



Press and Information

General Court of the European Union  
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Judgment in Case T-188/12  
Patrick Breyer v Commission

## **The Commission may not automatically refuse access to the written submissions of Member States in proceedings before the Court of Justice on the grounds that they are documents used in court proceedings**

*The decision on the request for access must be made on the basis of the regulation concerning the access by the public to documents held by the European Parliament, the Council and the Commission*

According to the Treaties of the EU, any EU citizen<sup>1</sup> is to have a right of access to documents<sup>2</sup> of the EU institutions, bodies, offices and agencies. However, the Court of Justice of the EU<sup>3</sup> is subject to that obligation of transparency only where it performs administrative functions, so that judicial activities as such are excluded from the right of access. Regulation No 1049/2001<sup>4</sup> lays down detailed rules on access to documents held by the European Parliament, the Council and the Commission. It provides, in particular, for an exception under which those institutions may refuse access to a document where its disclosure would undermine the protection of court proceedings unless there is an overriding public interest in disclosure. As regards documents originating from a Member State, the regulation provides that that State may request the institution not to disclose them without prior agreement.

In March 2011, Mr Patrick Breyer requested the Commission to grant him access to, among others, the **written submissions that Austria had presented to the Court of Justice in infringement proceedings** brought by the Commission against that Member State for failing to transpose the Data Retention Directive.<sup>5</sup> Those judicial proceedings were concluded by a judgment of the Court of 29 July 2010.<sup>6</sup> The Commission refused access to those documents, of which it held a copy, on the grounds that they do not fall within the scope of Regulation No 1049/2001. Mr Breyer then brought an action before the General Court of the European Union seeking the annulment of the decision refusing access.<sup>7</sup>

By today's judgment, **the General Court annuls the Commission's decision refusing access.**

According to the General Court, **the written submissions at issue are not documents of the Court of Justice which would, if they had been, be excluded from the scope of the right to access and, therefore, from the scope of Regulation No 1049/2001.**

A distinction must be drawn between the exclusion of the judicial activities of the Court of Justice from the right of access to documents on the one hand, and documents drafted with a view to

<sup>1</sup> In the same way as any natural or legal person residing or having its registered office in a Member State. (Article 15(3) first subparagraph, TFEU).

<sup>2</sup> Whatever their medium.

<sup>3</sup> Together with the European Central Bank and the European Investment Bank. The 'Court of Justice of the European Union' includes the Court of Justice, the General Court and the Civil Service Tribunal.

<sup>4</sup> 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 (OJ 2001 L 145, p. 43).

<sup>5</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

<sup>6</sup> Case [C-189/09](#) *Commission v Austria*.

<sup>7</sup> Finland and Sweden have intervened in the present proceedings in support of Mr Breyer.

proceedings before the Court, on the other. The latter, although included in the judicial activities of the Court, do not fall within the exclusion instituted by the Treaties and are, on the contrary, subject to the right of access.

Thus, it is clear from the case-law that the documents drafted and submitted by the Commission before the Courts of the EU fall within the scope of Regulation No 1049/2001. Accordingly, it is on the basis of that regulation and, in particular, on the basis of the exception it lays down, specifically in order to protect court proceedings,<sup>8</sup> that the decision to grant access to such a document must be taken.

According to the General Court, there is no reason for a distinction to be drawn, with a view to the inclusion of documents within the scope of the right of access to documents, between those originating from the Commission and those from a Member State. The General Court also recalls that, by adopting Regulation No 1049/2001, the EU legislature abolished the 'authorship rule', in accordance with which, when a document held by an institution was created by a third party, the request for access to the document had to be addressed directly to its author.

**The General Court concludes that the written submissions at issue fall within the scope of Regulation No 1049/2001.** It observes, however, that that finding is without prejudice to the application, if appropriate, of one of the exceptions laid down by the regulation (in particular, the exception concerning the protection of court proceedings) and the possibility for the Member State concerned to ask the institution concerned not to disclose its documents.<sup>9</sup>

The General Court emphasises that its judgment is without prejudice to the separate issue of whether documents created by the court itself (such as the minutes of the hearing) sent to an institution in the course of judicial proceedings are also covered by the scope of Regulation No 1049/2001.

Furthermore, the General Court notes that, in accordance with the case-law, no rule or provision authorises the parties to proceedings to disclose or prevents them disclosing their own written submissions to third parties and that, except in exceptional cases in which the disclosure of a document would adversely affect the proper administration of justice, the parties are, as a matter of principle, free to disclose their own written submissions.

On the other hand, the General Court finds that Mr Breyer has committed an abuse of rights by publishing certain documents on the internet in the course of the present proceedings, such as, in particular the Commission's defence and a letter from it requesting Mr Breyer to remove that document from his website. By publishing those documents, Mr Breyer used his right of access to the Commission documents for purposes other than pursuing his own case in those proceedings, and has thereby adversely affected the Commission's right to defend its position independent from any outside influence. That is all the more so given that that publication was accompanied by an option for internet users to publish comments, certain of which were critical of the Commission. That abuse of rights prompts the General Court to order Mr Breyer to bear half of his costs despite the fact that his action was successful.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If

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<sup>8</sup> As far as concerns that exception, the Court has already acknowledged that, while court proceedings are pending, there is a general presumption that the disclosure of written submissions lodged by an institution in the course of such proceedings compromises the protection of the latter.

<sup>9</sup> With regard to that possibility, the General Court notes that it is not a general and unconditional right of veto, which would have the effect of preventing on a discretionary basis the disclosure of documents originating from it and held by an institution. Rather, that possibility allows the Member State concerned to participate in the decision to grant access to the document in question, including where written submissions drafted with a view to court proceedings are concerned.

the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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