

Draft Recommendation of the European Ombudsman in the inquiry into complaint 262/2012/OV against the European Parliament

Recommendation

Case 262/2012/OV - **Opened on** 29/02/2012 - **Recommendation on** 31/03/2014 - **Decision on** 06/10/2014 - **Institution concerned** European Parliament (Draft recommendation accepted by the institution) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant, the Foundation for a Free Information Infrastructure [2] , complained to the Ombudsman about how Parliament dealt with its request for public access to the minutes of meetings of Committee Coordinators [3] .
2. On 8 July 2011, the complainant requested the minutes of the meetings of Parliament's International Trade Committee (INTA), Legal Affairs Committee (JURI) and Constitutional Affairs Committee (AFCO) relating to the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) [4] . It also requested the minutes of all related meetings of Committee Coordinators.
3. On 28 July 2011, Parliament's Transparency - Public Access to Documents Unit replied that the minutes of all meetings of Parliament's Committees were available on Parliament's website [5] . It went on to state that these minutes include a point called " *Coordinators Decisions* " or " *Chair's announcements* " with the relevant decisions by the Coordinators. However, it added that it had no separate minutes for the Committee Coordinators' meetings.
4. On 29 July 2011, the complainant made a confirmatory application for public access to the minutes of the meetings of Committee Coordinators. The complainant pointed out that a Google search for " *European Parliament coordinator's meetings* " identified separate minutes of meetings of the Committee Coordinators for the Environment, Public Health and Food Safety Committee (ENVI Committee).
5. On 5 August 2011, Parliament insisted that, normally, no separate minutes of the meetings of Committee Coordinators existed. It added that some Committees, like the ENVI Committee,



had decided to publish results of their meetings.

6. On 5 October 2011, the complainant wrote to the INTA Committee's Secretariat. It referred to the previous replies from Parliament that "[n]o separate minutes for the Coordinators meetings exist" and argued that these statements had turned out to be wrong since in a letter from Mr Carl Schlyter MEP to the INTA Committee, reference was made to the Coordinators' minutes. The complainant stated that the INTA Committee's Secretariat had denied or hidden the existence of documents and urged the Secretariat to record all existing documents in one of Parliament's document registers, so that the public could appeal against decisions refusing access.

7. On 25 October 2011, Parliament, referring to the complainant's request of 5 October 2011 to the INTA Committee's Secretariat, granted access to the minutes of the INTA Coordinators' meetings dealing with ACTA, that is to say, the minutes of the meeting of the INTA Committee Coordinators which took place on 21 June 2011 [6] .

8. On 20 November 2011, the complainant wrote to Parliament thanking it for having sent it a copy of the minutes of the INTA Committee Coordinators meeting dealing with ACTA. It however pointed out that, in its request of 8 July 2011, it had also asked for the minutes of the JURI Committee Coordinators' meeting, but that Parliament had denied the existence of these meetings three times. It again requested public access to these minutes.

9. On 28 November 2011, Parliament replied to the complainant that "*following information obtained from the JURI secretariat, we confirm our reply provided last July: the JURI committee secretariat does not elaborate separate coordinator's minutes. JURI minutes are available on EP webpage, please visit: [reference] . The decisions taken by coordinators are included in the committee minutes (point "Chair's announcements") ...*".

The subject matter of the inquiry

10. The Ombudsman asked Parliament to submit an opinion on the following allegation and claim:

Allegation:

Parliament fails to register all existing Parliament documents in its electronic Register of documents, in particular the minutes of the meetings of Parliament Committee Coordinators.

Claim:

Parliament should register all existing Parliament documents in its electronic Register of documents, in particular the minutes of the meetings of Parliament Committee Coordinators.



The inquiry

11. The complaint was forwarded to Parliament for an opinion. Parliament sent its opinion on 31 May 2012. The opinion was then forwarded to the complainant, which sent its observations on 25 July 2012.

The Ombudsman's analysis and conclusions

A. Alleged failure to register all existing Parliament documents in the register

Arguments presented to the Ombudsman

12. The complainant argued that Parliament infringes Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Regulation 1049/2001) [7], by not registering all Parliament documents (such as the minutes of the meetings of the Coordinators of the INTA, JURI and AFCE Committees) in a public register of documents. It also argued that this failure also gives rise to an infringement of Rule 103 of Parliament's Rules of Procedure ("*Transparency of Parliament's activities*"), which states: "*Parliament shall ensure that its activities are conducted with the utmost transparency, in accordance with the second paragraph of Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union and Article 42 of the Charter of Fundamental Rights of the European Union.*"

13. In its opinion, Parliament noted that recital 14 of Regulation 1049/2001 states that "[i]n order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents". It also noted that recital 6 states that "[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity". It also quoted Article 12 of Regulation 1049/2001, which reads as follows :

" 1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.



4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located. "

14. Parliament then explained the structure of its electronic register. It stated that, in order to comply with Article 11 of Regulation 1049/2001, it made an inventory of categories of documents produced by Parliament, or received by Parliament in the context of inter-institutional procedures. Once this list of documents was established, Parliament developed the necessary IT tools allowing for the automatic feeding of (produced/received) documents into an electronic public register. The different categories of documents are listed on the public register, allowing for online searches by category. Direct downloading of documents is possible in most (95%) cases. Where direct downloading is not possible, the reference of the relevant document appears in the register. The document can then be requested from Parliament.

15. Parliament stated that, in creating the public register, it applied the criteria that listed documents had to be "formal" documents, that is documents having a certain degree of finalisation and which have been registered in an internal document management system. Parliament stated that ephemeral or transitory documents (for instance personal notes, internal preparatory drafts, e-mails, etc.) are, unless they are necessary for the adequate follow-up of a specific file, not registered in any system. As a consequence, they are not on the public register. In contrast, formal drafts or preparatory documents relevant for the discussions concerning (mainly legislative) files to be adopted by parliamentary Committees or by the plenary of Parliament are included in the public register.

16. Parliament argued that, in developing the automatic feeding system, it had prioritised documents produced and received in the context of the legislative procedure, in order to comply with Article 12 and recital 6 of the Regulation and to contribute in a proactive way to the transparency of the legislative procedure. Parliament further stated that the scope of the register widens progressively as new typologies of documents are identified and produced, in parallel with Parliament's increased competences.

17. In reply to the complainant's claim that Parliament should register *all* existing Parliament documents in its electronic public register, Parliament stated that, in its view, Article 11 of the Regulation does not impose an obligation on the institutions to list in their registers *all* the documents which are in their possession. Moreover, it is neither feasible nor advisable, from the point of view of good administration, to register all existing documents, independent of their formal status and degree of completion. It would also be contrary to effective transparency.

18. Parliament argued that, from a technical point of view and given the very wide definition of "document" in Article 3(a) of the Regulation, the creation of a fully exhaustive register is impossible. Indeed, in practical terms, the wide definition implies that any preparatory paper with the first ideas (even hand-written) on a future report could be considered a document. The same applies to all preliminary versions of a draft report. Such documents (personal notes, e-mails, post-its, preliminary drafts) do, of course, "exist". However, because of their ephemeral character, they are not normally recorded.



19. Parliament argued that the complainant's claim stemmed from confusion between the principle of wide access (recital 11 of the Regulation) and the obligation for the institutions to set up a register. It stated that a public register is a tool to facilitate public access. Parliament stated that the Regulation does not draw a parallel between the scope of the principle of public access and the scope of the register. Should such a parallel be established, its implementation would be unrealistic. It would impose a heavy administrative burden on the institutions because of the considerable amount of preliminary and informal documents of various kinds which are held by the institutions. Requiring institutions to register all such documents would hamper the good functioning of the institutions.

20. Such a distinction (between the right of access and the scope of the register) does however, Parliament insisted, not mean that there is a restriction on the right of access. On the contrary, it means that, when a request is made, the institution concerned has the obligation to identify the relevant document and to examine its content with a view to providing public access under the Regulation. This task is independent of whether or not the public register refers to the documents requested.

21. Parliament thus concluded that its public register of documents complies with the requirements of Articles 11 and 12 of Regulation 1049/2001.

22. In its observations, the complainant stated that it understood from Parliament's opinion that Parliament does not register ephemeral or transitory documents. However, it argued, there are many documents which are not ephemeral or transitory and which should be included in the register, such as i) minutes of meetings of the Committees' Coordinators, and ii) negotiation documents.

23. The complainant argued that *minutes of Coordinators' meetings* are not ephemeral or transitory documents. It stated that the Committees' secretariats draw up separate detailed Coordinators' minutes and send them to all Members of the Committee. These documents play an essential role, since they inform the Committee Members and may record decisions. The complainant argued that the Register fails to indicate which Committee secretariats draw up Coordinators' minutes. The complainant pointed out that it still had not received the requested Coordinators' minutes of the JURI Committee. According to the complainant, these minutes do exist. The complainant argued that it seemed that the Committees do not share their documents with the Register. It added that the Committees' secretariats operate like "little kingdoms" within Parliament, outside the reach of the Register. Parliament should thus, in its view, clarify which Committees produce separate Coordinators' minutes and update its register accordingly. Likewise, the secretariats of the Committees should provide correct information to the Register, which should have access to all document management systems (for the moment, the complainant says, it does not).

24. The complainant argued that Parliament's replies of 28 July and 5 August 2011, in which it stated that no minutes of the in camera (AFFO, JURI and INTA) Committee meetings are drafted, might be correct with regard to the full Committee meetings which are held in camera. However, the same was not true for the in camera meetings of the Committees' Coordinators,



as at least two of the three secretariats (of the INTA and JURI Committees) do produce (separate) detailed minutes of the in camera Coordinators' meetings. The complainant stated that proof of this is that it did obtain a copy of the Coordinator's minutes of the INTA Committee.

The Ombudsman's assessment

25. The Ombudsman notes that the present inquiry does not concern a refusal to provide public access to documents. Indeed, as soon as the existence of a requested document was confirmed by Parliament's services, the complainant was granted full public access to the document. The present complaint only concerns the allegedly wrongful failure of Parliament to include the minutes of meetings of Committee Coordinators in its public register of documents. The complainant argues that the failure to record those documents in the public register of documents impedes the exercise of the right of public access to documents.

26. Recital 14 of Regulation 1049/2001 reads as follows:

" Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights , each institution should provide access to a register of documents " (emphasis added).

27. Article 11 of Regulation 1049/2001 reads as follows:

" 1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002. "

28. Article 12 of Regulation 1049/2001 reads as follows:

" 1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.



3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located. "

29. It is an established fact that Parliament's services do not systematically include the separate minutes of Committee Coordinators' meetings in Parliament's public register of documents, even though these minutes certainly do exist [8] . For example, there is currently no reference to document INTA(2011)0621_2 in Parliament's public register of documents, even though that document certainly exists and the complainant was, eventually, given access to it (see paragraph 9 above).

30. The failure of Parliament's services to include that document in Parliament's public register of documents not only means that the complainant's exercise of its right of access to that document was delayed [9] , it also means that other members of the public are not, even today, made aware of the existence of that document.

31. The Ombudsman agrees that the wording and purpose of Articles 11 and 12 of Regulation 1049/2001 do not imply an obligation for Parliament to have, in its public register of documents, a reference to each and every document it holds. For example, to inform the public of the existence of the myriad of mundane administrative documents created by Parliament in the context of managing its staff and infrastructure, it would be adequate for Parliament to describe these categories of documents in the public register (even if each individual document in those categories is not listed separately in the register) [10] . If members of the public ever require public access to such documents, they could submit a request to Parliament, which should assist them in identifying specific documents.

32. However, Parliament should certainly interpret Articles 11 and 12 of Regulation 1049/2001 in a manner which allows the public to obtain as complete a picture as possible of how Parliament carries out its core tasks. Documents which relate to these core tasks should, as far as possible, be recorded in Parliament's public register of documents.

33. The work of MEPs in Committees certainly constitutes a core task of Parliament. This work encompasses work in meetings of Committee Coordinators. If separate minutes are drafted of meetings of Committee Coordinators [11] , the existence of such minutes should be recorded in Parliament's public register of documents.

34. Parliament's own internal Rules which seek to implement the right of public access to European Parliament documents [12] are in accordance with the above principles. Article 4(3) of those Rules states: "*Documents drawn up under the legislative procedure or for the purposes of parliamentary business shall be entered in [the public register] as soon as they have been tabled or made public* " (emphasis added).



35. However, in the present case, Parliament failed to comply with its own internal rules. Even though minutes of at least one meeting of Committee Coordinators relating to the negotiation of ACTA exist (see paragraph 9 above) and even though those minutes certainly fall under the category of "*documents drawn up ... for the purposes of parliamentary business*", no reference to that document is included in Parliament's public register.

36. It is the Ombudsman's understanding that Parliament does not, as a matter of general policy, include references to minutes of meetings of Committee Coordinators in Parliament's public register of documents. As a result, rather than being an isolated failure by Parliament to make public the existence of a single document that relates to the work of MEPs, there is a systemic failure by Parliament to mention, in the public register of documents, the existence of a whole series of documents that relate to the work of MEPs.

37. In light of the above, the Ombudsman finds that Parliament's failure to include references to the minutes of the meetings of Committee Coordinators in its register of documents amounts to an instance of maladministration. She therefore makes a corresponding draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

38. The Ombudsman underlines that the present complaint was triggered by lack of transparency with regard to access to documents concerning the negotiation of an international trade agreement, in the present case, ACTA. In his recent reply of 10 January 2014 to the Ombudsman [13], the President of Parliament took a position in favour of more transparency in international trade negotiations. It is also with this commitment in mind that the Ombudsman makes the present draft recommendation.

B. The draft recommendation

When minutes of meetings of Committee Coordinators are drawn up, Parliament should include the minutes in its public register of documents and make them, in principle, directly accessible, in accordance with Article 12 of Regulation 1049/2001.

Emily O' Reilly

Done in Strasbourg on 31 March 2014

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The Foundation states that it is a not-for-profit association dedicated to the development of information goods for the public benefit, based on copyright, free competition and open standards.



[3] The European Parliament has 20 parliamentary committees consisting of between 24 and 76 MEPs. The parliamentary committees meet, in public, once or twice a month in Brussels. They produce reports on legislative proposals, which are then presented to the plenary assembly of Parliament. Rule 192 of the Rules of Procedure of Parliament states that the political groups in Parliament may designate one of their members as "coordinator" in each committee. Meetings of "Committee Coordinators" are then convened, normally on the same day as committee meetings, to prepare the decisions to be taken by that committee, in particular decisions on procedure and the appointment of rapporteurs. A committee may also delegate the power to take certain decisions to the coordinators, with the exception of decisions concerning the adoption of reports, opinions or amendments.

[4] ACTA is a multinational treaty for the purpose of establishing international standards for intellectual property rights enforcement. ACTA was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. On 26 January 2012, Mexico, the European Union and 22 countries which are member states of the European Union also signed ACTA. After ratification by six countries, ACTA will come into force in countries that ratified it. As the European Union and [its Member States \[Link\]](#) share competency on the subject of this convention, the entry into force of the ACTA required ratification both by the Member States and the European Union. Ratification by the European Union required the consent of the [European Parliament \[Link\]](#) (in accordance with Article 218 of the Treaty on the Functioning of the European Union). However, in its vote of 4 July 2012, the European Parliament rejected the ratification of ACTA.

[5] <http://www.europarl.europa.eu/committees/en/minutes.html> [Link]

[6] The Foundation for a Free Information Infrastructure has made these minutes (reference number INTA(2011)0621_2) available on its website at:
<http://people.ffii.org/~ante/acta/INTA-minutes/Coordinators%27s%20minutes%202011%200621.pdf> [Link].

[7] OJ 2001 L 145, p. 43.

[8] Whether or not a particular meeting of Committee Coordinators is minuted is at the absolute discretion of the participants of that meeting (that is to say, the Committee Coordinators themselves decide whether or not minutes will be taken at a particular meeting). (Rule 192 of Parliament's Rules of Procedure, which concerns the role of Committee Coordinators, does not impose an obligation to draft minutes.)

Since the right of public access to documents (and the need to include references to documents in a public register of documents in order to facilitate the exercise of that right) **only applies to documents that exist** and does not imply any obligation to create a document, the issue of public access to separate minutes of any given meeting of Committee Coordinators simply does not arise if the participants of that meeting have not opted to create separate minutes of the meeting.



Where Committee Coordinators do decide that a Committee Coordinators' meeting be minuted, two options are open to the Parliament service responsible for drafting such minutes (namely, the relevant Committee Secretariat). First, the minutes of the Committee Coordinators' meeting can be directly incorporated into the minutes of the relevant Committee meeting. For example, the JURI Committee Secretariat has expressly stated that it never draws up separate Committee Coordinators' minutes and that the decisions taken by Coordinators are included in the Committee minutes under the section "Chair's announcements". Alternatively, Committee Coordinators can opt to have separate minutes of a meeting. For example, the minutes of the INTA Committee of 21 June 2011 do not include minutes of the Committee Coordinators' meeting of the same day (see Document reference INTA_PV(2011)0621_1). Instead (see paragraph 9 above), separate minutes of that Coordinators' meeting were drafted and given a formal registration number (INTA(2011)0621_2).

Nothing binds a Committee to consistently follow one or the other option. Indeed, the very same Committee, the INTA Committee, adopted one approach for its meeting of 21 June 2011 and another approach for its meeting of 25/26 April 2012 (the minutes of the Committee Coordinators' meeting related to the INTA Committee meeting of 25 April 2012 are included on pages 4 to 9 of the minutes of the INTA Committee meeting of 25/26 April 2012 (INTA_PV(2012)0425_1)).

[9] The complainant requested public access to the minutes on 8 July 2011. It took until 25 October 2011 for Parliament to recognise that the minutes existed and to provide the complainant with a copy.

[10] Of course, those documents that are recorded in the register can themselves be organised within categories, for ease of use.

[11] See footnote 8 above.

[12] Bureau decision of 28 November 2001, OJ 2011 C 216, p. 19, see also <http://www.europarl.europa.eu/RegistreWeb/information/publicInfo.htm?language=EN> [Link].

[13] <http://www.ombudsman.europa.eu/en/press/release.faces/en/53287/html.bookmark> [Link]