



Smoke Free Partnership

Response to Public consultation on the green paper on the review of Regulation 1049/2001 on access to documents

The Smoke Free Partnership is a strategic, independent and flexible partnership between the European Respiratory Society, Cancer Research UK and the Institut National du Cancer. It aims to promote tobacco control advocacy and policy research at EU and national levels in collaboration with other EU health organisations and EU tobacco control networks. www.smokefreepartnership.eu



1. Introduction

The Smoke Free Partnership is a strategic, independent and flexible partnership between the European Respiratory Society, Cancer Research UK and the Institut National du Cancer. It aims to promote tobacco control advocacy and policy research at EU and national levels in collaboration with other EU health organisations and EU tobacco control networks.

Despite evidence that tobacco control measures by the European Community and within the Member States have had a positive effect on smoking rates and saved thousands of lives, smoking still remains the largest single cause of preventable death and disease in Europe.

Although much has been achieved in tobacco control over the past decade, increased capacity for tobacco control is needed at civil society level in order to bring about further changes within Member States and the EC. Resources available for tobacco control actions still fall far short of what is needed, despite the trans-national nature of the tobacco industry and the need to facilitate a European response.

In order to achieve its aims, the partnership build on existing alliances, support national tobacco control efforts, supplement existing tobacco control activities at EU level and harness the partners' existing research and funding capacities, as well as develop NGO capacity and research strategy at EU level in a more targeted way.

- **Cancer Research UK**¹ is the world's largest independent organisation dedicated to cancer research with a research spend of over £257 million in 2005/06. The charity's vision is that together we will beat cancer. Cancer Research UK carries out world-class research to improve the understanding of cancer and to find out how to prevent, diagnose and treat different types of the disease. It ensures that its findings are used to improve the lives of all cancer patients. It helps people to understand cancer, the progress being made and the choices each person can make. Cancer Research UK works in partnership with others to achieve the greatest impact in the global fight against cancer
- **The European Respiratory Society** is a non-profit, international medical organisation with over 7,000 members from 100 countries. It was founded in 1990 and is the largest organisation in its field in Europe. The main objective of the Society is to promote respiratory health in Europe in order to alleviate suffering from respiratory disease and it is the leading forum in Europe for the presentation of research findings and for exchange of knowledge between all scientists and health professionals involved in respiratory medicine. This is accomplished by promoting basic epidemiological and clinical respiratory research, collecting and disseminating scientific information, organising congresses and conferences, producing scientific publications, supporting training and continuous education in respiratory medicine and collaborating with organisations that represent patients and their carers. Through its diverse activities, the ERS seeks to improve the prevention, management and treatment of lung disease. Further information is available at www.ersnet.org/ers

¹ Registered charity no. 1089464



- The **Institut National du Cancer** is responsible for providing a global view of the fight against cancer in France. Therefore one of its main duties is to monitor the implementation of the Cancer Plan. As a coordinating body, the National Cancer Institute is intended as a benchmark centre in terms of expertise and resources for researchers, healthcare professionals and government bodies. With the status of a French Groupement d'Intérêt Public (Non-profit Public Interest Group), the National Cancer Institute is a framework for stable cooperation between private and public stakeholders in the fight against cancer. Governed by the rules of transparency required to monitor the use of public funds, the National Cancer Institute has the management autonomy necessary for a cooperative structure whose members include private-sector legal entities. Nearly 1.2 million Europeans die of cancer each year. In Europe alone, more than 2 million new cases of cancer are recorded each year. One of the most common forms is lung cancer. Efforts to monitor tobacco should therefore bring significant reductions in cancer mortality in Europe.

This Response has also been fully endorsed by:

Association of European Cancer Leagues (ECL) www.europecancerleagues.org

European Network for Smoking Prevention (ENSP) www.ensp.org

Action on Smoking and Health (ASH) www.ash.org.uk

Health 21 Hungarian Foundation <http://health21.hungary.globalink.org/>

2. General Comments

We recognize that the institutions of the European Union are gradually becoming more open to the public. For instance, we note the new policy of open meetings in Council as a very positive outcome. We also congratulate the European Commission for seeking ways of adding value to the debate on the “European Transparency Initiative” launched in November 2005 in order to further a culture of openness between the EU and the citizens of Europe.

We therefore recognise that the right of access to documents is only one aspect of the European transparency initiative. However, we note that this green paper, in places, appears to be more protective of the Commission's interests, rather than opening up the field for discussion and debate. Access to documents is a very important aspect of openness yet the Commission's consultation is very limited in scope. Furthermore, we agree with the Commission that seeking the views of citizens, including civil society organizations, economic operators, public authorities and other organization is crucial. However, we would like to point out that access to European documents is of crucial importance to stakeholders even if they do not have a specific interest in European affairs (as indicated in page 3 paragraph 4 of the Green Paper). Indeed, many EU documents have an impact at national level. Also, the specific interest of a person in obtaining access to document should not be relevant with regard to the decision as to whether or not to disclose the documents.

We welcome the opportunity to comment on the regime for obtaining access to documents of the European Institutions and to react to the options set out in this Paper.



3. Executive Summary:

Regarding the information provided through registers and on the websites of the institutions:

- We recommend that a common register for all institutions would be the best option. This would greatly improve the ability of the public and stakeholders to find the documents they need without losing too much time. This would also make for greater clarity regarding the stage of the legislative process of a particular document. More specifically, the Commission should:
- Amend the Regulation by making a coherent proposal in order to ensure a single point of access in a clear and structured way to all preparatory documents dealing with a legislative or regulatory procedure;
- Reorganise the institutions' registers by adding a common interface so that the citizen/user is able to find the same functionalities in the three registers;
- Define common rules for archiving documents, avoiding duplication and ensuring the authenticity of the various versions;
- Present in a clear and comprehensible way the work-flow of the Institutions and, where relevant, the point of access to the documents.

Regarding active dissemination of information:

- The scope of the registers, in particular those of the Commission should be improved.
- The number of documents and the amount of information made directly accessible to the public should also be improved.
- At the very least, article 17.1 stating that “*Each institution shall publish annually a report for the preceding year*” should be respected.
- Dissemination of information should also include active dissemination of the right of access to documents itself, and more resources should be allocated to informing the public of their right in this respect.

Regarding a single set of rules for access to documents, including environmental information:

- All Tobacco documents held by the public authorities should be released as a prerequisite for stepping up the application and monitoring of Community law, as well as the application and monitoring of the FCTC. Indeed, implementation of the FCTC should be according to the strictest standards possible within national constitutional limitations. The World Health Organization Framework Convention on Tobacco Control is a treaty adopted unanimously by the 56th World Health Assembly on May 21, 2003. It became the world's first international public health treaty when it came into force on February 27, 2005. The treaty has been signed by 168 countries and is legally binding in 61 ratifying countries representing 2.3 billion people. **At the very least**, access to environmental information should include all tobacco files as it is recognised that tobacco is major environmental hazard.



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

Regarding protection of personal data:

- The institutions should develop Article 4 in the review of access to documents, showing their commitment to improving transparency.

Regarding adequate protection of commercial and economic interests of third parties:

- Disclosing information in the interest of the public good should be the norm with exemptions only being made in limited and well defined circumstances. The current criteria for exemptions is too broad in scope and should be further refined.
- The question of what constitutes an “overriding public interest” needs clarifying and it should not be left up to the Court to define the “public interest” on those occasions when a case is brought.
- Standards or guidelines should be made available, in order to make the process more transparent.

Regarding derogation from the normal rules on access:

- The EU institutions and Member States should be willing to contribute to the culture of openness in the better regulation process and should not deny access to documents unless they can specify in more detail the grounds on which they deny access to documents.

Regarding the concept of "document":

- Merging the definitions in Article 3(a) and 2(3) as this could provide some clarification.

Regarding indication of events before and after which exceptions apply:

- The Regulation should specify after which time documents withheld to the public can become available.
- The withholding of documents to the public under special circumstances should be the exemption rather than the norm.
- Documents specifically relating to public consultations and legislative initiative should not be withheld so that the public can effectively participate in the EU decision-making process.



- Once a piece of legislation has been adopted, everything that led up to the decision should be made accessible, so as to enable the public to understand the processes by which decisions concerning them were made.

Question 1: Would you qualify the information provided through registers and on the websites of the institutions as:

- A) Comprehensive and easy to access
- B) Comprehensive but difficult to find?
- C) Easy to access but insufficient as regards their coverage?
- D) Insufficient and difficult to access?**

The information provided varies between Institutions and the websites of the institutions suffer from a similar lack of consistency.

With regards to the European Commission, the register is not always comprehensive. It would help if all the documents relating to the work of the different DGs were included in the register as this would add coherence to the process and would make it easier for applicants to find what they are looking for.

With regards to the Commission's websites, there are very different levels of comprehensiveness. Some have very up-to-date information, while others are badly designed, and/or out-of-date. Improving consistency between the different websites would add value. The stage of the legislative process of a particular document should also be mentioned very clearly as this is not always the case at present. This would greatly improve the ability of the public and stakeholders to respond at appropriate stages of the decision-making process.

With regards to the Council, the register is the least comprehensive. It would help if all the documents related to the work of the Council (including working groups) were available and if the minutes of the Council were put on line shortly after the debate has taken place.

We recommend that a common database for all institutions would be the best option. This would greatly improve the ability of the public and stakeholders to find the documents they need without losing too much time. This would also allow for greater clarity regarding the stage of the legislative process of a particular document. More specifically, the Commission should:

- Amend the Regulation by making a coherent proposal in order to ensure a single point of access in a clear and structured way to all preparatory documents dealing with a legislative or regulatory procedure;
- Reorganise the institutions' registers by adding a common interface so that the citizen/user is able to find the same functionalities in the three registers;
- Define common rules for archiving documents, avoiding duplication and ensuring the authenticity of the various versions;
- Present in a clear and comprehensible way the work-flow of the Institutions and, where relevant, the point of access to the documents.



Question 2: Should more emphasis be put on promoting active dissemination of information, possibly focused on specific areas of particular interest?

YES

Regulation 1049/2001 states that its objective is to “give the fullest possible effect to the right of public access to documents” and the institutions should be commended for the improvement of information dissemination that stakeholders have seen in recent years. Article 11 of the Regulation also states that “*references to documents shall be recorded in the register without delay*” and this obligation should not be optional. In the light of the complaints lodged with the European Ombudsman against the Commission on its public register², much improvement is still needed. The scope of the registers, in particular those of the Commission should be improved. The number of documents and the amount of information made directly accessible to the public should also be improved. At the very least, article 17.1 stating that “*Each institution shall publish annually a report for the preceding year*” should be respected. The failure to publish the 2005 annual report in 2006 as required under Article 17.1 is a clear case of maladministration. Indeed, as of 16 April 2007, the Commission still has not published the 2005 report. The SFP agrees with ECAS³ that “*Requests for information and active dissemination should be two sides of the same coin, with the aim of providing citizens with the information they want and need*”. Hence, the European Commission should be aware of its responsibility under the Regulation to publish an annual report. The only way that citizens can learn of the Commission’s response to applications for access to its documents is through its annual report and this should be fully respected.

We suggest that the dissemination of information should also include active dissemination of the right of access to documents itself, and more resources should be allocated to informing the public of their right in this respect.

Question 3: Would a single set of rules for access to documents, including environmental information provide more clarity for citizens?

YES

The subject of the Aarhus Convention⁴ goes to the heart of the relationship between people and governments as it is not only an environmental agreement, but also a Convention about government accountability, transparency and responsiveness, acknowledging that there is an obligation to future generations. In this respect, The Smoke Free Partnership would like to stress that Regulation 1049/2001 is a major set back from Directive 2003/4 and the Aarhus Convention. We note that both Directive 2003/4⁵ and the Aarhus convention were agreed

² <http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf>

³ <http://www.ecas.org/Access%20to%20Documents/2371/default.aspx?id=653>

⁴ <http://www.unece.org/env/pp/treatytext.htm>

⁵ On 25 June 1998 the Community signed a Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention). So that it can be ratified, Community legislation must be compatible with it. This Directive seeks this compatibility, extends the level of access to information set in Directive [90/313/EC](#) and repeals this with effect from 14 February 2005.



before Regulation 1049/2001⁶, although this is not made clear in the green paper. Indeed, the new Directive repeals Directive 90/313/EC of 7 June 1990 on the freedom of access to information on the environment. It sets out the basic terms and conditions to grant right of access to environmental information held by or for public authorities and aims to achieve the widest possible systematic availability and dissemination of this type of information to the public. Moreover, it is aimed at aligning Community law with the provisions of the Aarhus Convention with a view to its ratification by the Community.

We welcome the fact that the access to environmental information held by the public authorities is a prerequisite for stepping up the application and monitoring of Community environmental law. We note that both the Aarhus Declaration and Directive 2003/4 restrict Member States from preventing the disclosure of documents at EU level, in relation to the environment, which they would have to disclose under national law. We believe that this principle should be extended to cover the majority of EU subject areas not just the environment. It should be noted that disparities between the laws in force in the Member States can create inequality within the Community as regards access to information. Hence, Regulation 1049/2001 should also restrict Member States from preventing the disclosure of documents at EU level, which they would have to disclose under national law.

The World Health Organization Framework Convention on Tobacco Control is a treaty adopted unanimously by the 56th World Health Assembly on May 21, 2003. It became the world's first international public health treaty when it came into force on February 27, 2005. The treaty has been signed by 168 countries and is legally binding in 61 ratifying countries representing 2.3 billion people. **At the very least**, access to environmental information should include all tobacco files as it is recognised that tobacco is major environmental hazard. All Tobacco documents held by the public authorities should be released as a prerequisite for stepping up the application and monitoring of Community law, as well as the application and monitoring of the FCTC. Indeed, implementation of the FCTC should be according to the strictest standards possible within national constitutional limitations. All Member States will need to develop and implement comprehensive tobacco-control strategies encompassing prevention, protection, cessation and harm reduction.

Member States should be asked to specify in more detail the grounds on which they currently deny access to documents. Documents specifically relating to public consultations and on-going legislative initiatives should not be withheld so that the public is not at a disadvantage and can effectively participate in the EU decision-making process.

We recommend that the Regulation changes its mandatory language to the discretionary language used in the Directive.

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

⁶ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 at the Fourth Ministerial Conference in the 'Environment for Europe' process.



Case Study: On the 22 March and 20 April 2007 the Smoke Free Partnership made a request for the entire KPMG study in order to respond appropriately to all the questions set out in the consultation paper on *the structure and rates of excise duty applied on cigarettes and other manufactured tobacco*. Our application was registered on 26 April 2007. The Smoke Free Partnership recognises the efforts made by the Secretariat General and trust that the European Commission is doing its utmost to provide us with a final reply. However, we regret that we have not yet received the study and that our recommendations will thus be based on incomplete information, despite the fact that the TAXUD consultation paper describes the problems and possible solutions in a comprehensive and detailed manner.

Smoking continues to be the largest single cause of death and disease in the European Union (EU), despite the progress that has been made in tobacco control. Over 650,000 Europeans are killed every year⁷ because they smoke, one in seven of all deaths across the EU, and over 13 million more are suffering from a serious, chronic disease as a result of their smoking. It is also now established, beyond doubt, that tobacco smoke is a serious environmental health hazard, killing around an additional 100,000 non-smoking Europeans, with many millions more having illnesses exacerbated by inhaling other people's smoke. Furthermore, The EU bears a substantial economic burden due to smoking. A conservative estimate of these costs falls between **€98-130 billion a year**, or between 1.04-1.39% of the region's Gross Domestic Product for 2000. The true costs are undoubtedly higher, and will continue to escalate if appropriate measures are not taken. This increase in costs will result from higher smoking rates in the new EU10 Member States, healthcare improvements and increasing demand for healthcare services. Smokers, but also non-smokers, governments and employees have to cover these costs. Empirical evidence shows that tobacco consumption represents a net burden for state budgets even after accounting for collected tobacco tax and savings in social security payments due to premature mortality among smokers. EU Member States impose both *ad valorem* and specific excise taxes on tobacco products, in addition to Value Added Tax. The choice of the type of excise tax has profound implications for the amount of tax paid per cigarette pack, and is one of the reasons why cigarette prices vary substantially among Member States. Specific excise taxes are more efficient; they are easier to administer and better support the EU's public health goals because they discourage the smoking of all cigarette brands equally, rather than encouraging substitution with less expensive brands⁸. Therefore tobacco tax is a very important measure to reduce the burden of tobacco-related death and disease in the EU.

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

A) Granting partial access to documents, expunged for personal data, is a satisfactory way of balancing transparency and the protection of personal data.

⁷ The ASPECT consortium. Tobacco or health in the European Union. Past, present and future. Luxembourg, European Commission, 2004.

⁸ The Aspect Report can be found on the website of the Commission at: http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/ev_20041022_en.htm - the full report is also available on <http://www.smokefreepartnership.eu/-Reports-and-Publications->



B) The disclosure of personal data should always be assessed under the criteria set by the Regulation on the protection of individuals with regard to the processing of personal data (Regulation 45/2001).

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

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

Question 5: How should the exception laid down in Article 4(2), 1st indent of Regulation 1049/2001 be clarified in order to ensure adequate protection of commercial and economic interests of third parties?

A) The current system where the protection of commercial interests is balanced against the public interest in disclosure strikes the right balance.

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

C) The current rules do not sufficiently protect commercial and economic interests.

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

Commercial interests seem to be over protected by the regulation at present. The question of what constitutes an “overriding public interest” needs clarifying and it should not be left up to the Court to define the “public interest” on those occasions when a case is brought. Standards or guidelines should be made available, in order to make the process more transparent. Civil society organisations wanting to use the overriding public interest to access documents could then have a better chance of knowing whether their request was likely to be successful.

Question 6: Would it be acceptable to derogate from the normal rules on access, in particular the time frames where access requests are clearly excessive or improper?

No.

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

In any case, it would seem that the number of requests for documents is rather small, and it certainly does not warrant changes in the law on the basis of a hypothetical situation. The problem of voluminous or excessive requests should be dealt with through communication between the institutions and the applicant. Access to documents should not be seen as a battle



between applicants and institutions and should allow cooperation, creating a system from which both sides benefit.

Question 7: With regard to the content of databases, should the concept of "document" cover sets of information that can be extracted using the existing search tools?

No opinion

We do not have a strong opinion on this matter. Regulation 1049/2001 gives a broad definition of what can be termed a “document”⁹, which includes documents in electronic form. We suggest merging the definitions in Article 3(a) and 2(3) as this could provide some clarification.

Question 8: Should the Regulation indicate events before and after which exceptions would or would not apply?

YES

We believe that the Regulation should specify after which time documents withheld to the public can become available. However, as outlined in the answer to question 5, the withholding of documents from the public under special circumstances should be the exemption rather than the norm. Documents specifically relating to public consultations and legislative initiative should not be withheld so that the public can effectively participate in the EU decision-making process. Once a piece of legislation has been adopted, everything that led up to the decision should be made accessible, so as to enable the public to understand the processes by which decisions concerning them were made.

Final comments

- Future consultation exercises should have a preliminary consultation with stakeholders in order to ensure that the questionnaire is as balanced as possible. This was one of the recommendations of the Better Regulation Task Force 2005 report on consultation in the EU, and it is particularly important in order to ensure that the questions raised for consultation are not too narrow or biased. We know that this is possible and can give an example of good practice within the Commission: DG SANCO launched an informal consultation with EU Member States’ authorities, environment and health stakeholders as well as the industry in the run-up to the adoption of a Commission Green Paper on Smoke-Free Environments. This informal consultation issued prior to the drafting of the Green Paper *Response to the Green Paper - Towards a Europe free from tobacco smoke: policy options at EU level* was extremely useful, as it outlined the problem and gave a list of policy issues and options. We would like to congratulate again the unit responsible for the Green Paper within DG Sanco for the clarity of the documents published on this topic.

⁹ 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.



As a result, the Green Paper was a well-researched document based on strong scientific evidence which presents a range of possible options for smokefree policies.

- The Commission should improve the clarity of the citations and recitals in Regulation (EC) No 1049/2001 in order to clarify the legal basis for the Regulation itself. From a constitutional perspective, the legal basis is not clear. For instance, it would be useful to underline if Article 255¹⁰ EC, is taken into account¹¹:

¹⁰ Article 255 EC: (1) Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3. (2) General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam. (3) Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

¹¹ Based on the European Parliament resolution with recommendations to the Commission on access to the institutions' texts (2004/2125(INI)) P6_TA(2006)0122.