25 March 2012

Civil Society Campaign on Reform of the EU Access to Documents Rules

We the undersigned call for the reform of Regulation 1049/2001 to take into account the following 20 key concerns in order to ensure that any reform either meets the goal of strengthening the right of access to EU documents as enshrined in Article 15 of the Treaty on the Functioning of the European Union or, at the very least, of avoiding any narrowing of the current right of access to documents.

1. All persons are beneficiaries of the right: We call for language which grants everyone, regardless of nationality or residence, the right of access to EU documents.

2. Full institutional scope: In line with the TFEU, the right of access to documents should apply to all documents of the Union institutions, bodies, offices and agencies. It would be preferable if the right were to apply to the non-administrative functions of the European Central Bank, European Investment Bank and the European Court of Justice, even though this is not provided for in the EU treaties post Lisbon.

3. Comprehensive definition of a document: We call for a simple and broad definition of a document consistent with the language in the TFEU at Article 15 which provides for "*a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium*" and does not contain any further specifications nor limitations. Our proposal is that: "*'document' means all content, whatever its medium."*

In addition, consistent with the open government standards which the Commission is currently promoting, a requirement should be introduced to provide access to documents in an open, machine-readable format, free of copyright restrictions and without limitations on re-use.

4. Harm & public interest tests to apply to exceptions: We call for Regulation 1049 to be modified to make clear that all exceptions are subject to both a harm and a public interest test, which is not currently the case. We call for a new provision which provides that the public interest in disclosure shall always outweigh any potential harm caused by publication when the document requested relates to, inter alia, the protection of fundamental rights and the rule of law, sound management of public funds, or the right to live in a healthy environment, and emissions into the environment.

Currently the exceptions for public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State, and the privacy and the integrity of the individual are not subject to a public interest test; which they should be.

5. No "block" or "blanket" exceptions: We do not believe that blanket exceptions are consistent with the right of access to documents as protected by the TFEU. We therefore call for a rejection of the proposal to remove from the scope of the right of access to documents entire classes of information such as exceptions for documents submitted to the Courts by natural or legal persons or documents containing information gathered or obtained from natural or legal persons in the course of investigations by the EU.

6. Public security & national security exceptions consistent with international standards: The public security exception (public safety / *ordrepublique*) should be subject to a test of serious harm and an overriding public interest test and should not be rephrased to cover national security of Member States.
National security is a separate concept in international law, which is partially provided for by the existing provision on "defence and military matters"; any reformulation should therefore be carefully phrased. It also should be subject to a test of serious harm and an overriding public interest test.

7. Legal advice: only legitimate exceptions: We call for the current exception on legal advice to be either abolished or, if retained, interpreted narrowly. This would be consistent with European Court of Justice jurisprudence and the TFEU requirement for legislative process transparency.

We note that legal advice is not one of the exceptions permitted by the Council of Europe Convention on Access to Official Documents and that normally it could be protected by other exceptions (e.g.: protection of decision making or protection of court proceedings).

The functioning of the European Union is very particular in nature and advice from internal legal services is heavily relied upon by the EU institutions for most if not all decisions. Hence, citizens should be able to access those opinions in order to hold EU institutions to account in all but exceptional circumstances.

8. No expansion of the decision making exception: We call for a rejection of the amendments proposed by both the Commission and the Parliament to the decision making exception. The Commission's language encourages withholding of documents after decisions have been taken whereas the Parliament's language does not admit that this ever might be possible; both interfere with the process of case-by-case consideration of whether or not to release documents based on an assessment of the harm that would be caused.

We also call for rejection of the proposed separate new provisions on selection procedures (Commission) and public procurement (Parliament) as these are unnecessary, being already covered by the decision making exception.

We are particularly concerned about any proposals to broaden the scope of the decision making exception which might result in a denial of access to information needed to check against the "revolving door" phenomenon or to permit the public to monitor the spending of public funds.

9. Privacy and personal data to be balanced against the right to documents: We call for Regulation 1049 to contain language which adequately reflects the fact that the right of access to documents is now recognised as a fundamental right in Article 15 of the TFEU, and hence has to be balanced against the right to private life (Article 7 Charter of Fundamental Rights) and the protection of personal data (Article 16 of the TFEU).

The European Data Protection Supervisor should be consulted to ensure that any new language will permit striking the appropriate balance between the two rights and will include adequate protections when it comes to data processing whilst insuring that information about public officials and others acting in their professional capacities in relation to EU affairs can be accessed by members of the public.

10. No Member State veto: We support the procedure for consulting with Member States before releasing a document but call for language which prevents Member States having a veto on release of a document. Furthermore, denials of access to documents must only be based on the exceptions permitted by Regulation 1049 after application of both the harm and public interest tests and not on Member State legislation.

11. Only reasonable time limits: We call for the rejection of the proposal to extend the time limit for considering confirmatory applications from 15 working days to 30 working days. We support an additional 5 working day timeframe for consultations with Member States and other third parties during the initial consideration of a request. Aside from that, we call for rejection of any other extension of the time limits.

12. Unique interface for register of documents: We support the proposal that a single interface be created for the access to the register of documents to facilitate citizen access.

13. Aarhus Treaty alignment: We support the proposal to align Regulation 1049 with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This includes ensuring that all requests for documents containing environmental information are handled in line with the Aarhus provisions in order to achieve maximum access, and that there is an absolute public interest override for access to information about emissions into the environment.

We support the inclusion in Regulation 1049 of a new exception which provides for limited withholding of information where this is necessary to protect the environment, such as the breeding sites of rare species.

14. Intellectual property: We call for the rejection of the proposal to add additional language stating that the "existing rules on copyright" may be grounds for refusing to provide copies of documents. The right to property and to protection of intellectual property established in Article 17 of the Charter on Fundamental Rights is already adequately protected by the exception protecting the "commercial interests of a natural or legal person, including intellectual property."

When it comes to information generated by the EU or with public funds there should be no restriction on either access or re-use.

15. Classified documents should be reviewed upon receipt of a request: We support the proposal to link Regulation 1049 to the classification rules that were recently passed with minimal public debate.

We call for Regulation 1049 to make clear that whenever classified documents are requested, an assessment will be made on a case-by-case basis to determine whether at that point in time any exceptions apply, as subject to a harm and a public interest test.

16. Information officers: We support the proposal to introduce into Regulation 1049 a requirement that every EU body appoints an information officer. Not only does this figure contribute to upholding the right of the public to information, but they often contribute to increased efficiency of information management within the public body.

Such a position does not imply creation of an entirely new post, as many bodies already have someone responsible for handling access to documents requests and for those which do not, this could be undertaken, for example, by the body's data protection officers.

17. Organisational and budgetary transparency: We support the proposal that the proactive dimension of the right of access to documents be incorporated into Regulation 1049 with a requirement that EU bodies proactively publish basic information about their functions and the use of public funds.

18. Proactive publication of legislative documents: We support the proposal to give effect to the Lisbon treaty requirement that "*The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures*".

As proposed by the Parliament, this should include, at a minimum, proactive publication of: *Documents relating to legislative programmes, preliminary civil society consultations, impact assessments and any other preparatory documents linked to a legislative procedure, as well as documents relating to the implementation of Union law and policies linked to a legislative procedure, shall be accessible on a user-friendly and coordinated inter-institutional site and published in a special electronic series of the Official Journal of the European Union.*

19. Transparent legislative process includes preparatory documents: We support the proposal to introduce language requiring the institutions to make public preparatory documents relating to the legislative process on a common Internet site reproducing the lifecycle of the procedure concerned. This is consistent with the TFEU requirement of transparent and open legislative procedures.

20. No privileged access for research purposes: We reject the proposal (by the Parliament) to allow privileged access for research purposes to material that would otherwise fall under one of the exceptions.

Such a provision would run counter to basic standards on access for all as a fundamental right and introduce by the back door a requirement that requesters "motivate" requests explaining both who they are, why they want the information, and what they plan to do with it.

Such a provision would be very hard to apply in practice in ways which are non-discriminatory: How would an EU public official determine if someone is a researcher or not? If academics are considered researchers where is the cut off point: doctoral students or those doing a master's thesis? And if an academic who has had access moves to work for industry or an NGO, will they still have access and what do they do with what they already know? Would journalists be included in the definition of researchers – and if so what about bloggers and citizen journalists?

There is also a doubt about which information this provision would apply to: if Regulation 1049/2001 is properly applied, only a limited quantity of information which genuinely falls under the exceptions because its disclosure would cause harm to a legitimate interest would be withheld from the public. It is questionable whether this information should be available to "researchers" using the access to documents mechanism. If any access were to be granted, for example to those conducting scientific research, this could be done via another mechanism rather than the rules governing the public's right of access to documents.

We urge the Commission, Council and Parliament and all Member States to take these points into consideration during the review of Regulation 1049.

We urge all parties to the negotiations to work together to achieve consensus so that a new version of Regulation 1049 which is consistent with the right of access to documents in the TFEU can be adopted.

If such consensus proves impossible, we call for the modification of the current Regulation to incorporate the institutional scope of the TFEU post Lisbon, with the right of access applying to all EU institutions, bodies, offices and agencies, and for energies to refocus on the implementation of this regulation on a day-to-day basis in responding to requests from members of the European Public.

Endorsed by:

Information Commissioners

Estonian Freedom Of Information Authority, Estonia

Serbian Commissioner for Information of Public Importance and Personal Data Protection

Information Commissioner, Serbia

Information Commissioner, Slovenia

Non Governmental Organisations

Access Info Europe

Access to Information Programme, Bulgaria

ACIMA, Spain

AITEC, France (Association Internationale de Techniciens, Experts et Chercheurs)

Asociación Andaluza para la Defensa de los Animales, Spain

Asociación de vecinos "El muellito del roque" de Arinaga, Spain

Associação para a Cooperação Entre os Povos, Portugal

Asociación Plataforma El Chorlitejo, Spain

Asociación Tambor de Hojalata, Spain

Atlatszo, Hungary

Bahrain Transparency Society

Centre for Law and Democracy, Canada

Centre for Legal Resources, Romania

Centre for Public Policy PROVIDUS, Latvia

Chachipe a.s.b.l, Luxembourg

Citizen Control - Animal Defence, Bulgaria

Civio - Fundación Ciudadana, Spain

Comité des Droits de l'Homme et Développement, Democratic Republic of Congo

Diritto Di Sapere, Italy

Ecologistas en Acción, Spain

EPAS Association, Romania

European Citizen Action Service

European Federation of Journalists

El Albergue, Spain

European Union Transparency.org

Foro Social de Cangas, Spain

Foundation Open Society Macedonia

Frag den Staat, Germany

Freedom Forum, Nepal

Freedom of Information Center of Armenia

Fundació ENT, Spain

Fundación Pro Acceso de Chile

GONG, Croatia

Govern Obert, Spain

HELIO International, France

Hungarian Civil Liberties Union, Hungary

International Collective in Support of Fishworkers

IKME, Cyprus

Independent Journalism Centre, Moldova

Institute for Development of Freedom of Information, Georgia

Irukandji Aquatik Films, Spain

Iuridicum Remedium, Czech Republic

Kibris Ab Dernegi (KAB), Cyprus

K- Monitor Watchdog for Public Funds, Hungary

La Sociedad Caminera del Real de Manzanares, Spain

Macedonian Young Lawyers Association, Macedonia

N-ost, Germany (Network for Reporting on Eastern Europe)

Peace Institute, Slovenia

Pozarządowe Centrum Dostępu do Informacji Publicznej, Poland

Pro Media, Macedonia

Publish What You Fund

Regards Citoyens, France

Socio-Economic Rights and Accountability Project, Republic of Nigeria

Sustentia, Spain

Swedish Society for Nature Conservation

Tanzania Citizens' Information Bureau

The Center for Independent Journalism, Romania

The Environmental Pillar, Ireland

Transparency International, Russia

Transparency Macedonia

Transparency International, Serbia

Verdegaia, Spain

Zain Dezagun Urdabai Elk, Spain

Civil Society Coalitions

Africa Freedom of Information Centre
24 Members

Coalition for Fair Fisheries Agreement
14 members

European Alternatives
5 members

South East European Network for Professionalisation of Media
18 members

OCEAN2012
151 members

World Press Freedom
Committee
37 members