should continue to be the general legal norm governing access to EU documents. Public access to documents should be the norm and exceptions from this norm should be limited in scope and in quantity.

The Commission's proposal contains some elements that increase the transparency of the Union's activities. In particular, the broadening of the range of beneficiaries of the

regulation is an improvement. However, most of the proposed amendments seem rather to limit access to documents. The committee finds particularly worrying the proposals to narrow the definition of "documents" and to exclude certain entire classes of documents from the scope of the regulation altogether.

The definition of "documents"

The definition of "documents" in the current regulation is quite broad. The term "document" applies to any content pertaining to policies, activities and decisions within the remit of an institution. The Commission proposes that the definition in Article 3 (a) is limited to documents drawn up by an institution and formally transmitted to one or more recipients or otherwise registered or received by an institution.

The Commission claims in its explanatory memorandum that the current wide definition of the concept of "document" is maintained. The Constitution Committee does not believe this to be true. The proposed new wording would mean that a non-registered document that has not been officially transmitted outside the institution would by definition not be considered a document at all. This would give institutions broad discretionary powers to determine, by means of their registration and transmission procedures, whether or not individual documents are covered by the regulation, as the concepts "formal transmission" and "register" have not been precisely defined, or been made duties of the institutions. The amendment is likely to create legal imprecision and to permit inconsistent practices to evolve.

The Constitution Committee has in its previous assessments of the transparency regulation considered it to be important that the scope of the regulation includes all documents in the possession of an institution, including internal preparatory and consultation documents (cf. PeVL 6/2000; PeVL 16/2001). The committee found that the original proposal and the ultimately approved regulation took due note of the proper scope of the regulation. The committee considers it most important that the broad definition of "documents", which is a fundamental element of the current regulation, is not narrowed as proposed by the Commission. The best alternative would be to leave the definition of "documents" as it is now. If amending the definition is absolutely necessary, it should be done in a way that continues to ensure the widest possible access to documents.

Exceptions from access to documents

The relationship between the transparency regulation and data protection legislation. The Commission proposes removing Article 4 (1) (b), which concerns protection of privacy and the integrity of the individual. The recast Article 4 (5) would provide that names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data.

In its explanatory memorandum, the Commission says that the recasting would clarify the relationship between the transparency regulation and regulation (EC) 45/2001 on the protection of personal data. The Commission also makes reference to the judgment of the Court of First Instance in the *Bavarian Lager* case (194/04).

The Commission's proposal would mean in practice that a significant share of the personal data contained in documents would be left outside the scope of the transparency regulation. With the exception of the very narrowly defined personal data mentioned in the first sentence of Article 4 (5), making available this information would be subject to EC data protection legislation. For those persons not covered by the first sentence, privacy and integrity of the individual would no longer be mentioned as protected interests to be considered *in casu* as criteria for exceptions to the rule of accessibility.

The Constitution Committee considers the proposed division of documents into two categories based on their content of personal data, and the resulting narrowing of the scope of the transparency regulation to be a highly worrying development. This amendment would mean a significant general shift of the balance between the accessibility of documents and data protection, as was also remarked by the European Data Protection Supervisor (EDPS; opinion dated 30 June 2008). Also, it would jeopardise the principle that the transparency regulation is the general norm governing access to documents in the EU. The committee agrees with the Government that protection of privacy should be explicitly mentioned in the regulation as grounds for an exception and that harm to privacy should be a criterion for exception. The current wording of the regulation already does this; it need not be amended. The EDPS's opinion contains an alternative proposal aimed at maintaining the afore-mentioned balance. According to the EDPS's proposal, personal data shall not be disclosed, if such disclosure would harm the privacy or the integrity of the person concerned. However, the proposal lists quite comprehensively situations in which such harm is not deemed to arise. Also, data shall be disclosed, if an overriding public interest requires disclosure (cf. para. 74 of the opinion). If changing the article is considered absolutely necessary, the EDPS's proposal would be a better basis for further discussion.

The Constitution Committee also draws attention to the Commission's explanatory memorandum, in which reference is made to the Court of First Instance's judgement in the *Bavarian lager* case. The proposed amendments do not, in fact, reflect the Court's judgment; they are based on the almost opposite views advanced by the Commission in the court procedure. The committee considers that the Commission's justifications are flawed and indeed misleading. The EDPS has also seriously criticised the Commission's proposals and justifications on this basis.

Legal advice. The Commission proposes a rephrasing of Article 4 (2) concerning the exception to be made on grounds of court proceedings and legal advice – the committee sees no substantive significance in the proposal. The committee does, however, emphasise that all amendments that might lead to a narrowing the EC Court of Justice's ruling (*Turco* case, C-39/05 and C-52/05; in particular paras 59 – 69), that documents containing legal advice can be subject to discretionary disclosure, should be opposed.

Documents originating in Member States

It is proposed that the provisions on consultations with Member States are moved from Article 4 to Article 5. The proposal takes into consideration the Court of Justice's judgement (*IFAW* case, C-64/05), which found that a Member State is obliged to justify a request that a document originating in that Member State is not disclosed, in consideration of the exceptions in Article 5 (1) – (3) of the transparency regulation. The Commission, however, also proposes that Member States may invoke, in addition to the exceptions in the regulation, provisions in its domestic legislation that would prevent disclosure. This would in practice increase greatly the ability of Member States to prevent disclosure of documents originating in those states. This is in manifest contradiction to the purpose of the regulation as expressed by the Court of Justice in the *IFAW* case (cf. in particular para. 75 of the judgment).

As noted by the Court of Justice, Member States, as members of the Council and participants in numerous committees under the Commission and Council, are a significant source of information and documents relating to community decision-making (para. 63 of the judgment). The committee considers it essential for the accessibility principle that national legislation cannot be invoked to prevent disclosure of documents originating in Member States. The reference to national legislation should thus be removed from the proposal. The committee agrees with the government that there may be a case to review the current exceptions, if these do not cover all interests that it is justifiable to protect.

The scope of the regulation

The Commission proposes adding to Article 2 a new section (5) stating that the regulation shall not apply to documents submitted to courts by parties other than the institutions. Other documents in the possession of the institutions, for instance documents that they received as parties to a court case, would thus be outside the scope of the regulation. In the current text, the regulation applies to all documents in the possession of the institutions, but their disclosure can be limited through the exception clauses in the regulation.

This proposal is, in the view of the committee, contrary to the basic principles of the transparency regulation, i.e., the broad scope of the regulation and the requirement that the harm resulting from disclosure is assessed *in casu*. The committee agrees with the government that any limits, if deemed necessary, should be introduced by expanding the exceptions in Article 4.

The same observation holds for the proposed new Article 2 (6). The proposal means that the afore-mentioned principles are abandoned in the case of documents relating to a pending investigation. The Commission further proposes to exclude permanently from the scope of the regulation documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations. The wording would seem to prevent even partial disclosure of a document, even when only a part of the document contains privileged information. Altogether, the committee considers that the proposed new provisions on the scope of the regulation should be removed as contrary to the principle of public access.

Conclusion

The Commission's proposal to recast the transparency regulation contains, in the view of the Constitution Committee, many provisions that are in serious contradiction to the principle of public access to documents. Approving the Commission's proposal would entail a major reversal of the Union's transparency and the public's access to documents. The proposal thus needs significant revision before it could be accepted. If this is not possible, the committee recommends that the recasting of the regulation be abandoned altogether.

Statement

As its statement, the Constitution Committee submits,

that it agrees with the Government's position, emphasising strongly the criticism contained in the above opinion.

16 October 2008

OPINION OF THE LAW COMMITTEE LAVL 14/2008

The Government's communication U 38/2008 on the proposed regulation regarding public access to European Parliament, Council and Commission documents

To the Grand Committee

Findings of the Law Committee

Introductory remarks

The Commission published its proposal to recast the transparency regulation (COM (2008) 229) in April of 2008. The Commission claims that the purpose of the amendments is to increase transparency and public access to documents. The approach is one of assessing the functioning of the regulation in the light of experience gained since it was adopted and in view of the findings of the European Court of Justice and the European Ombudsman.

The Law Committee finds that the Commission's proposal does include some elements that increase transparency, such as extending the group of beneficiaries to all natural and legal persons irrespective of domicile, and improving access to legislative documents in electronic information networks. These proposals may be considered beneficial. However, the Commission's proposal contains several proposals that limit access to documents and constrict the scope of transparency. As a whole, the proposal means a decisive step backwards as regards public access to documents and transparency.

Definition of "documents"

According to the Commission's proposal (Article 3 (a)) a document is understood to be content drawn up by an institution and formally transmitted to one or more recipients or otherwise registered or received by an institution. Content in electronic data recording, processing or retrieval systems would be deemed "documents" if they can be retrieved as paper printouts or as electronic copies using tools that are available in the system. The committee considers that the terms "formally transmitted" and "otherwise registered" are likely to limit the scope of the term "document", as neither has been precisely defined or made a specific duty of the institutions. The Commission's proposal would make it possible to refuse disclosure on the grounds that a document has not been registered or

rendered into a specific technical format. Also, the proposed definition would seem to be narrower than the right of access, in Article 2, to "all documents held by an institution".

The committee finds the proposed restrictions of the concept of "documents" unnecessary. The proposed wording might also in practice cause unnecessary imprecision and avoidable difficulties of application. According to information received, the present, broad definition of "documents" has been the cause of general satisfaction. Finland has supported retaining the current definition. The committee is of the opinion that the broad definition of "documents" is a fundamental principle of the transparency regulation, and should not be tampered with without good reason.

Exceptions from public access to documents

The Commission proposes several amendments to the exceptions from public access to documents in Article 4. The committee draws attention to the following.

The Commission proposes to repeal privacy and the integrity of the individual as grounds for non-disclosure (currently Article 4 (1)(b)). The provision would be replaced by a new, quite broadly drafted provision in Article 4 (5), saying that personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on protection of individuals with regard to the processing of such data.

The committee finds the proposal problematic on several counts. As the legal norms on the protection of personal data cover only a portion of the protection of privacy, the proposed provision is insufficient for the protection of privacy as defined in the European Convention of Human Rights and the European Charter of Fundamental Rights. Secondly, the proposed provision would subsume the application of the transparency regulation to the provisions on the protection of personal data. Recent jurisprudence has clarified the relationship between the transparency regulation and data protection legislation. The Court of First Instance (*Bavarian Lager* case; 194/04) found that the transparency regulation is the generally applicable norm governing public access to documents, and applies also to documents containing personal data. Before disclosure of documents, there should be an assessment of whether disclosure would harm the privacy of the individual. The committee does not find the Commission's proposal an apposite manner of regulating the relationship between the transparency regulation and data protection legislation. In the committee's opinion, the proposed fusion of two separate regulatory areas will serve primarily to restrict public access to information.

The committee also draws attention to the provision in Article 4 (5) that says that names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. It is conceivable that, for example, asserting legal responsibility for official actions could be construed as adversely affecting the official concerned; the wording of the provision would permit non-disclosure in such a case. The proposal cannot, in the opinion of the committee, be considered consistent with the principle of access to information.

The Commission further proposes that protection of arbitration and dispute settlement proceedings be added to the protected interests in Article 4 (2) and that the wording of

the article be amended. The committee refers in this context to the Court of Justice's judgement in the *Turco* case in July 2008 (C-39/05 and C-52/05), where the court found that disclosure also of documents containing legal advice should be considered *in casu* and that documents containing legal advice that relate to a legislative procedure should be disclosed as a rule. The Court's interpretation corresponds to established practice in Finland. The committee agrees with the government that assurances should be sought that the amendment will not broaden the exception to public access.

Scope of the transparency regulation

The Commission proposes to restrict the scope of the regulation in two ways. Firstly, the regulation would apply only to documents transmitted to courts by an institution. Other documents held by institutions, for example documents that they received as parties to litigation, would be outside the scope of the regulation. This restriction must be considered problematic in view of the requirements of public and fair trials enshrined in the European Convention of Human Rights and the European Charter of Fundamental Rights.

The current regulation allows non-disclosure in cases when disclosure would harm the interests of a legal procedure, unless there is an overwhelming public interest in disclosure. The regulation also provides for consultation in cases where a request for disclosure concerns a document originating with a third party. The committee finds the current arrangement appropriate. If there is a need for new rules about court documents originating with third parties, these can be achieved by developing the exception rules in Article 4.

The Commission proposes new rules concerning access to documents relating to investigations (Article 2 (6)). The committee considers it important that certain information collected in investigations, e.g., trade secrets, has adequate protection and that investigative bodies can perform their duties undisturbed. However, the proposed new rules would extend non-disclosure beyond the end of investigations. For example information on investigations into the use of institutional funds would, in the committee's understanding, be unavailable even after the investigation has ended. On the other hand, trade protection procedures involve, according to information received by the committee, documents that may not be disclosed even as a result of the lapse of time.

Broadness of scope and *in casu* examination of the harm that may be caused by disclosure of documents are fundamental principles of the transparency regulation. This should continue to be the case. If there is felt to be a need for change, the committee considers that other means than restricting the scope of the regulation must be found to protect investigations, for example developing the exception criteria in Article 4.

The recasting procedure

The committee wishes to draw attention to the drafting technique chosen by the Commission, i.e., recasting. Generally, it is useful to review European legislative texts periodically. So far, the transparency regulation has not been amended since it was adopted in 2001; the committee does not see why recasting is needed.

In conclusion

According to information received, the transparency regulation has functioned well. The basic constructions of the regulation may be considered generally well chosen and the committee does not see any reason for amending the regulation at this time. The interpretation of the regulation has been clarified in recent jurisprudence of the Court of Justice, which has adopted an approach that approximates the Finnish understanding. The committee considers it important that the rules on access to EU documents are developed in a direction that favours transparency and good administration and that supports citizens' access to information and citizens' participation.

Statement

As its statement, the Law Committee submits
that it agrees with the government position.

25 September 2008

OPINION OF THE ADMINISTRATION COMMITTEE HAVL 23/2008

The Government's communication U 38/2008 on the proposed regulation regarding public access to European Parliament, Council and Commission documents

To the Grand Committee

Findings of the Administration Committee

Introductory remarks

The committee considers that increasing the transparency of the EU's decision-making and activities is an important goal and that the proposed amendments to the transparency regulation should be actually supportive of this goal. The committee has consistently argued for developing the Union's institutions and administration in the direction of greater simplicity and transparency, as required by the principles of good administration. Transparency increases the clarity and the public's understanding of the Union's decisions; it promotes access to information and citizens' participation. If any changes are made to the regulation, they should increase access to documents.

Beneficiaries

The Commission proposes that every natural and legal person should have the right to access documents of the institutions. The committee supports the proposed expansion of the category of beneficiaries of the regulation.

Documents transmitted to a court or related to investigations

The committee observes that Article 2 (5) would restrict the scope of the regulation to documents that the institutions have transmitted to a court. Other documents in the possession of the institutions, for instance documents received as parties to a court case, would be outside the scope of the regulation.

As regards investigations (Article 2 (6)), the committee finds it appropriate that certain information linked to ongoing investigations, e.g., business secrets, are adequately protected and that investigations are protected from disturbance. The committee points out, however, that breadth of scope and *in casu* assessment of the harm resulting from disclosure are fundamental principles of the transparency regulation. The proposed

wording of Article 2 (6) would mean that this principle is abandoned in respect of documents relating to pending investigations and – in the case of documents emanating from third parties – even after the closure of an investigation. The committee cannot support such an amendment.

Definition of "documents"

According to the commission's proposal (Article 3 (a)), a document would be deemed to exist only after it has been transmitted to its recipient, circulated within the institutions or otherwise registered. The proposal would in other words make it possible to refuse disclosure of a document on the grounds that it has not been registered or conveyed into a particular technical format. The current wording recognises as a "document" any content, irrespective of its medium. The committee emphasises that the current broad definition of "documents" is of fundamental importance and should not be tampered with without important reasons.

Direct access to documents

The phrasing proposed by the Commission is more binding than the current text in respect of legislative documents and non-legislative acts of general application. In the case of other documents, in particular those concerning the elaboration of policies or strategies, Article 12 would require only that they be made available "where possible". The committee acknowledges that the proposal would improve the availability of legislative documents, but it lacks a general obligation to make all categories of documents available to the public. The Article needs to be more precise in this respect.

Statement

As its statement, the Administration committee submits

that it agrees with the government's position with the afore-said remarks.

7 October 2008