Transparency in Europe II

Public Access to Documents in the EU and its Member States

Hosted by the Netherlands during its chairmanship of the EU Council

The Hague, 25 and 26 November 2004
Colofon

Publication
Ministry of the Interior and Kingdom Relations
Constitutional Affairs and Legislation Department
P.O. box 20011
2500 EA The Hague

Editors
Mr. P.J. Stolk
E. peter.stolk@minbzk.nl
Ms. Aida Tunovič MA
E. aida.tunovic@minbzk.nl
Mr. H. Kranenborg, University of Leiden
Prof. mr. W. Voermans, University of Leiden

Cover design
European Commission
Aeroset bv, Wateringen
Ministry of the Interior and Kingdom Relations

Lay-out
Aeroset bv, Wateringen

Print
Artoos, Rijswijk

ISBN nummer
90541 40925
Table of Contents

1 Foreword 5

2 Programme 7

Plenary Session I 9

3 Opening remarks by J.K. Wiebenga, State-councillor and former member/vice-president of the European Parliament 11

4 Opening speech by Mr. Th.C. de Graaf, Minister for Governmental Reform and Kingdom Relations 13

5 Paper and Presentation by Ms. van Bijsterveld, Professor at the Tilburg University 17

Workshops

6 Workshop I: Transparency in the New Treaty 43
   • Introduction by Mr. Cashman, member of the European Parliament 43
   • Report of the discussion 47

7 Workshop II: Public Access to Documents in the new Member States 49
   • Introductory presentation by Mr. Tallo, Director of e-Governance Academy 51
   • Introductory paper and presentation by Ms. Pirc-Musar, Commissioner for Access to Public Information 63
   • Report of the discussion 83

8 Workshop III: Public Access to Documents and Security 85
   • Paper by Jakob Thomsen and Wouter van de Rijt, DG F and DG H respectively, EU Council 87
   • Report of the discussion 101

9 Workshop IV: Harmonisation of the EU and Member State Legislation 105
   • Introductory paper by Mr. Driessen, EU Council 107
   • Introductory presentation by Mr. Maes, European Commission 115
   • Report of the discussion 123
<table>
<thead>
<tr>
<th>No.</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td><strong>Speech by Mr. H. Brunmayr, DG Transparency, EU Council</strong></td>
<td>129</td>
</tr>
<tr>
<td>11</td>
<td><strong>Closing speech by Mr. Atzo Nicolaï, Minister for European Affairs</strong></td>
<td>149</td>
</tr>
<tr>
<td>12</td>
<td><strong>Conclusions by Mr. W.J.M. Voermans, Professor Public Law and Legislation,</strong></td>
<td>153</td>
</tr>
<tr>
<td></td>
<td><em>University of Leiden</em></td>
<td></td>
</tr>
<tr>
<td>13</td>
<td><strong>University Leiden Research</strong></td>
<td>161</td>
</tr>
<tr>
<td>14</td>
<td><strong>List of Participants</strong></td>
<td>287</td>
</tr>
</tbody>
</table>
This book has tried to capture both the essence and the nuances of these debates by including the speeches, papers, presentations, short reports and an extensive research on access to public documents in the EU.

I hope that the book has managed to echo the tremendous enthusiasm of the participants, especially of the speakers. I hereby thank them all for their efforts and there is enough material for the next phase of Europe’s quest for transparency namely, “Transparency in Europe III”.

THE MINISTER FOR GOVERNMENTAL REFORM AND KINGDOM RELATIONS

Thom de Graaf
Programme

Transparency in Europe II

Wednesday 24 November
Arrival of participants and registration for workshops
19.00 – 21.00 Ice breaker cocktail at Dorint Hotel

Thursday 25 November 2004
09.30 Arrival of participants and registration for workshops
10.30 Plenary meeting
- Opening speech Mr Thomas de Graaf, Minister for Government Reform and Kingdom Relations
11.00 Break
11.15 - General introduction by Ms Van Bijsterveld
- Questions and Answers
12.30 Lunch
14.00 Parallel session of Workshops 1 - 4
15.30 Parallel session of Workshops 1 - 4
17.00 Drinks
19.30 Transfer to dinner venue
20.00 Dinner at Scheveningen
Friday 26 November 2004
10.00 Reception with coffee

10.30 Plenary meeting
- Opening speech DG Brunmayr

11.00 Parallel session of workshops 1-4

12.30 Lunch

14.00 Plenary meeting
- Conclusions by Professor Voermans
- Forum discussion with panel and participants

15.15 Closing speech by Mr Atzo Nicolai, Minister for European Affairs

15.30 End
Plenary Session I

Wim Voermans: University of Leiden
Sophie van Bijsterveld: Tilburg University
Jan-Kees Wiebenga: State Council
Hans Brunmayr: EU Council
Michael Cashman: European Parliament
Ivar Tallo: e-Governance Academy
Opening Remarks

Jan-Kees Wiebenga

The Genesis of the Regulation on Public Access to EU-documents

The Regulation on Public Access to EU-documents came into force only after a very difficult process of law-making. In 2000 the European Parliament received a weak draft from the European Commission which was primarily based on existing practices. A proper regulation on transparency was deemed unacceptable at the time. With the ‘Solana Coup’ in the summer of 2000, the situation for transparency actually worsened. The Council of Ministers decided to declare virtually all Council documents secret with only a few exceptions. Thus, secrecy became the rule and transparency the exception.

The EP changed the guiding principle of the draft-regulation decisively, however. Its main principle was amended to one which read: ‘transparency for all documents, with exceptions’. Nevertheless, the Council of Ministers, in a parliamentary hearing in November of that year, continued speaking about confidentiality of documents as a main principle in this field. The Council mentioned the problems of ‘transparency-shopping’ (referring to the practice of applying for confidential EU-documents in ‘open-minded’ member-states like Sweden) as another hick-up. No reference was made by the Council of the ‘Europe of the citizens’.

The European Commission was not much better than the Council of Ministers in the beginning of the drafting period. The draft of the Regulation had hardly been discussed in the college. Indeed, many Commissioners regarded it as a bureaucratic matter.

However after the first reading in the EP in November 2000 the scene changed. The European Commission eventually sided with the European Parliament in its struggle with the Council of Ministers. The latter maintained its secret diplomacy, its closed-door policy.

In the final phase, the Parliament was lucky. With the Commission more or less on board, Sweden took over the EU presidency in January 2001. The EP and Sweden were able to reach a final compromise which led to the present regulation in May 2001. It was based on transparency as a guiding principle and was adopted in the second reading with a large parliamentary majority.
The story does not end here, however. It has only just begun. Indeed, the saying “the proof of the pudding in the eating” applies well to the story of public access to EU documents.

**The Present State of Affairs**

The Regulation has been functioning for three years now. We have an evaluation report on the table in front of us. We also have a new European Commission and 450 million European citizens who are entitled to good governance – also on the European level. These citizens are supported by the European Court of Justice, by the European Ombudsman and by a newly elected European Parliament with MEP’s from 25 Member States.

We, as participants of this conference, have the task to think about the future of transparency on a European level. How about making “secrecy is the trade-mark of weak governance; openness is the trade-mark of good governance” our motto? I wish all of you a good conference!
Ladies and gentlemen,

Our citizens may vote for us but they don’t necessarily trust us. In the United States the expression: “to fight city hall” is synonymous with a frivolous effort or at best an uphill battle. In other places the words “politics” and “government” are associated with – let’s say the least – their own “rationality”. They are in any case not examples of openness or beacons of transparency. Government – the further away, the worse – is usually perceived as a closed black box.

This is not something that we – modern politicians and civil servants – appreciate. On the contrary, apart from the moral aspects, we experience that the lack of trust is a serious impediment for effective and inspired government.

Three years ago the Dutch government organized a conference about “Transparency in Europe”. Today’s conference is its follow-up. The backdrop of 2001 was the article in the EU treaty that stipulated that – within limits – documents of the Council, Commission and Parliament were to be public. That resulted in regulation 1049. It was a landmark.

Now we have a constitution for Europe. In it, the public access to documents is extended. Citizens have the right to examine the documents of all the institutions, bureaus and organizations of the Union. This represents also an extension vis-à-vis what was included in the original Charter for Fundamental Rights. Public access to documents is now a fundamental right for the citizens of the European Union. And in this respect the Union is ahead of nearly all of its member states. Let’s hope that the good European example will be followed by its constituents.

Ladies and gentlemen,

Since that conference in 2001 10 countries joined our Union. Many of them passed – in the last four years – new laws concerning the public access to documents. In fact precisely in those recent member states we see new developments in legislation on the public access to documents.
Old members, new members; we all need transparency and we need it, in order to involve – and serve – our citizens.
Their involvement is – after all – the determining factor in our democracies.

We need transparency as well, to secure the integrity of public administration. This is reflected in the goals mentioned in the preamble of the recommendation of the Council about public access.

Actually three goals are mentioned, that are interdependent. Firstly: public access gives citizens the possibility to form an opinion on the state of the society and on the authorities that govern them. And that will hopefully encourage them to participate in public matters. The second goal is, that openness stimulates the efficiency and effectiveness of administrations. Thirdly: the legitimacy of administrations and the trust of the public in their governments depend also on transparency. Openness is the enemy of corruption; transparency is the ally of integrity.

Let me elaborate on this, because we are talking about the basics of democracy. At stake is an issue that is more controversial than we often care to admit. A so called green-paper published under the auspices of the Council of Europe observes a controversy. On the one hand democracy expands. More countries get rid of dictators or one party systems. The value and acceptance of democracy as such is beyond discussion. On the other hand however, there is a growing discontent with the practice of democracy. The green-paper notices that the lack of trust of people in their authorities leads to indifference. Distrust may even lead to overt hostility and ultimately political extremism. This applies everywhere, also here in the Netherlands.

Now, I am well aware that transparency is not the cure-all for this discontent and distrust, but it is a condition for regaining the trust of our citizens.

To this I must add that the problem with openness is not only a possible lack of information. Too much information without structure is just as inaccessible. We need to give information that is not only reliable but also adequate; that enables people to take an informed position; that entices them to get involved.

Ladies and gentlemen, I like to make a link between two of my favourite subjects. Between transparency and the possibilities of information- and communication technology; or ICT as we affectionately call it.
There is a new dimension to transparency with the rapid growth of ICT. ICT can open up public documents and information at hardly any costs to practically everybody.

The decision to make document public is reversed. Authorities have to decide if there is any valid reason not to make all information available.

There is a new reality. Inside-information of governments that once might have been restricted is now open to large parts – if not the whole – of the civil service.

There is no reason whatsoever not to give that information to members of parliament, journalist, or in fact to anyone interested.

Arguments from the “paper” age: printing- and mailing costs, opening hours of the archives, the damage to the filing cabinets; all that is not valid anymore. There is no good reason why public servants would be allowed to prevent their real masters to look over their shoulders.

Digitalization has also consequences for the laws regulating the public access to information.

Lawmakers all over Europe face the task to adapt the laws in this field to the new technology. Many laws refer to paper documents, whereas much of the government documents and information is stored electronically.

Other laws govern access to information that is not even available anymore.

In other words: lawmaking is never very fast, but if we are dealing with the speed of light, we may at least accelerate from walking to jogging.

Public access to information also raises the question of how to deal with the misuse of information. In the Netherlands we believe that disaster prevention is best served by giving public access to all technological hazards. An example are the risk-factors in the petrochemical industry. But that gives terrorists also an easy access to the information.

To put it in philosophical terms: if the ideal democracy is characterized by total openness, how do we maintain that ideal against those who want to use it in order to destroy it.

It is an old argument and there is no real good answer, we all know that. But even though I prefer the optimal transparency, I see the need to exclude some information, at least for a while, from public access.

Obviously intelligence operations, police investigations, policy discussions in their incipient phase, need to be confidential. But never more and never longer than needed.
And a government should be open about when and why it wants to remain silent. Disinformation is not a valid alternative.
Civil servants and politicians, lawyers and lawmakers, police investigators and the fighters against terror have to do their work in confidence and relative peace.
The results however, have to be shared, so they can stand the public scrutiny of parliament, of journalists and also of the citizens – late at night behind their PC.

Transparency: a typical European trait. Doesn’t that sound good? We have the Constitution, we have the Charter, and today it’s your move. There is more at stake than legal niceties, it’s about basic democratic values.
And just so you know; in the spirit of openness: we are looking over your shoulders for the results.
A Crucial Link in Shaping the New Social Contract between the Citizen and the EU

Sophie van Bijsterveld

1. Introduction

Without a doubt, the European Union is one of the most fascinating constitutional projects in the world today. Through the European Union, we can daily face the most fundamental questions of governance, of the ordering of society, and of the relationship between public authority and the citizen in a way that is quite different from what most of us are used to in the familiar context of the national states. The recent expansion of the European Union has only heightened this awareness and is challenging us with basic questions regarding the functioning of a polity and the foundations on which it is constructed.

The developments in the EU are interesting not only from a theoretical point of view: They also have profound practical relevance. The ambitions of the EU itself as formulated in the Lisbon strategy, the expectations of the outside world in regard to the EU, and the demands of its citizens set high performance standards. These are so high, and manifest themselves in such a variety of different areas, that they are not only hard to meet but may even seem hard to reconcile as the tensions between the requirements of expansion and deepening of the EU show. Added to that, the EU, like national states, needs to respond to general societal transformations and the changing role of law in society, often sparked by technological advances and the process of globalisation. As the EU cannot rely on age-old traditions, these transformations sometimes confront the EU more pertinently than they do national states.

All these developments are making demands on processes of decision-making, including the way they relate to the citizen. On the one hand, law and policy processes within the European Union seem to be cumbersome and are perceived to take an inordinate amount of time. On the other hand, the dynamics of European integration and constitutionalisation are beyond our wildest dreams, especially seen from a distance. The period between the adoption of the Single European Act in 1986 and the establishment of the Convention for the Future of Europe covers not much more than fifteen years. This is an almost paradoxical experience that most of us working in the EU or otherwise involved with developments in the EU will certainly recognize.
Apart from real or perceived difficulties in consensus building, the dynamics of treaty reform and constitutionalisation have yielded a remarkable result. Unsystematic, unexpected, and even unorthodox provisions have been introduced in the (quasi-)legal system of the EU which do not have counterparts in national legal systems. Consider, for instance, the Declaration to the Final Act of the Maastricht Treaty concerning a “right to information”, urging the Commission to submit a report “on measures designed to improve public access to the information available to institutions”, or a Declaration on sports added to the Final Act of the Amsterdam Treaty. More than once such novelties have been sparked off by seemingly coincidental political pressures or have been the result of haphazard negotiations. On closer inspection, these and similar provisions may be preludes to innovations which enable the EU to take a constitutional leap forward in a way that even national states would find hard to do or are not even ready to do. Thus, the EU is in a position to make a positive contribution to constitutional renewal that may even have significance for its Member-States. In other words, the EU can make us sensitive to the constitutional demands of the future.

This is also true with respect to the sudden emergence and success of the notion of transparency. The debate on openness in the EU, initially focused on access to information, has certainly played a key role in the promotion of “transparency”. But what should we make of this new “principle” of transparency? Where did it come from? And what function does it fulfil? What does the principle of transparency, in turn, tell us about the state of European law on access to information? These are the issues that will be addressed in this essay.

2. **Access to Information and the European Ombudsman: Mutually Reinforcing Elements in the Promotion of “Transparency”**

In the Declaration to the Final Act of the Treaty of Maastricht (Declaration nr. 17), the recommended steps to improve public access to information were already connected to “transparency of the decision-making process”. At the time, improvements in this area were specifically seen as a means of strengthening “the democratic nature of the institutions and the public’s confidence in the administration”. Despite the fact that the recommendation was fairly “soft” and that it was merely laid down in a Declaration, the very fact of its adoption was significant. This became especially clear in the aftermath of the conclusion of the Maastricht Treaty. National processes of ratification, especially those that involved popular referenda, made it clear that forging and maintaining the support of the citizenry for the European project had become truly pressing. The European Council meetings in both Birmingham and Edinburgh, held in 1992, concerned themselves with this
issue. These Council meetings resulted in a Declaration entitled “A Community Close to its Citizens” and a set of concrete measures relating to the Council. The Council and the Commission agreed on a code of conduct, and the Council altered its rules of procedure.

The issue of openness was lifted to the constitutional level at the first following occasion. Article 1 EU as adopted in the Treaty of Amsterdam in 1997 stated that decisions must be taken “as openly as possible” in all three so-called pillars of the EU. Furthermore, a provision on access to information was adopted on that occasion (Article 255 EC). Even if not a directly applicable provision, its new status was a major recognition of its importance. It is not surprising that the commitment to openness and access to information have found a place in the Constitutional Treaty for the EU. The latter is even guaranteed as a fundamental right and complemented with a general and new right to “good administration”.

For our present purpose, it is not necessary to enter into a detailed critical assessment of these provisions – as one could; it will suffice to note the rapid constitutionalisation of “openness” and “public access to information” and their importance as a way to increase “transparency” in the EU and thus bring the EU closer to its citizens.

The 1992 Treaty of Maastricht was important to the development of the notion of “transparency” in the EU in another way as well. It established a European Ombudsman. Ombudsmen, well-known instruments at the national level, are independently functioning mechanisms of public scrutiny or low-threshold mechanisms to deal with the complaints of individual citizens, most a combination of both. They have a parliamentary connection (ombudsmen are appointed by, and must report to, Parliament) and their concern is to counter maladministration. They can conduct an inquiry regarding the complaint of an individual or on their own initiative, as can the European Ombudsman. Such an inquiry may result in a settlement or a recommendation. The Treaty of Maastricht linked the establishment of the European Ombudsman to the introduction of “European citizenship”. The function of a low-threshold mechanism to deal with complaints carries extra weight in the EU, as direct access to the Court of Justice for private parties is strictly limited. It was not explicitly established to increase transparency, but contributing to openness is, to a certain degree, inherent in its function.

One benefit of the establishment of the Office of the European Ombudsman is that it has helped to give direction to standard-setting with regard to access to information and has contributed to increasing administrative transparency. The European Ombudsman has concretised the requirements of “openness” in decision-making processes. Like the courts, it has played a role in the interpretation of the
Council and Commission Decisions mentioned above. It has conducted inquiries into the practice of bodies other than the Council, the Commission, and Parliament (with the exception of the Courts).
Without going into the details of the activities and results of the European Ombudsman in this field, it is clear that the institution of the Ombudsman, as well as its functioning, have played an important role in the debate on openness in the European Union and the promotion of “transparency”. However central these two tendencies have been to the (initial) promotion of transparency, the idea of transparency has evolved further and has outgrown the two initial driving forces.

3. Transparency in the EU: A Developing Debate

The moves towards realising access to information and the establishment of the European Ombudsman can be explained in the context of the times. It was already clear in the run-up to the Maastricht Treaty that the activities of the EC were expanding rapidly. This expansion was accommodated and taken further by the Treaty. It was generally agreed that the attribution of powers to the EU should be accompanied by similar guarantees that liberal democracies provide their citizens. The increasing significance of the EU should not be allowed to erode the constitutional achievements of the Member-States.
Thus, inter-institutional relationships were revised in favour of increased parliamentary involvement. The introduction of European citizenship fit into this picture, as did the establishment of a European Ombudsman and the – still hesitant – reference to access to information. As it was clear that full openness of the legislative process (notably the meetings of the Council) was not yet to be expected, the openness that could realistically be realised could at least function as compensation.
We can extend the comparison even further. The move towards open decision-making and access to information in the EU may be seen as a logical follow-up to the call in the 1970s for open government in Western European states. The call for open government at the national level at the time coincided with developments in the welfare state, a period characterised by an ever-expanding state and the accompanying unquestioned belief in the state. From this perspective, the drive towards realising these ideas in the EU can be explained in terms of its expansion of competences and its transformation to a structure that more than ever before acquired state-like features.
The notion of transparency and its original focal points of Ombudsman and access to information in part fulfil a constitutional function similar to their counterparts at the national level. The notion of transparency within the EU first developed in areas relating to classic decision-making, that is, open government in the decision-making process, inter-institutional relations, and, more specifically, access to information by the citizen. It is not surprising that access to information and open government initially focused on the Council of Ministers and the Commission. Transparency was also linked to other areas, notably the emerging issue of ‘comitology’, the delegation of implementation measures by the Council of Ministers to the Commission with the use of intermediary committees.

However, that perspective alone is too restricted. The initiatives have become part of a far more far-reaching transformation. The notion of transparency with which these initiatives were initially so strongly identified reaches far beyond its initial concern. Innumerable references to transparency can be found in the Official Journal of the EU, not only in policy documents but also in the legislation of the EC itself. The Court of Justice has also taken to using the concept of transparency. The notion features in a wide variety of different contexts.

4. Transparency: An Ongoing Concern. The Laeken Declaration and the Constitution for Europe

The notion of transparency has become a key concept in Europe. It also features prominently in the Laeken Declaration and is one of its overriding concerns. It is clear that transparency is seen as a central requirement of legitimate governance in the EU. It is not surprising that the Constitution for Europe in many ways reflects this call for transparency.

Transparency is an essential part of the Laeken Declaration’s fabric. “Openness” and “transparency” are brought in connection with various different elements and statements. With its almost magic appeal, it functions more or less on the basis of intuitive consensus.

Under the heading: “The democratic challenge facing Europe”, the Declaration states that the Union must be “brought closer to its citizens”. The openness of European Institutions is regarded crucial to that aim. Under the heading: “The expectation of Europe’s citizens”, it is stated that the citizens are calling for, among other things, an “open” Community approach.

Where the Laeken Declaration moves towards formulating the “Challenges and reforms in a renewed Union”, the need for transparency in the Union features prominently. This is again reflected in the various areas of concern that are outlined with a view to the establishment of the Convention for the Future of Europe. The
Laeken Declaration points out four of these areas. The first is a “better division of competence” in the EU. The second is “simplification of the Union’s instruments”, and although the word transparency is not explicitly mentioned, the whole section and its explanatory text express the need for transparency. The third area, headed “More democracy, transparency and efficiency in the European Union” again makes transparency a central point. As a concrete example of how transparency could be enhanced in the institutions, it suggests the consideration that meetings of the Council “at least in its legislative capacity” be public. It also raises the question of improving access to Council documents.

We can easily conclude that transparency is a central notion in the Laeken Declaration and that the project of drafting a Constitution for Europe itself is an exercise in transparency. The very fact that a Constitution – whatever complexities it in turn introduces in its effort to reform the Union – is an achievement in terms of transparency. The Convention for the Future of Europe, too, and its method of operation was exemplary in its transparency, as was the preceding Convention for the fundamental rights of the European Union.

The draft Constitution presented by the Convention more than lived up to the wishes of the Laeken Declaration. In the areas mentioned by the Declaration, it also fulfilled the aim of creating a more transparent structure.

There are more ways in which the Constitution is innovative beyond what has been achieved or is likely to be achieved at short notice at the national level. The provisions in the title on the “Democratic Life of the Union” are a marked example of this. The “dialogues” that are foreseen with civil society organisations, for instance, are worthwhile mentioning.

Transparency can most assuredly enhance legitimacy and create goodwill; but can we go beyond that? Can we go one step further?


The cry for transparency seems a natural reaction to opaqueness, to complexity, and procedural variety. The initial focal points for increased transparency – which continue to be important – were in areas in which the European Union still had to achieve what was generally achieved at the national level. It was clear, in that respect, that transparency could bring the Union “up to the mark” constitutionally. But this alone cannot explain its success.

To understand the (constitutional) role transparency fulfils as a parameter of modern decision-making, we must assess modern law and policy making against classic decision-making in the context of a national state. As a starting-point, it is necessary to note that the mechanisms of liberal democracies are based on the
presumption that public decision-making takes place in the context of the national state.

Three factors have changed the presumption that the national state is the ultimate centre of public decision-making. First, the position of the national state as the centre of public decision-making has eroded in favour of internationalisation of public decision-making. Second, the awareness of the limits of steering power of the state and the limits of the possibility to shape society through law has led to a massive transfer of tasks to agencies and other public institutions, as well as to hybrid structures, and even to the private sector. The activities concerned are still conceived as being of “public” interest, but they fall outside of the scope of classic constitutional structures. Third, even though legislation, administration, and court rulings take place as they used to, the reality behind these phenomena has become a completely different one than classic constitutional law suggests. As a result, the guarantees of classic constitutionalism – that is, the mechanisms of democracy and the rule of law – fall short when it comes to dealing with these new realities.

As regards the EU, these trends are significant as well. First, the national mechanisms cannot simply be transplanted to the reality of the EU. Separation of powers, for example, formulated with regard to the traditional Trias Políctica, cannot have an identical expression at the level of the EU. Second, the phenomena of the creation of agencies and other institutions and the shift of “public tasks” towards the private sector are clearly visible in the EU. Stronger even, the EU has played a decisive role in processes of liberalisation and privatisation. Third, new ways of governance are experimented with in the EU. This means that new expressions are necessary to give substance to the values of democracy and the rule of law.

As the first and second trends are self-understanding, let us have a closer look at the third. It is striking that many of the experiments in the realm of European governance are both meant to increase the legitimacy of the EU and, at the same time, raise questions concerning the legitimacy of the EU. In order to find a more solid basis for its policies, the EU has made an issue of closer involvement of national parliaments in its work. It is also searching for ways to have more direct involvement with regions with respect to policies that have a strong regional impact. In doing so, the EU is exploring methods of “multi-level governance” that do not completely conform to more traditional models of federalism. In its relationship to the outside world, including the relationship to other international institutions, the EU is becoming more and more a factor in its own right; in shaping its own policies, informal processes such as the “method of open co-ordination” are being advanced, which do not embody the usual constitutional guarantees.

The reality of law and policy making within the EU is also moving away from classic constitutional understandings in other ways. We may think of the participation of
civil society (NGOs), the role of experts, and the involvement of private parties in the ultimate implementation of EU policies. In its White Paper on Governance (COM (2001) 428 final) the Commission gives a clear insight in the emerging new realities of European governance. It is clear that these developments may strengthen the legitimacy of EU governance. At the same time, they require adequate procedural mechanisms in order to be legitimate themselves.

Of course, public decision-making still takes place in classic ways, according to the classic parameters of constitutional law. But it is in all these novel areas, that our traditional expressions of the liberal democracy are no longer adequate to secure the basic values of our constitutional systems. These traditional expressions, therefore, need to be newly defined. It is especially in these fields that transparency comes in. Analysis shows that transparency not only fulfils a crucial role in these fields, but also actually features as a standard against which the legitimacy of the creation of actions, policies, and law needs to be measured. Either explicitly or implicitly, and whether in primary or secondary law, we often find references to transparency. The notion also features in rulings of the Court of Justice and the Court of First Instance. The White Paper on European Governance mentions “openness” as one of the principles of “good governance”, in line with, among other things, participation, and effectiveness. In doing so, the White Paper has certainly struck an important chord. But where does this “principle of transparency” come from? How can we relate it to our classic constitutional values?


The preceding analysis enables us to understand the magic of the principle of transparency. Although it is promoted as a standard of “good governance”, it is still important to see why it has suddenly acquired this status and from what it derives this status.

Transparency largely promotes the same and similar values as the principle of legality, that is, the requirement of a legal basis for government action. In its underlying values, transparency is closely related to legality; therefore, it can fulfil a crucial role in law and policy making processes, where the principle of legality is out of reach and does not make sense. This is notably the case, in new, unorthodox ways of decision-making that often characterise themselves through a high degree of informality. In other words, transparency is becoming the new counterpart of the classic principle of legality. Moreover, transparency naturally fits in with the Zeitgeist of the information age and the birth of the Internet.

This is not to say that the classic principle of legality needs to be discarded. It is still one of the cornerstones of our legal systems and certainly will continue to be.
However, the principle of transparency fulfils the same or similar functions that are crucial to uphold, also in cases the principle of legality cannot help us. To mirror transparency as a principle of good governance against the classic principles of liberal democracies is important: When we realise its constitutional significance, we can better understand why it fulfils such a crucial role in the relation between public authorities and citizens.

The core of the principle of a legal basis for government action is that intervention in the freedom and property of the citizens is allowed only on the basis of a rule, generally formulated, and equally applicable to every individual, and established with the cooperation of representatives of the people. Even if not enshrined explicitly in national constitutions, it is strongly embodied in these constitutions and in constitutional thinking. The principle of legality is a primordial achievement in legitimate governance in the classic Rechtsstaat.

The principle of legality implies generality of a norm, and the formulation of the norm in advance of administrative action taken. It bans retroactivity and implies a certain degree of precision.

The functions of the principle of legality are to counter arbitrariness and make public authority action predictable. "Legal security" is a key dimension of legality. Legality encompasses, at least implicitly, a reference to the idea of equality. Likewise, it is related to democracy and fundamental rights. Through legality, rules are recognisable; they are known in advance.

Within the EU, the classic requirement of a legal basis for action is of prime importance. The system of attribution of power is as crucial to the EU as it is to any international organisation. Only in so far as the EU is attributed competences does it have a legal power to act. The requirement of a legal basis, therefore, functions in the relationship between the EU and its Member-States in the demarcation of powers. Obviously, it also plays a role in inter-institutional balances, that is, in the relationship between the institutions among each other. Where different decision-making procedures exist, notably with different degrees of involvement of the European Parliament, the choice of a legal basis for the exercise of a particular power is crucial. And, the principle of legality functions in relations between the institutions and its citizens, embodying all the above-mentioned guarantees.

As we know, escape hatches exist: the principle of legality does not prevent the existence of a broad discretion to act or not to act. Furthermore, the Court of Justice has acknowledged the existence of so-called implicit competences. And, finally, Article 308 EC enables, to a certain degree, the extension of powers beyond the strict system of enumeration of powers. And, as is the case at the national level, the myth that all legal action is a derivative of the higher, democratically established law is questionable at the European level; the excessive but unavoidable use of delegated
legislation is a case in point. However, the fact that legality is not watertight at the European level (as it is neither at the national level) does not detract from its importance.

The principle of transparency picks up where the principle of legality falls short. With respect to the new realities of public decision-making, it can fulfil a similar crucial role as the principle of legality. Its appeal as a new principle of good governance is strong, because it also picks up on basic values that underpin our legal systems in a vast array of different areas of law. To illustrate this: It has counterparts in the classic constitutional law in that parliamentary debates are open; minutes are available and published, a law must be published in order to come into force. It resonates with established obligations of information provision in administrative law (the right to be heard, the obligation to provide motives for decisions, for instance). It is even in many ways entrenched in legal relationships in private law. It is also interesting to see the way the European Court of Human Rights has interpreted the requirement that limitations to fundamental rights guaranteed in the European Convention must inter alia be based on “law”. In the eyes of the European Court, this means that limitations must be “accessible” and “foreseeable”. Thus, the Court has accepted that professional codes and policy regulations, which are both not based on a formal power to issue binding rules, can be limitations based on the “law”. In doing so, it has not only accommodated the common law tradition, which does not so heavily rely on written legislation as the continental traditions traditionally do. It has also opened up to such new legal phenomena as highlighted above. This development shows the natural and close connection between transparency and legality.

Seeing the principle of transparency as the new functional counterpart of the principle of legality can motivate us to develop it further. It can also help us visualise ways in which it can be implemented. In other words, we can now position the transparency debate in a constitutional perspective. We can see it in the light of modern requirements of legitimate governance and assess its functioning against this changing background.

7. Transparency in focus

We can now define the principle of transparency:

“The principle of transparency requires clarity with regard to decision-making, actions, and policies at both the national and international level, in public, mixed, and private institutional settings as to:

– their position(ing) in the overall context of institutional decision-making;

– the organisational context in which they are set;
– the allocation of powers within that structure;
the actual process of their establishment, including the parameters according to which it takes place, and
– their content, including their status.” (The Empty Throne, p.62)

This definition reflects the fact that there is no longer one single centre, one focal point for public decision-making. There are many centres, places, and ways in which public decision-making takes place. The definition also reflects the fact that public decision-making is not one strictly outlined period of time, defined by formal decision-making criteria, but that it is a continuous process in which all sorts of relevant steps, both formal and informal, are taken. Finally, it shows that the borderlines between private and public decision-making are shifting and that it is often not even easy to tell the difference between the two.

This means that the mechanisms and ways through which and along which the principle of transparency can be shaped will differ from one area to the other. For example, transparency within the context of the decision-making within the Convention for the Future of Europe (which was transparent) is different than that of ordinary decision-making processes of a Council directive; it is different again in the context of processes of informal consultation of experts or NGOs, or, generally, processes to which the Council regulation on access to documents applies.

This makes it all somewhat complex. This cannot be avoided (as yet). The various ways in which policy-making processes take place necessitate tailor-made solutions to give shape to the requirements of transparency. A clear awareness of its constitutional significance and function makes it possible to consider the appropriate design. Exceptions and nuances, obviously, may have to be accepted.

Sound criteria are necessary to strike a justified balance between competing interests.

8. Access to Information and other Areas: How to move forward?

Progress has been made in various respects regarding the dossier on access to information. From the non-binding Declaration, the issue has acquired constitutional status and even the status of a fundamental right. From a regime relating to the Commission and the Council, it has been extended to other institutions and bodies. Developments have taken place with respect to the policy areas to which the standards are applicable. Developments have been made with respect to the standards and the exceptions allowed. But the debate has not ended.

How can we move forward? What is the ultimate horizon for access to information? How does that ultimately relate to other principles such as data protection? How
does it relate to openness with regard to Member-State documents and applicable national regimes? Answers to these questions are obviously not self-evident. However, in conducting the debate and trying to formulate answers, it is important to see these questions (also) in the broader light of the principle of transparency, a principle that is not just synonymous with access to information, nor a mere empty fashionable term. It is a principle of modern governance that takes up the age-old values underlying the principle of legality and incorporates them in new realities of modern governance. Seeing transparency in this light enables us to realise the crucial role it plays in achieving real, perceptible legitimacy in the eyes of the citizen. Without taking a point of view in the debate on access to information at this moment: The initial debates on and achievements in the law on access to information as well as the establishment and functioning of the European Ombudsman have given leverage to the notion of transparency. Outlining the constitutional significance of transparency in the broader context of changing processes of law and policy making is enabling us to look from this new perspective to the legal regime concerning access to documents.

A few other observations must be made. Transparency, we must realise, is not simply concerned with providing (massive) information, but also with presenting it in a coherent and understandable fashion. This may even be relevant with respect to legislation. Transparency is not simply concerned with information, but with useful information and a sensible ordering of the information. Meeting these requirements obviously places great responsibilities upon the authorities involved; but it is necessary to do so, and it is worth it. Quality of information and timely availability are important.

It is also clear that transparency, interpreted as we have done, is not merely realised with passive provision of information, that is, provision of information only on demand. However important, the purport of transparency reaches much further. It also comprises active information policies. In only a few years time, information policies have indeed been devised and the provision of information through the Internet has increased tremendously, both in quantity and quality. Further reflection remains necessary.

It could be asserted that the notion of transparency itself, and the treaty provisions regarding access to information are too vague or not compelling enough to trigger further legal development. In dealing with such criticisms, we must be aware that the principle of legality is often not explicitly codified in national constitutions either, and if so, it was done after its recognition as a principle of constitutional law.
The recognition of the principle of transparency and the correct assessment of its constitutional significance, however, make it possible for it to exert this driving force. The same is true with regard to the law on access to information. The developments so far already bear witness of this and show the potential of further progress.

9. Transparency in context

The previous shows that transparency is more than a fashionable expression that will not live to see the next year. The very notion of transparency resonates a deep understanding of the major transformations we are witnessing in the public domain at large. It is an answer to the urgent questions that arise in the relationship between government and citizen, and it is a key to a new understanding of legitimate governance.

However, the importance of the notion of transparency must not blind us to the fact that it is only one dimension of legitimate governance. It does not cover all dimensions of good governance. Just making governance transparent is not sufficient. More elements play a role in the relation between government and citizen.

Transparency does not relate to participation of the citizen in government. It does not secure fair play or separation of powers. It does not secure accountability nor give us a clue to the mechanisms to be set in place. It does not relate to the outcome of the decision-making process; and therefore does not secure its content. For these demands, other principles are important. This is not surprising. In classic settings of liberal democracies, legality is an important principle of governance, but is not enough either. Ministerial responsibility, separation of powers, and parliamentary democracy play a role in this respect. It can be expected that these other classic principles are no longer adequate to cover the whole range of governance we are used to and that are mentioned in this essay. Therefore, these are undergoing a transformation as well. It is in this combined new setting that we redefine democracy and the rule of law.

Transparency is crucial; it is a precondition to many of the other principles. In order to assess the outcome, transparency is necessary. In order to be able to fully participate as a citizen or for the functioning of accountability mechanisms, transparency is crucial. Without transparency, the other principles fall short. In designing new mechanisms to secure good governance, all these elements must play a role.
The social contract renewed

In developing its processes of decision-making and the parameters within which these processes take place, the EU must move forward in a way that is both solid and innovative. The solidness can be derived from the age-old principles of governance that have crystallised in our current classic understanding of the liberal democracy. It must be innovative as the preconditions to which the mechanisms, which give expression to the classic liberal democracy are tailored, are no longer valid. New expressions and new mechanisms are necessary to shape the basic values underlying the very idea of liberal democracy. Transparency is an example of such an expression.

To convince the citizens of its legitimacy, the EU must have a clear view of its determining factors. Policies may change. Decision-making structures and procedures are subject to change too. Moreover, they are unavoidably and intrinsically complex. This makes it even more important to be clear on the pillars on which it all rests. Again, this is not a mere theoretical issue; it has practical urgency as well.

For the EU to be successful, it must be successful in the eyes of its citizens. Whatever perspective one takes – that of wise statesmanship or that of the rights of the people to democracy and the rule of law – the efforts so far and the importance of the EU require it to deal with this demand.

The Declaration of Laeken states: “Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence.” This is not true simply with respect to the expansion of the EU or the formal establishment of a Constitution. It also concerns the way the Union operates in day-to-day life and the understanding it is able to win with the citizens for whom it is all meant. Transparency plays a crucial role in this process.

Literature:

TRANSPARENCY

The new social contract between the citizen and the EU

Sophie van Bijsterveld
Tilburg University

The Public Debate

- The Enron affair
- The Ahold debacle
- The health care system
- The university
- National governments
- The EU?
Search for Principles of Governance

- Corporate governance
- Social (or societal) governance
- Public governance

The EU

- Expansion of activities
- Increasing (public) interest in the EU
- Democratic deficit debate
- Sui generis construction
- Perceived distance of the EU
Challenges to the EU

Triggers of the Debate

- Increasing complexity of the organisation
- Need to respond to dynamics of outside world
- Increased level of expectations of citizen-consumers
Restraining Forces

- Rigidity of structures
- Political restraints
- Room for maneuver
- Institutional set-up

Linking with Citizens

- European citizenship
- European Ombudsman
- Declarations of Birmingham and Edinburgh
Access to Information

- A crucial step forward
- A leverage to the emerging cry for transparency
- Development way beyond initial initiatives
- Role of the European Ombudsman

Transparency

- Has outgrown the access to information debate
- Resonates a deep sense of transformation of law and policy making
- Has become a principle of modern governance
Functions of Transparency

- Predictability
- Legal security
- Counter arbitrariness
- Equality
- Precondition to accountability
- Precondition to participation and debate

Transparency (I)

The principle of transparency requires clarity with regard to

- decision-making, actions, and policies at both the national and international level, in public, mixed, and private institutional settings
TRANSPARENCY (II)

- As to:
  - their position(ing) in the overall context of institutional decision-making;
  - the organisational structure in which they are set;
  - the allocation of powers within that structure;
  - the actual process of their establishment, including the parameters according to which it takes place, and
  - their content, including their status.

Transparency for the EU

- Basic texts and organisational structure
- EU strategies and policies
- Decision-making procedures
- Practice of policy making
- Day-to-day functioning
Operational Dimensions – Examples

- Convention for the future of Europe
- EU – website
- European policy issues
- Connecas and other fora
- Codes of conduct
- Access to information law

Implications

- Catalyst of governance debate
- Crucial dimension in legitimacy
- Element of new social contract
- In line with *Zeitgeist* of information society
- Standard of reference for access to information
Making it Work – Next Steps

- Quality
- Coherence
- Single access points
- Relevance
- Positioning
- Sensible ordering
- Timeliness
- Active and passive information
- Role of information technology
- Way of thinking

- Limitations: conscious and in light of principle
The EU

- Crossroads
- Solidity and innovation
- Complexity cannot be avoided
- Practical urgency
- Success in the eyes of the citizen
- Transparency crucial
- Access to information is a key to this
Workshop I

Transparency in the New Treaty

Speakers:
Sophie van Bijsterveld
Michael Cashman
Hans Brunmayr

Chairman: Jan van Schagen
Rapporteur: Sander Hendriks
Workshop I – Transparency in the New Treaty

Chairman: Mr. Jan van Schagen of the Dutch Ministry of the Interior and Kingdom Relations
Speakers: Ms. van Bijsterveld, University of Tilburg
Mr. Brunmayr, DG Transparency, EU Council
Mr. Cashman, Member of the European Parliament
Reporter: Mr. Sander Hendriks of the Dutch Ministry of the Interior and Kingdom Relations

Introduction by Michael Cashman, MEP, Rapporteur on Regulation 1049/01

Legal situation between now and ratification and entry into force of Constitution

1. The constitution can already be applicable in certain cases. It cannot apply to new elements or anything which is in contradiction with the current treaties. However, it can be already be deemed as applicable in those articles which the constitution makes obligatory procedures and policies which already exist or are already possible under the current treaties. This applies to transparency (Reg 1049/01). There is no legal reason why the Council couldn’t apply article 50 of the constitution already.

Transparency in the EU after the signature of the Constitutional treaty

1. Since the beginning of the legislature, the European Parliament has twice asked\(^4\) for the adaptation of regulation 1049/01 on access to institutional texts to the requirements of transparency contained in the Constitutional Treaty. The Parliament maintains that the adoption procedures of a Union which legislates for 450 million citizens and, in some cases in sensitive areas such as fundamental rights, are still unclear and do not respect the democratic principle the Union declares itself to have been founded upon.

This is of particular importance in the adoption of legislative acts on the part of the Council. These acts are adopted by the Council not only without public debate, but without any debate at all (according to the point “a” procedure), since in most cases the ministers limit themselves to guaranteeing compromises reached between their ambassadors within Coreper.
2. The situation is less dramatic when the European Parliament is involved in the adoption procedure, since in the case of substantial modifications of the original proposal, the Parliament is publicly re-consulted and it is thus, possible to indirectly follow the evolution of negotiations in the Council. The above procedures, such as those in which the Parliament participates in the adoption of the act through the co-decision procedure, are still in the minority (95 texts in co-decision out of 507 in 2003 and 81 out of 431 in 2002 - CELEX).

What is still more worrying is that in all cases (whether the Parliament is involved or not) the Council does not make the national delegation positions public until the end of the procedure in order to preserve the negotiators’ room for manoeuvre. In other words, following the diplomatic tradition, the Council believes in giving national delegations the opportunity to change position without losing face or having to explain themselves to their national parliaments. The Council justifies this practice with the necessity of preserving “the effectiveness of its decision-making process” as indicated in art. 207 par. 3 of the Treaty.

3. The paradox of the present situation is that, while the position of the national delegations in the Council is well known to lobby groups, who are often behind the amendments in discussion, the only ones not acquainted with the negotiating positions are the citizens and their representatives in the European Parliament and most of the national parliaments. Such a situation, unacceptable when one is discussing prices of grapefruits and sardines, becomes a violation of the democratic principle when one is dealing with free movement, provision of services or the right to defence in criminal proceedings.

4. It is thus not by chance that the great majority of the members of the Convention, who prepared the draft Constitution, fought for the transparency of legislative documents and debates, in particular in the Council, and this can now be verified in the text of art. I-50 of the Treaty, signed in Rome on the 29th of October last. The latter defines, along with articles I-33 to I-39, the hierarchy of the Union’s acts, specifying which should be considered either legislative or executive. This clarification is fundamental as the definition of legislative acts contained in art. 7 of the internal Regulation of the Council and art. 12 p.2 of the regulation 1049/01 is too general and generic and refers more to the effect of the acts than their nature or adoption procedure.

5. The question which the institutions should investigate is the following: what to do to make the Union decision-making process more transparent even before the ratification of the Constitutional Treaty?
It is certainly possible to anticipate the content of the treaty, which is signed, though not yet ratified, when the provisions to be adopted have a legal basis in the treaty in vigour. When signing a treaty, the member states commit themselves, in good faith, to bring about its objectives and to abstain from activities, which could obstruct the attainment of such aims.

Now, there is no doubt that the objective of transparent European institutional activities is already present in articles 1, 207 and 255 of the TCE and it has been partially put into operation by the Regulation 1049/01 and by the internal regulations of the Parliament, Council and Commission. It is thus necessary to see how a modification of this regulation could already take into account the strategy of the Constitutional Treaty. Without unnecessary delay, the functioning of these institutions could be made more transparent and efficient, when acting as legislators as well as when operating under another profile (executive activities or international agreements). Your rapporteur considers the following modifications both opportune and urgent:

\[ \textbf{a) Better define the notion of legislative activity.} \] This entails modifying the present definition of art. 12 of Regulation 1049/01 and art. 7 ensuring that acts are to be considered legislative acts when their legal bases correspond to the articles of the Constitutional Treaty, which defines them as such. For all these acts, the preparatory works and debates should be public in Parliament as well as in the Council. The legislation which is defined by the Commission (acts of the so called “comitology system”) should be present among these acts.

\[ \textbf{b) Make the administrative activity more transparent.} \] This encompasses informing citizens about the procedures to be followed, final deadlines and the services involved in the non-legislative activity of the institutions, as well as the conditions and times in which interested parties or the common citizen can have access to such information. Previously, in the negotiations on regulation 1049/01, the Parliament supported the necessity to also make the administration more transparent, as is the existing case in the common law countries with the laws on Freedom of Information and in countries of Latin-Germanic traditions with laws on administrative procedure.

\[ \textbf{c) Provide common norms on the treatment of confidential norms.} \] In the last few years, the European Union has assumed a series of competencies in the area of internal and external security, which necessitates the provision of common norms, comparable to those in vigour in the member states in the sphere of state secret. The
present situation in which every institution defines its own internal security regulation and negotiates with third countries and international organisations regarding the treatment of this information is no longer satisfactory. Common norms which recognise the specific role of each institution, and the European Parliament in particular, are necessary.

d) Give a more solid legal basis to the “soft law” norms which presently regulate the writing, publication, codification and “recasting” of legislative texts. As is acknowledged, norms on the methods of drafting legislative and administrative texts do not exist. Nor are there norms on their publication in the official gazette or norms on the official gazette itself or norms on the consolidation, codification and recasting of legislative texts. All these activities are based on inter-institutional agreements or on “sui generis” decisions which, although being of a high quality (having been based on proposals of the three institutions’ legal services) deserve a more solid legal basis than the so called “soft law”.

6. Your rapporteur is convinced that the signature of the new Constitutional treaty obliges the European institutions, and not only the member states, to take serious account of their own legislative and administrative role and to offer their citizens, the European tax payers the transparency, which they have a right to. To wait for the 1st of November 2006 or the latter date for the ratification of the Treaty by all the member states (as President Barroso announced during the debate on the investiture of the new Commission on the 18th of November last), would not only be a debatable political sign for European citizens but also a confirmation of the position of the Euro-sceptics, who accuse the European Union of preferring the ancien régime of diplomatic negotiations and technical agreements between bureaucrats to transparent legislative procedures under the control of European citizens.
Report of the discussion

After this introduction Mr. Brunmayr reacted on the introduction of Mr. Cashman. He asked the question: what is new in the Treaty? Most member states sell the Treaty by claiming that it gives more transparency. But, as Mr. Brunmayr agrees with Mr. Cashman on this subject, the new provisions are only a consolidation; although it would have been better to call them a ‘right to information’. There is an essential change in the second paragraph of article 50. This change on the discussions in the Council will make a big difference, but we should not start pre-implementing it. This could break the dam and a flood of other pre-implementing requests might be the result. This, in turn, could damage the new Treaty.

Mr. Brunmayr disagrees with Mr. Cashman on the situation in the Council: there is co-decision since Amsterdam; there are discussions in public; documents are in public. Only in the preparatory stages are the discussions not in public. Transparency could harm the negotiations. Next to these measures there have been made a lot of efforts to make the administration more transparent. This could be improved, but it is going in the right direction.

In reaction to the first two speakers Ms. Van Bijsterveld made 3 remarks:

1. Article 50 has 3 layers: a. meeting in public b. access and c. as openly as possible. This last one is very vague, but important because it stimulates the debate.
2. The discussions should be removed from mere technicalities; transparency is a principle.
3. Transparency is not only necessary but also an opportunity to relate to citizens.

A large part of the discussions focussed on the aspect of pre-implementing the provisions on transparency in the new Treaty. Some participants claimed that there is no legal basis for pre-implementing and therefore this should not be done. It was also stated that pre-implementing is not very democratic. Transparency should be promoted, but only on the basis of the existing treaty.

Mr. Brunmayr remarked that the Council takes decisions on basis of current law by amending the rules of procedure. This is a political and sensitive question. Mr. Cashman stated that citizens also have the right to hear political parties, but the best way for this is of course to become a member.

Another subject in the discussion was the additional legal basis in article 50 of the new Treaty. How can this article be put into practice? Ms Van Bijsterveld argued that
one can create an information strategy to reach out to citizens who do not follow the EU from a close perspective.

A participant asked Mr. Brunmayr why legal opinions are not made public. Mr Brunmayr answered that not all legal opinions correspond with the definite position of the Council. There has been a recent verdict of the Court of first Instance which reaffirms this position.

Notes

1 On the 14/10/04 with the recommendation to the Council and the European Council on the future of the Area of Freedom, Security and Justice and on the 18/11/04 with the resolution regarding the new Commission presided by President Barroso

2 “3. The Council shall adopt its Rules of Procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.”

3 ARTICLE I-50 Transparency of the proceedings of Union institutions, bodies, offices and agencies

1 In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have, under the conditions laid down in Part III, a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium.

European laws shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.

4 Council Int. Rules: Article 7 Cases where the Council acts in its legislative capacity

The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).

Where legislative proposals or initiatives are submitted to it the Council shall refrain from adopting acts which are not provided for by the Treaties, such as resolutions or declarations, other than those referred to in Article 9.

Art. 12 p 2. Reg. 1049/01 “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....”

5 For Member States see art. 18 (1) of the 1969 Vienna Convention on the Law of Treaties according to which “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty...subject to ratification”; for the European Institutions see the Art. 10 of TCE on “loyal cooperation” as interpreted by the Court of Justice
Workshop II

Public Access to Documents in the New Member States

Speakers:
Ivar Tallo
Nataša Pirc Musar

Chairman: Peter Stolk
Rapporteur: Aida Tunović
Plan of our workshop

- Some theoretical moments
- Practical examples of access to documents in the new member states
- Problems
- Conclusions and recommendations
“Knowledge is power”

Sir Francis Bacon 1561-1626

Hague, November 25th 2004

FOI laws in the CEE countries

- Czech Republic 1999
- Estonia 2000
- Hungary 1992
- Latvia 1998
- Lithuania 2000
- Poland 2001
- Slovakia 2000
- Slovenia 2003

Hague, November 25th 2004
Functional vs. normative

- Access to information (freedom of information) as a demand for a democratic governance
- Access to information as a foundation for more effective government
- Information “just in case” vs. “information on demand”

Historical development trends

- State secrets acts
- Freedom of information laws
- Protection of individual
- Copyright and patent laws as protection of intellectual property
Creation of FOI laws

OECD report “Citizens as Partners”:

- “in 1980 20% of OECD member countries had Freedom of Information laws,
- in 1990 40% of OECD member countries had FOI laws and
- in 2000 over 80% of OECD member countries or 24 out of 30 countries had FOI laws”

– A uniform development?

Attributes of FOI laws

- Scope of application
- Scope of limitations
- Costs
- Response time
- Active versus Passive
Three traditions of government-citizen interaction

- **Anglo-american or liberal tradition**
  - government as Leviathan: necessary evil
  - result: explicit distrust
- **Continental tradition**
  - government as fatherly figure
  - result: implicit trust
- **Scandinavian tradition**
  - government as partner
  - result: informed trust

Two ways of information movement

- Information “in case” – our regular administrative practice

- Information “on demand” – libraries

Hague, November 25th 2004

**ICT and administrative reform**

- **Introduction of the ICT in the public sector without a public sector reform:**
  
  Russian proverb: beer without vodka is like throwing money into the wind

- **Procedural law of public administration**
  
  – No action without legal basis (rule of law)
  
  – Demand of clarification for an action
  
  – Demand of consultative process

Hague, November 25th 2004

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**Phyiscal vs. legislative**

- **729 Public Internet Access Points**

- **Homepage required from all central government institutions and local governments**

- **Access to Internet as a right of citizen:**
  
  Telecommunications law and the universal access requirement

- **Access to Information as a law:** requirement to have homepages and public access points in all libraries

Hague, November 25th 2004
Estonian Public Information Law

- Constitution §44: all public information shall be open …
- Demand for an “active information provision”
- Digital document registries
- Definition of information that cannot be restricted
- Requirement for all public institutions to have a home page.
- Requirement for all public libraries to have a public internet access point
Hague, November 25th 2004

Government's Briefing Room

...posted by the Press Office is meant foremost for the news media
Key questions for a public information law:

- What is public information?
- Whom should the law apply to?
- What information should be restricted?
- How should the mechanism for access to information look like?
- Active information provision – what is it?
- Protection of personal data

A holder of information is required to disclose the following existing information relating to the duties thereof:

- 1) generalised economic statistics and economic forecasts of the state and local governments;
- 2) generalised statistics relating to crime and misdemeanours;
- 3) statutes of state or local government agencies and their structural units;
- 4) formats of petitions and other documents submitted to state and local government agencies and instructions for the completion thereof;
- 5) job descriptions of state and local government officials;
- 6) positions in state and local government agencies, and the given names, surnames, education, areas of specialisation, telephone numbers and electronic mail addresses of officials filling the positions prescribed in such agencies;
- 7) information concerning danger to the life, health and property of persons;
- 8) reports on work results and the performance of duties in state and local government agencies;
- 9) names and electronic mail addresses of members of the supervisory boards and management boards of legal persons in public law;
- 10) management reports and income and expense statements of legal persons in public law;
- 11) budgets and draft budgets of state agencies, local governments and local government agencies, and reports on the implementation thereof;

Hague, November 25th 2004
Main points:

• There are different ways how information flows are regulated in any given society and they reflect larger issues like state-society relations.
• The way information flows are regulated in “Nordic” model is better suited to build information society.
• Normative vs. functional approach losess importance in building e-government.
• When talking about theory of access, one should not forget about the practical side of the question.

In a way of conclusion ...

• It is possible to take the current administrative procedures into the net but the real gains in efficiency come only when we change administrative procedures and start from the premise of public information being public.
• Not “any” kind of openness is compatible with the information society. You can use the ICT to reinforce the existing structures and patterns of information exchange.
• The Scandinavian or Nordic model of openness seems to offer the best ways to reap the benefits of the explosive growth of information and communication technologies.
• Easy access to public information is both question of democratic governance and efficient state administration, it is not only normative but also a functional requirement for a successful deployment of e-government.
• The debate about e-government and e-governance is not about introducing e-services or simply raising efficiency, it is about the fundamental change of the government and governance.

Hague, November 25th 2004
Problems with FOI laws: New vs. Old Member States

- Are the advances made by "new member states" being rolled back by the practices of "old member states?"
- Is the fight against terror going to reverse the process of transparency?
- Can we make European Commission a more transparent institution?

Hague, November 25th 2004

Thank you for your attention!

Questions and comments: Ivar.Tallo@ega.ee
The Access to Public Information and its Development – in the light of Commissioner for Access to Public Information

Nataša Pirc Musar, Commissioner for Access to Public Information, Slovenia

Foreword for the Commentary of the Access to Public Information Act, will be published in December 2004

The access to public information is one of the youngest rights among the fundamental rights since most of the countries began placing it into their legislation as late as in 20th century; moreover there are still many countries today which haven’t regulated this field yet. (See the map).

The origins of this right date back to 1766, to the dual kingdom of Sweden-Finland. The true Father of access to public information is deemed to be the Finnish priest Anders Chydenius, a member of the Swedish Parliament since 1765. Being an extremely studious person he got the idea about the right from the written records of Old China in the 7th century and completed it. He was inspired by both the emperor Tai Zhong of the Tang Dynasty and his own awareness that the government action must be transparent. In 627 Tai Zhong began to renovate the state apparatus. For this purpose, he set up a special group of highly educated scholar officials who not only recorded all government decisions and correspondence but who were also expected to criticize the government, including the emperor. Chydenius was the initiator of passing the Freedom-of-Press and the Right-of-Access to Public Records Act. There he wrote “that all citizens have a right to access to all-government-held documents. The government should upon request immediately make available the official documents to anyone making a request at no charge.” On the basis of this act even documents such as letters from the Swedish emperor to foreign heads of state were, and still are, open to public scrutiny. This should be recognized as a remarkable achievement also because only one year later the Swedish parliament also passed legislation establishing the position and defining the role of the world’s first parliamentary ombudsman. The Finnish priest adopted it 25 years before the Americans. Unlike the Swedish legislation, however, neither the United States First Amendment to the Constitution provided for freedom of access to government-held documents or for an ombudsman. The Constitution provided (only) for the right to free expression.
According to the fact that nobody followed the Swedish Act for a long time since its enforcement (historians maintain this happened especially due to the fact that it was not written in English), we can take a look at the history of the right to free expression’s development which is also the basis of the right to be informed. In the USA the right to free expression entered into the Constitution with the First Amendment in 1789 (when in the framework of the Bill of Rights 10 amendments to the Constitution of 1788 were made, all relating to the human rights). However, for the first time it was mentioned in 1776 in the American Virginia Declaration of Rights. This one had an influence on all further declarations on human rights. Its Article 12 says:

“The freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.”

What is interesting is that the American courts kept turning down this right and ignoring it by letting it open to public scrutiny till 1920. As late as 1919 the first case in the history of the American judiciary met the decision of the Supreme Court unanimously confirming the previous decision of the lower court in Schenck v. United States. It convicted a member of the Socialist Party of that period for distributing antiwar leaflets. In 1920 when the Supreme Court assessed a similar case (Adams v. United States) the decision was not taken unanimously anymore. Namely, two judges wrote down different opinions stating the concept of “clear and present danger” causing an immediate damage as the only basis for limiting free speech. On the basis of the different opinions the same judges (Oliver Wendell Holmes and Louis D. Brandeis) created a clear and present danger test being still used today and taken over and completed by the European Court of Human Rights. The defenders of freedom consider this case as a turning point in the struggle for establishing the right to free expression.

The United Nations adopted the Universal Declaration of Human Rights in 1948 in Paris. Its Article 19 made a step forward from the right limited only to freedom of expression and press. It states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive (pointed out by N.P.) and impart information and ideas through any media and regardless of frontiers.”

In this Declaration it was written much more explicitly and completely that everyone can also seek information. We, defenders of freedom of expression and the right of access to documents, do not interpret this article as if each individual can seek and seek and seek ....but we produce a question if a state is obliged to help an individual
and eventually give him a document it holds. The quoted provision of the Universal Declaration of Human Rights is not clear in this part. In fact, it is good for human rights to be clearly stated so we cannot say “as many lawyers as many different opinions” Thus, the law in this field has tried to be in step with time as I will show further on. It has been developing and it has reached a level known to the developed democracies nowadays. Furthermore, many countries already have not only freedom of expression but also access to information written in their constitution. I am convinced that this right will continue to develop and that without doubt the new European Constitution has put a stamp on Europe. I will discuss this in a few words in the second part of my deliberations.

Also the Article 10 (Freedom of speech) of the European Convention on Human Rights coming into force in 1953 and to which 46 countries of the Council of Europe adhere (surely also Slovenia) did not explicitly define the right of access to information. It says:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive (pointed out by N.P.) and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

This Convention may be a step back since this article does not say that everyone has the right to seek information but it refers more to the right to receive information. It is not based so much on active role but rather on passive role of those who want to be informed. However, in section II of this Convention we find some exceptions which an individual country should take in consideration as regards limitation of information imparting. By my opinion, these explicitly written exceptions (i.e. limitation of the access to information) indicate that citizens have the right to access to all the other information not being part of these exceptions. These are mentioned, some are added and written in more explicit form in all laws on the access to information, but generally they are more or less just a detailed presentation of the
basic limitations mentioned in the European Convention of Human Rights.

It soon revealed that the right to the access to information should be defined in a more detailed way since the right to freedom of expression does not give sufficient explanation for the right to public information, i.e. the right to the access to information. It is not clearly enough defined only by the constitutional right what kind of duties must countries, “holders” of information; carry out for their citizens or applicants. The Americans tried to solve this problem in the sixties and enacted the Freedom of Information Act in 1966. In Europe, Scandinavian countries were first after Sweden to become aware of the importance of this field. Finland, which gained independence in 1927, passed its Freedom of Information Act in 1919 (ignoring the act written by the above-mentioned priest), Great Britain and Ireland passed the law in the same year as the USA, i.e. 1966. Afterwards, this way of thinking reached also other parts of Europe and of the world. Today almost all European countries have Freedom of Information (FOI) Act, the only exceptions are Montenegro and Germany on a federal level (4 federal countries (Brandenburg, Berlin, Schleswig-Holstein, North Rhine – Westphalia) and Luxembourg. However, these three countries (Montenegro is preparing its own act) will put an end to this “emptiness” considering the fact that the acts are being prepared. The Serbian Parliament passed the Access to Public Information Act (ZDIJZ) on 2nd November 2004 on the basis of experience in implementing Slovene ZDIJZ. In Germany the masses have called on the government to enter the law into the parliamentary procedure also due to the pressure of non-governmental institutions in recent years. Here I should state that in the opinion of many lawyers the word “transparency” was the word of the year 2003, and the experts dealing with human rights say the access to information is beyond doubt a fundamental human right today.

Slovenia enacted the law in this field rather late, i.e. in March 2003 (it was overtaken by Hungary which enacted it already in 1992, Latvia in 1998, Chezh Republic in 1999, Albania in 2000, Bulgaria in 2000, Estonia in 2000, Slovakia in 2000, Poland in 2001 ...while it is interesting that Switzerland enacted it as late as 2004) although the legislator placed this right among fundamental human rights in our first Constitution in 1991. In Article 39 titled “Freedom of expression” the first paragraph states that “freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive and disseminate information and opinions”. The second paragraph states that “except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law”.7
Luckily our act on the access to public information made a step forward following other similar laws and recommendation of international conventions (for example Recommendation of the Council of Europe as you could read later), but this was even a step forward from the constitution since it stated that it is not necessary to have a legal interest. It is enough to be curious. Our law does not limit this right only to the citizens but everyone has the right to access to public information.

The European Union as one of the greatest bureaucracy apparatuses in the world was also late in regulating the field of access to information. It “woke up” really late and only because of the pressure (it’s clear) of the Scandinavian countries. It enacted the first regulation on this field to access to “its own” documents as late as 2001. The Council of Europe with its recommendations for member countries was faster than EU for two decades in this field.

As early as 1981 the Committee of Ministers of the Council of Europe enacted the recommendation to member states (Recommendation No R(81) 19 of the Committee of Ministers to Member States on the Access to Information held by Public Authorities) to settle the implementation of the right to access to information held by public authority in their legislation and practice according to the alleged principles. These principles determine that everyone shall have the right to obtain, on request, information held by the public authorities according to the alleged principles. Effective and appropriate means shall be provided to ensure access to information to anyone on the basis of equality. Access to information shall not be rejected on the ground that an applicant has not a specific (legal) interest in the matter. Any request for information shall be decided upon within a reasonable time. A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice. One of these recommendations was accepted by the Committee of Ministers on 21st February 2002 (Recommendation Rec (2002) 2 on Access to Official Documents). This recommendation states that the countries shall have an independent body which considers the decisions of the competent public authority on the access to information. The Council of Europe also recommends the use of public interest test. It states also some permissible exceptions, cases where the state may refuse the access to a document.

The first reflection in law of the mentioned policy of the European Council, the European Union saw in 1990 by legalizing the access to information on the environment (Council Directive 90/313/EEC on the Freedom of Access to Information on the Environment), which was rewritten in 2003 (the old one expires
on 14th February 2005 because of the new one and till then all member countries shall enter this provisions of this directive into its laws and by-laws). Only in 2001 the access to European Parliament, Council and Commission documents was settled. (Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission documents).9

However, a big step forward was also made by the new European Constitution which finally became the highest legal act of the European Union and gave a full meaning to all human rights, including access to documents. In the second part of the EU constitutional treaty titled Charter of Fundamental Rights of the European Union the right of access to documents is included among the citizens’ rights (a special article, separated from the article relating to freedom of expression. This article (II/102) states:

“Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.”

And what is the practice of institutions reviewing legitimacy of rejecting the request for access to documents?

At first I would like to tell there are three systems of second-instance (judicial) decision making:

1. Many countries left the conflict between the body obliged to follow the rules of the access to information and applicant of information to be settled before the courts which proved to be extremely non-efficient in the systems where judiciary process is slow since a chief aim of the access to information – speed is not reached. In these systems the disadvantage is also the fact that the courts as the third branch of government are not included in the system of bodies obliged to follow the rules of the access to information although they hold many documents which should be made public without doubt (documents from the field of court administration, judgement...). Take for instance Montenegro where the Access to Public Information Act (ZDJIZ) is still being prepared and most of the problems are connected with the courts since it is not possible to obtain final judgement from them and they are indifferent concerning the public. What is more, they even do not have computer judiciary data and it is needless to say that non-governmental organizations a lot of times need to apply exactly the jurisprudence of court in exercising their rights.
2. In many countries the function of review is subject to Ombudsman (who does not have a statutes of a second instance body) which may be good where his words count but may not be good where he is seen as a toothless tiger whose decisions do not have any legal power since the one who rejects to give information can either respect Ombudsman’s decisions or not.

3. In the countries where democracy is still under develop is surely most sensible to have an authorized body, independent state body (sui generis) watching over law enforcement and reviewing the conflict between the person obliged to follow the rules of the access to information and the applicant. Its decision is final and no appeal shall be made against this decision except complaint (in all countries which have an authorized body an administrative dispute may be launched since it is clear that judiciary has to be the last instance dealing with the protection of the right). Article XIX, the biggest non-governmental organization in the world dealing with protection of human rights recommends having an Information Commissioner to all since it was found out it has the least disadvantages and that the applicants obtain information in the fastest possible way. The basis for the analysis were Anglo-Saxon countries where the function of Information Commissioner passed into law already a few decades ago and evolved to such a level to enable measuring of the results. Today 30 countries have an information commissioner and the number is still increasing. At the moment there are 7 countries in Europe (Belgium in the Flemish Federal Community is preparing modifications on the federal level and it will set up a special committee as a multimember body. Ireland, Great Britain, Scotland, Hungary, Portugal, Brandenburg and Berlin Federal State in Germany and Slovenia have their own information commissioner).

Each of these three systems has its advantages and disadvantages. The main value of the states is and has to be the Access to Public Information Act, and the question which body supervises is finally not so important. In fact, a bigger problem is if a state does not have this act at all or even worse if these human rights are not even written down in the Constitution.

Regardless of different traditions in law the fundamental solutions to legislative regulation of the access to public information in the legal orders of developed democracies are totally comparable. The fact is that the access can be limited only in precisely determined cases which are also similar in comparable law. The legislative regulation of protection of the law in the case of rejecting the access to public information is also totally comparable. Recently, when it came to the appeal procedure, the importance of instance review by an independent body from civil service has been pointed out. Judicial supervision (i.e. administrative dispute) remains the last legal means in all cases.
What is the access to information like in the light of both European courts?

In October this year during the Council of Europe’s conference in Trieste one of my colleagues - lawyers, professional assistants to the European Court of Human Rights expressed a very interesting opinion on the protection of personal data. He said that judges have never taken the Article 10 of the European Convention on Human Rights as a basis for court rulings talking about access to information because till now they have always reviewed such issues in consideration of privacy and family life protection. In fact, they have always had cases where the citizens of the member states of the Council of Europe requested for access to documents including their personal data, data on their relatives and data influencing their right to family life …The decisions in journalist cases have been reviewed according to the article 10 but only from the following point of view: press and media can keep informed the public and the public has the right to know and not to collect and request for information. The judges of this court have always started to review which article is a basis for judging. As already mentioned, the Article 10 has never been used for the access to information, but Article 8 on the right to respect private and family life has been used instead. The case of Guerra and Others v Italy[12] may be a good example where the judges reviewed if the country had done enough to protect private and family life when it hadn’t informed the inhabitants about the consequences of a nearby chemical factory releasing toxic substances into the air. They reviewed the fact if the country should have been more active in imparting information. Guerra referred to the article 10 but judges did not accept his argument and insisted on the article 8.13

The judges wrote the following argument for not taking the Article 10 as a basis for judgement:

“Right of public to receive information had been recognised by Court on a number of occasions in cases concerning restrictions on freedom of press, as a corollary of specific function of journalists, which was to impart information and ideas on matters of public interest – facts of present case were, however, clearly distinguishable from aforementioned cases since applicants complained of a failure in system set up pursuant to relevant legislation – although prefect had prepared emergency plan on basis of report submitted by factory and plan had been sent to Civil Defence Department on 3 August 1993, applicants had yet to receive relevant information.”

Freedom to receive information basically prohibited a government from restricting a person from receiving information that others wished or might be willing to impart to him – that freedom could not be construed as imposing on a State, in circumstances such as those of
The court offered to inhabitants of the village with this factory compensation but it was much smaller than expected since according to court’s opinion they did not prove they suffered material damage because of the lack of information. Court recognized only immaterial damage.

Those dealing with the right of access to documents still wait on the first real case (where the basis for judgement will not be Article 8 but exclusively Article 10 of the Convention and where the applicant won’t be a journalist) enabling the European Court of Human Right to put an end to practice in this field.

The Court of Justice in Luxembourg has already reviewed a “classic” case on the access to information. The judgements passed after 2001 when the European Union institutions had to start to apply the 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 are very interesting. This Regulation covered more precisely the access procedure. The judgments of both mentioned courts are of course binding not only on Information Commissioner but also on all Slovene courts.

What kind of observations I have made at my work?

At the beginning of my work I noticed that those working in public sector and deciding on the basis of Access to Public Information Act as the first instance officials are not aware enough of the deep significance of this law. In our state apparatus it has been generally believed that a “by the way” citizen (allow me to express myself in such a way) does not have legal right to request anything on the pretext that every document is a priori secret, except if there is the law according to which a document can be obtained by a citizen. The Access to Public Information Act turns everything upside down. The basic principle of thinking is and must be: “Everything except exceptions is clear!” I am aware that such a shift in thinking it is not and it won’t be easy. Nevertheless, all those working in public sector should be aware that they work in the name of people and for the people. We should never forget that Slovenia is a democratic republic (Article 1 of the Constitution of the Republic of Slovenia) and that in Slovenia power is vested in the people (Article 3 of the Constitution). Although it seems to be a cliché and a banal or even overly emotional thing to say, this means that we – civil servants – are paid by the taxpayers, i.e. we work “in the name of people”.

present case, positive obligations to collect and disseminate information of its own motion.14
Thus, in my opinion, it is necessary to exercise the right of access not only on the basis of the article constitution referring to freedom of expression, also because the modern democracies have people rule (demos kratos). Both rights; right to co-govern and access to documents and information, are complementary to each other: one without the other does not mean anything. How can people rule without being informed? In my opinion, freedom of expression means in that case freedom to “informed” expression. How can the citizens participate in governing the state if are badly informed? The answer is clear – our part in governing will be insignificant causing more possibilities of self-will and abuse of position of those having the access to information or in other words those being able to prevent us the access to information. In my opinion, freedom of expression does not mean only freedom of speech but to express on any subject by being informed. So there should be no ignorant attitude towards citizens (which is present in public administration too many times) and all those “working in the name of people” should always bear that in their mind. I can’t and I will never accept the fact that bodies behave as if documents and information they produce are their own property, body’s property. They are not – they are without doubt property of all of us. The fact that Slovenia enacted a good law bringing us a new point of view, new way of thinking about bureaucracy’s everyday work gives me a lot of satisfaction. I also firmly believe the transparency of the institutions’ activity will increase with this act year by year so that the awareness of our bureaucrats will become such as the one of our Scandinavian counterparts.

However, we have to bear in our mind there are also exceptions (they are stated in a logical and comprehensive way under Article 6 of this Act). Especially I am aware that I always have two parties throughout the procedure: a state body (obliged to follow the rules of the Act) and an applicant. Moreover, the scale of justice (if I can borrow this term from judiciary) is not automatically on the applicant side. I must have a correct and professional attitude towards both of them and judge the rights on equal, well-founded and deliberate terms in order to gain their trust. I will always put the right to access to information on the scale of justice. As the citizens have the right to access to personal data so the legal person has the right to protect business secrets and the state has the right to protect official secrets. Every applicant has to be aware of these law elements. But it is difficult for me to except the state bodies’ answers referring many times especially to protection of personal data and not explaining their rejection of the access to documents at all neither rendering a decision. In this case we can talk about severe mistake in the procedure since there is no legal protection for a citizen (applicant). If there is no explanation, there is no basis for legal judgement and if there are no instructions on legal remedies, applicant who is usually a layman in law field doesn’t know he can make a complaint.
which can be addressed to the Commissioner if he or she doesn’t agree with the decision. Let me point out that when the body which is obliged to follow the rules of the Act rejects the request to access to information, has to judge always in the light of exceptions written under Article 6 of the Access to Public Information Act and has to give an explanation for its decision in the administrative procedure. Thus, I appeal to these bodies to avoid silence of the body since I have to consider this case as a rejecting decision according to Access to Public Information Act (ZDIJZ). And if the body did not submit and write its arguments for rejection, he lost the chance to persuade me it did the right thing.

In many state bodies representatives of public relations were appointed for deciding as officials about access to public information. However, it should be known that the access to public information does not have much to do with “classic” public relations, with the segment covered by public relations service in public sector. It is true that it relates to the public but rejection of the access to documents is more or less a legal action. When the body approves the access to a document there is no need of any legal procedure but it is enough that the official makes a notice and submit the document to the applicant. This part is easily covered by public relation services. An important instrument at their work is a register of public information which should be prepared till 9.12.2004. This register must comprise all information owned by the body and which are public without restrictions. Wherever possible there should be a connection from this register to the website. Internet is very helpful in the public relations service since only in such a way there will have less work to do. It should be noted that in Slovenia 47 % of Slovenes who are more than 15 years old use internet. In my opinion when the access to information must be rejected, there is a need of a lawyer’s assistance. It should not be forgotten that such a procedure is completely in compliance with ZDIJZ since one body can have more officials and even more important, the procedure can be lead only by an official appointed by a body representative.

If I return at the beginning of my thinking, I must point out it is not sufficient that the rights are written down in a constitution and laws but they must also be exercised and taken into consideration. A century and a half had to pass so that the United States started to look on and understand the right to freedom of expression as we do today. There are several countries today that do no respect freedom of expression and many of them still do not have laws referring to the field of access to information. To solve the issue on access to information non-governed by laws is one of the basic tasks of above mentioned non-governmental organisation Article XIX (and of many others). Referring to the right to access to information, this organization says it is
becoming increasingly aware this right must be placed among the basic principles, basic directions in spreading democratic principles. They help other countries in passing the laws and monitoring their implementation on this field. In September 2004 I talked to some colleagues from the countries of ex-Yugoslavia and I was disappointed by the fact that even though their parliaments enact modern laws (in accordance to the European legislation) there are a lot of problems with implementation in practice: the acts remain only a dead letter on a paper.

However, at the same moment when I hear about the problems of these countries I become pleased because Slovenia is in advance in thinking and implementation of laws (although still behind more developed Europe). I can firmly state that ZDIJZ was not ignored by the majority of the bodies obliged to follow it. Judging by my first experiences, the bodies (especially in the state administration) took the law very seriously and consequently start to prepare public information registers in all seriousness. There are problems only with weighting two or three rights. I can calmly say it is more or “less dangerous” for bureaucracy if a body issues out a wrong rejecting decision since the applicant can make a complaint to me who I must have more knowledge in this field. Without doubt, it is not good for law discipline and the structure of the rule of law if the body obliged to follow ZDIJZ simply ignore the applicant or in the case when the document was really not produced by it, sends the applicant door to door even though it has the information but it wishes to avoid the responsibility or work relating to writing of a rejecting decision because it wouldn’t like to disclose it.
At the end I have borrowed thoughts written by my colleagues-lawyers on the web page ACLU (American Civil Liberties Union) – where they summarized the essence of the access to information in the last of three reasons; why the freedom of expression is essential to a free society:

“It’s necessary to our system of self-government and gives the American people a “checking function” against government excess and corruption. If the American people are to be the masters of their fate and of their elected government, they must be well-informed and have access to all information, ideas and points of view. Mass ignorance is a breeding ground for oppression and tyranny.”

I hope that this first act with a comment will be useful for all so that we will regulate this field (since our business will never end because law is alive and must be living so that it must adapt to changes in society) to the level to be proud of. Especially the practice of decisions implementing will draw up development guidelines. I am aware of this burden and task so I am taking it very seriously. However, there is no doubt that I won’t and I can’t succeed without you applying to the Access to Public Information Act (ZDIJZ) at first instance.
Notes

2 http://www.constitution.org/bor/vir_bor.htm
3 http://www.constitution.org/bor/vir_bor.htm
4 http://www.dostopdoinformacij.si/index.php?id=221
5 http://www.dostopdoinformacij.si/index.php?id=222
6 One of the fundamental principles of state action, the principle of legality of state action, has been in force all the time. It means that all the state bodies can act only in accordance with the constitution and legislation. On the other hand, an individual can do everything not explicitly prohibited (in legal order) which means in the light of my discussion that an individual can ask his/her country for all information except those that are explicitly defined in another way.
7 http://www.us-rs.si/index.php?sv_path=6
8 My predecessor Igor Soštes and my adviser Jurij Zurej, my adviser used public interest test right on the basis of this recommendation in the decision Rok Kajzer v. RTV Slovenija (referring to the public issue on the salary of the RTV public institute of managing director), although the Slovene law is not familiar with it (more about this in the comment on the Article 6 of the act).
9 All mentioned regulations are available on our web side www.dostopdoinformacij.si.
10 http://www.dostopdoinformacij.si/fileadmin/user_upload/Pogodba_o_Ustavi_z Evropo.pdf
11 http://www.article19.org/docimages/1112.htm
12 Case of Guerra and others v. Italy, 116/1996/735/932
13 This regulates the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
14 Case of Guerra and others v. Italy, 116/1996/735/932
15 Let me tackle the issue of the protection of personal data. It must be pointed out that in this field weighting of the rights is possible and obligatory. Take for example the public case of civil servants’ salaries. In Slovenia it is not very popular to talk about making civil servants’ salaries public, even among civil servants. The European Court for Human Rights reviewed making public salaries in the light of protected personal data a couple of times. It reviewed if state operatives’ salaries are public and if the data on salaries of individuals can be communicated with a name. When applying to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal of the European Communities L 281, 23.11.1995) the court warned that it is necessary to take in consideration not only the purpose of this Directive and the right to protection but also other fundamental human rights and freedoms. In the case described under number C-465/00 the court assessed that the interference with the privacy (examination of a civil servant’s salary) was in compliance with the law. It also determined that the aim of this interference was to provide suitable consumption of public funds which is a legal interest within Article 8 of European Convention on Human Rights. This Article includes economic well-being of the country among exceptions where there is no legal protection of personal data”.
16 Vasja Vehovar, 2003, Uporaba Interneta: Ris 2002/3 – Gospodinjstva, FDV, Ljubljana
17 http://archive.aclu.org/library/pbpt10.html
Access to Public Information in Slovenia

Nataša Pirc Musar, LL.B.

Commissioner for Access to Public Information

The Hague – 24th-25th November, 2004

Access to Public Information Act adopted in March 2003

- This Act governs the procedure which ensures everyone free access to public information held by state bodies, local government bodies, public agencies, public funds and other entities of public law, public powers holders and public service contractors. ALSO COURTS AND PARLIAMENT
  - All together 2853 bodies in the catalogue

- Commissioner started working in September 2003 (22 decisions, majority solved by telephone)
Access to Public Information in Slovenia

• **Article 39, Slovenian Constitution**
  – “Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law.”

• **Recommendation (2002)2 Council of Europe, Section 5**
  – “An applicant for an official document should not be obliged to give reasons for having access to the official document.”

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Access to Public Information in Slovenia

• **Why is the Commissioner as an independent body better than other solutions? (Courts, Ombudsmen)**
  – Decisions with power also obligatory for the courts
  – Faster than courts
  – Law specialisation in the field of access to documents
Access to Public Information in Slovenia

- The body shall deny the applicant access to requested information if the application relates to:
  - Classified Information
  - Information which is defined as a business secret
  - Personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data
  - And 9 more

- NO BALANCE TEST for personal data protection, harm test in some exemptions

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Access to Public Information in Slovenia

- **Balance test – public interest test (regarding personal data protection)**

- **Article 15, Slovenia**
  “Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution.”

  “Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interest mentioned in Paragraph 1, UNLESS THERE IS AN OVERRIDING PUBLIC INTEREST IN DISCLOSURE

  NO BALANCE TEST IN DIRECTIVE 95/46 AND REGULATION 1049/2001
Access to Public Information in Slovenia

• New Constitution for Europe recognises European Convention for Human Rights as basic law principle
  – Article 8
  “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Access to Public Information in Slovenia

• “Preventive activities” – communication with official persons of liable authorities

• THREE BASIC PRINCIPLES:
  1. Information “produced” by public institutions in the course of their work are property of citizens (apart from exceptions)!
  2. Transparency of public expenditure!
  3. Lack of response is unacceptable!
Access to Public Information Around the World
Workshop II - Public Access to Documents in the new Member States

Chairman: Mr. Peter Stolk of the Dutch Ministry of the Interior and Kingdom Relations
Speakers: Mr. Ivar Tallo, Director of e-Governance Academy, Tallinn, Estonia
Ms. Nataša Pirc-Musar, Commissioner for Access to Public Information
Reporter: Aida Tunović of the Dutch Ministry of the Interior and Kingdom Relations

Report of the discussion:

Balance of rights.
One of the main discussions during Workshop II was about balancing of rights. Already in her presentation, Ms Pirc-Musar indicated that in her work, she often has to choose between two fundamental rights, right of the public to access government information and right of every citizen to privacy (personal data protection). Ms Pirc-Musar gave several examples to illustrate how in her work as Commissioner for Access to Public Information she constantly needs to balance these two rights and perform what she calls ‘law gymnastics’. One of the most illustrative examples that she gave was about a Ukrainian prostitute who worked in several countries of former Yugoslavia including Slovenia. After her death, the doctors performed autopsy and discovered that she carried several sexually transmittable diseases such as syphilis and AIDS. The Commissioner wanted to make this information public and to put the picture of the prostitute in the newspapers. The question that arose in this case was which of the fundamental rights was more important, the right to privacy of the deceased prostitute or the right of the citizens to access information of public relevance. While she was working in Slovenia, the prostitute had sexual intercourse with eight men per day. Do these men have the right to the above mentioned information?

Commissioner, Courts or Ombudsman
Which body/institution is most apt to deal with access to public information? It became apparent during the discussion that there is not necessarily one good solution for all. The Commissioner in Slovenia is an independent body, a sui generis entity. S/he is rather immune to intimidation and can in certain cases impose fines on those who do not respect his/her decisions and/or requests. Courts are often independent as well but the justice they provide is according to participants too slow and slow justice is no justice at all.
The third option namely, the Ombudsman can only be effective in those countries where his/her reputation has been established (e.g. Sweden). However, if a country does not have an ombudsman tradition and happens to be in the middle of its democratisation process, then it is not advisable to choose for this option. During her presentation, the Commissioner talked about Bosnia and Herzegovina and said that the Ombudsman there resembles a toothless tiger because its decisions are not respected.

**Security versus Transparency**

Several participants expressed their concerns about countries such as UK and Belgium which are increasingly implementing secrecy clauses. Some of these developments could be considered as a serious threat to transparency efforts and achievements so far.

**Questions**

Question posed to Mr. Tallo: How did you manage to pass the Freedom of Information Law in Estonia with so much hostility from the civil servants?

Mr. Tallo answered that this hostility was basically ignored. Civil servants in the former Soviet Bloc countries were taught to strive for as much secrecy as possible and to make information public only in exceptional cases. Now, these Communist trained bureaucrats had to do exactly the opposite of that what they were taught: all information is public and it should only be kept secret in exceptional cases.
Workshop III

Public Access to Documents and Security

Speakers:
Wouter van de Rijt
Jakob Thomsen

Chairman: Jan Willem Severijnen
Rapporteur: Marga Groothuis
Public Access to Documents versus the Need for Security

How to Strike the Balance between Transparency and Confidentiality

Jakob Thomsen and Wouter van de Rijt*

I. Introduction: the general principle of right of access and its limits

Since the mid-nineties, public access to documents has played an important role in giving practical effect to the principle of transparency in the European Union as referred to in Declaration 17 to the Maastricht Treaty.

In the Amsterdam Treaty, which entered into force on 1 May 1999, the importance of transparency as a means to strengthen the legitimacy and the democratic nature of the European institutions was highlighted even further, and (what has now become known as) the “principle of openness” was included among the general principles of the European Union (Article 1(2) TEU).

The relevant provisions of primary EU law as regards transparency

Moreover, as from the entry into force of the Amsterdam Treaty, the EC Treaty contains specific provisions concerning access to documents (Article 255 TEC) and the instruments governing the citizens’ right of access to European Parliament, Council and Commission documents. In this context, it should also be recalled that Article 207 (3) TEC explicitly provides for the inclusion of rules governing public access to Council documents in the Council’s rules of procedure, and that the Articles 28 (1) and 41 (1) TEU foresee that the right of access also applies to the common foreign and security policy and to police and judicial co-operation in criminal matters.

The initial legal framework: the Code of Conduct

It is worthwhile recalling however, that although the principle of right of access as a general right granted to all natural and legal persons was not incorporated and references to the scope of the right of access were not included in the EU and EC
Treaties until Amsterdam (the Maastricht Treaty did not contain specific provisions in this regard), the fundamental principles of the Community system of access to documents were already established in the so-called Code of Conduct concerning Public Access to Council and Commission documents, adopted jointly by the Council and Commission in 1993, and were also clearly set out in the decisions, adopted by the institutions concerned with a view to give effect to the Code of Conduct.

It also followed from the Code of Conduct and the above-mentioned instruments implementing it, that no category of documents were to be excluded from the right of access, not even classified documents. However, a regime of exceptions was set up foreseeing the possibility for the institutions to refuse access to any documents whose disclosure could undermine the protection of the public interest as regards public security and international relations. In order to determine, whether the release of a given document could undermine any of the public or private interests expressly mentioned in the Code of Conduct and the implementing instruments, the institutions had to undertake an analysis of the harm that would be caused by its disclosure (the so-called “harm test”).

The very existence of a regime of exceptions does of course reflect the necessity for the institutions to strike the balance between, on the one hand, the general objective of ensuring maximum rights of access to the institutions’ documents, and, on the other, the equally essential need to ensure adequate protection for major public or private interests.

The present legal framework as regards transparency and confidentiality

The present legal framework, governing the right of access to the documents of the institutions, as established by Article 255 TEC and Regulation (EC) No 1049/2001 (based on Article 255 (2) TEC), does, in a similar way, cater for the need to ensure adequate protection for major public or private interests, by establishing a certain number of exceptions to the public’s right of access (see Article 4 of the Regulation) and by setting out guidelines allowing for a special treatment to sensitive documents (as set out in Article 9 of Regulation No 1049/2001).

It should be underlined, in this context, that, parallel to the adoption of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, the Council adopted on 19 March 2001 its Decision 2001/264/EC adopting the Council’s security regulations (based on Article 207 (3) TEC and Article 24 of the Council’s Rules of Procedure).
These two main instruments, which define the general guidelines as regards respectively (1) the principles, conditions and limits governing the right of access to the documents of the institutions and (2) the handling of information that requires a certain degree of confidentiality, are sometimes perceived as being in conflict with each other or as pursuing contradictory goals.

However, as demonstrated below, the provisions of the two instruments, which were drafted and adopted in parallel and which both entered into force at the same time (in December 2001), are by no means contradictory. As already mentioned, the need to ensure adequate protection for major public or private interest is clearly provided for in Regulation (EC) No 1049/2001, whereas Recital 7 of Council Decision 2001/264/EC of 19 March 2001 adopting the Council’s security regulations stipulates that “This Decision is without prejudice to Article 255 of the Treaty and to instruments implementing it”. Hence, the two instruments should indeed be considered as complementary and not as pursuing contradictory goals.

The purpose of this paper is to demonstrate how the implementation of the two instruments are linked to each other in practice. Thus, in the following, we shall set out in some detail

- the limits to the right of access that follows from Regulation (EC) No 1049/2001,
- the obligations of the Council also to consider requests for access to documents that contain classified information, notably its obligation to grant partial access to those parts of classified documents which contain information that do not require confidentiality
- the rules regarding the handling of classified information as laid down in both instruments,

and finally give some examples that illustrate how the general criteria underlying the so-called “harm test” are used in practice.

II. Exceptions to the right of access as established in Regulation (EC) No 1049/2001 and the relevant case-law regarding their application

As mentioned above, a regime of exceptions under which access to the documents of the institutions may be refused was already set up by the Code of Conduct of 6 December 1993. The principles and criteria underlying this initial regime of exceptions are still valid and constitute an integral part of the current legal
framework. However, in contrast to the Code of Conduct and to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, Regulation (EC) No 1049/2001 contains a specific exception to cover defence and military matters, given that documents related to these issues are now explicitly covered by the scope of the Regulation.

The existing regime of exceptions is established by Article 4 of Regulation (EC) No 1049/2001, which provides in its paragraphs 1 and 2 that the EU institutions shall refuse access to a document, where disclosure would undermine the protection of:

- the public interest, as regards public security, defence and military matters, international relations or the financial, monetary or economic policy of the Community or a Member State;
- privacy and the integrity of an individual, in particular in accordance with Community legislation regarding the protection of personal data;
- commercial interests of a natural or legal person, including intellectual property;
- court proceedings and legal advice;
- the purpose of inspections, investigations and audits.

Moreover, pursuant to Article 4(3) of the Regulation, the institutions shall refuse to provide a document, where disclosure would seriously undermine their internal decision-making process (it might be a document drawn up by an institution for internal use or received by it, which relates to a matter where the decision has not been taken by the institution, or a document containing opinions for internal use as part of deliberations and preliminary consultations, even after the decision has been taken).

Existing case-law regarding the application of the exceptions laid down in Article 4 (1), (2) or (3) of Regulation (CE) No 1049/2001

However, pursuant to the case-law as established by the Court of First Instance and the Court of Justice in a number of cases concerning access to the documents of the EU institutions, the above-mentioned exceptions should be interpreted and applied strictly, in a manner which does not defeat the application of the general principle of access to documents for citizens. It, moreover, follows from the case-law of the CFI and the Court of Justice that if only parts of a requested document are covered by any of the exceptions, the remaining parts of the document shall be released. This obligation to grant partial access, whenever possible, is now clearly provided for in Article 4(6) of Regulation (EC) No 1049/2001.

Furthermore, any decision to reject a request for access to a document must be based on a genuine examination of the particular circumstances of the case. Thus, the
institutions are required to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected by the arrangements for exceptions contained in Article 4(1), (2) or (3). The reasons given for a decision refusing access to documents should – at the very least for each category of documents – contain the specific reasons for which the institution concerned considers that disclosure of the requested documents falls under one of the exceptions provided for. A decision denying access is valid only if it is based on one of the exceptions provided for in the Regulation.

In this context, the Community courts have insisted on the institutions being required to state reasons for their individual decisions in accordance with Article 253 of the EC Treaty. If an institution has, in the decision of refusal, omitted to refer to the exception applicable, which forms the basis for the refusal, it can no longer rely upon it before the Community Courts.

It should be added, however, that the obligation for the institutions to state reasons does not mean that they are required – in all cases – to furnish, in respect of each document, “imperative reasons” to justify the application of the public-interest exception and thereby risk jeopardising the essential function of the exception in question, which follows from the very nature of the public interest to be protected and the mandatory nature of the exception. It would be impossible, in practical terms, to give reasons justifying the need for confidentiality in respect of each document without disclosing the content of the document and thereby depriving the exception of its very purpose.

III. The EU institutions are bound by an obligation to consider requests for access to all categories of documents

As illustrated by the case-law summarized above, the institutions are obliged to examine all documents requested – be they classified or not – on their own merits, and cannot refuse access to certain categories en bloc on the grounds that they generally contain information of a sensitive character. In order for comply with the established case-law, the institutions therefore must consider each requested document individually and examine whether it can be released wholly or partially on the basis of the so-called “harm test”.

This said, and in spite of the obligation of the institutions to state reasons for refusing access to all requested documents, the Community Courts have admitted
that the EU institutions are entitled to state their reasons for refusal in a way, which does not harm the interests to be protected. This need to formulate the statement of reasons for refusing access to sensitive documents in a way that justifies the confidential character of the documents without disclosing their content is catered for in Article 9 (4) of Regulation (EC) No 1049/2001, whereas Article 11(2) of the Regulation provides that references to sensitive documents in the public registers of the institutions shall be made in a manner, which does not undermine the protection of the interests mentioned in Article 4.

In the following, the rules and procedures as regards the treatment of sensitive documents will be set out in some detail. In this context, it is important to recall, that the security rules set out in Article 9 of Regulation (EC) No 1049/2001 and Decision 2001/264/EC adopting the Council’s security regulations do not contain any additional exceptions to the right of access, but merely define the treatment to be given to classified documents.

IV. The rules regarding the handling of classified information

Decision 2001/264/EC adopting the Council’s security regulations (based on Article 207 (3) TEC and Article 24 of the Council’s Rules of Procedure) applies only to the classified information of the European Union. This means that documents classified as “EU RESTRICTED”, “EU CONFIDENTIAL”, “EU SECRET” or “EU TOP SECRET” shall be handled according to the security regulations, whereas “ordinary” Council documents with the distribution code “LIMITE” do not fall within the scope of these regulations.

The purpose of the security regulations is to safeguard classified information from espionage, compromise or unauthorised disclosure. The classification is carried out on the basis of an assessment of the degree of prejudice to the essential interests of the EU or one or more of its Member States, which could be caused by unauthorised disclosure.

It should be recalled, however, that information shall be classified only when necessary. The classification shall be clearly and correctly indicated, and shall be maintained only as long as the information requires protection.

It follows from Recital 7 of the security regulations (see above) that these regulations do not constitute any obstacle to classified documents being examined by the Council with a view to determine whether, pursuant to the transparency rules adopted on the basis of Article 255 (2) TEC, such documents could be disclosed to the public. Hence, if
the examination of a classified document leads to the conclusion that (in view of its content and the criteria of public and private interests applicable) the document in question may be disclosed wholly or in part, the document shall be declassified (entirely or partly) in accordance with the relevant provisions of the security regulations before its disclosure.

Given the very purpose of the Council’s security regulations, it goes without saying, that the decision to classify a given document is taken only where one or more of the exceptions to the right of access provided for in Article 4 of Regulation (EC) No 1049/2001 are applicable.

However, as already indicated above, this does not exempt the Council from its obligation to consider a request for access to a classified document with a view to determine whether access can be granted in whole or in part. In some cases the originating services do come to the conclusion that the exceptions, which originally led to the classification of a given document, no longer apply, and that access may therefore be granted following declassification of the requested document. Yet, more often than not, the grounds for classification are deemed to remain valid, and access to the documents concerned must therefore be refused or limited to certain parts of the document(s) (partial access).

The Council’s security regulations expressly invites the relevant services of the General Secretariat of the Council not to over-classify their documents (notably because routine over-classification can result in a loss of confidence in the validity of the classification system), and the number of Council documents classified “EU CONFIDENTIAL” and above is therefore relatively limited. In practice, most of these documents concern the Common Security and Defence Policy.

It should be mentioned, in this context, that according to the definition of a “sensitive” document set out in Article 9 (i) of Regulation (EC) No 1049/2001, this concept does not include all kinds of classified documents, but only documents which (1) are classified “EU CONFIDENTIAL” and above (2) concern an area of public interest (public security, defence, international relations or financial, monetary or economic policy) referred to in Article 4(i) of the Regulation, and (3) originate from a Community institution or agency, a Member State, a third country or an international organisation. – This restrictive definition consequently excludes all documents classified “EU RESTRICTED” as well as those classified “EU CONFIDENTIAL” and above, but which do not concern areas of public interest or which are not issued by a public authority.
In practice, however, this distinction between “sensitive” documents and the broader concept of “classified” documents has no repercussions in terms of a “less favourable” treatment of applications for access to documents which are categorized as “sensitive” in comparison to the examination of applications for access to all other documents (whether classified or not), since all requested documents are subject to the so-called “harm test” with a view to possible disclosure. Access to a document is refused only, if the reasons for not making it available to the public still exist at the time of examination.

This said, it should be underlined, that applications for access to sensitive documents under the procedures laid down in Regulation (EC) No 1049/2001 shall be handled only by those persons who have the right to acquaint themselves with those documents. Moreover, sensitive documents shall be recorded in the public register or released only with the consent of the originator.

V. How to strike the balance between transparency and confidentiality (the “harm test”) – some practical examples from the area of Justice and Home Affairs

When examining requests for access to documents concerning issues related to the area of Justice and Home Affairs (JHA), the ground for refusal most frequently invoked is the protection of the public interest as regards public security (Article 4 (1) (a), first indent of Regulation (EC) No 1049/2001). However, this ground for refusal may, in some cases be given in conjunction with other grounds for refusal, such as the protection of the (internal) decision-making process of the Council (Article 4 (3) of the Regulation) and/or the protection of the public interest as regards international relations (Article 4 (1) (a), third indent of the Regulation).

Example 1:

The General Secretariat of the Council receives a request for access to a Council document containing the Outcome of Proceedings concerning talks between the EU and a third country “X” (for instance the United States) on a JHA-related issue:

Harm test (first stage):

It appears from the document that the two parties concerned agree to give priority to on the fight against the financing of terrorism.
Observation:

By making this information public, the Council Secretariat, would neither have revealed a secret nor done any harm to the public interest as regards public security.

Harm test (second stage):

It may also appear from the Outcome of Proceedings that the European Commission will table a proposal with a view to align the third Money Laundering Directive to the recommendations of the FATF (the Financial Action Task Force set up within the framework of the OECD).

Observation:

The release of this information would not constitute any threat to public security either. Moreover, a decision to disclose it would only affect an institution.

Harm test (third stage):

Let us imagine, however, that the Outcome of Proceedings also contains information of a more sensitive character, for instance that the United States has indicated that it is intending to track all bank accounts originating from country "Y" (a country in the Middle East) because there is suspicion of misuse of charities.

Observations:

Disclosure of this information would obviously do a lot of harm to the EU’s relations with the United States for the following reasons: (1) it is more than likely to undermine the effectiveness of the measure envisaged by the US; (2) it could, indeed, harm the relations between the US and the Middle East country concerned, and (3) it would certainly raise doubts about the reliability of the European Union as a cooperation and confidence partner for the US.

Conclusion:

Following its examination of the requested document, the General Secretariat of the Council would in all likelihood come to the conclusion, that only partial access can be granted to this document by excluding the sensitive parts of the document, the disclosure of which would undermine the protection of the public interest as regards the
relations of the EU (and its Member States) with certain third countries (Article 4 (1) (a), third indent).

Example 2:

The General Secretariat of the Council receives a request for access to one or several Schengen evaluation reports containing observations and conclusions following inspection visits at the borders of the Schengen countries.

Applications for access to such documents are generally turned down on grounds of public security. Given their very objective: to remedy possible flaws in the border control system, inspection reports normally contain detailed information about weaknesses and insufficiencies to be rectified, the disclosure of which could definitely “serve the purposes” of criminals involved in drugs trafficking, illegal immigration, trade in human beings etc., but would certainly not serve the public interest to be protected.

Whereas it clearly follows from the “harm test”, that the inspection reports as such can not be released to the public, it may seem less clear whether access to other documents prepared for the Council that are merely summarizing the outcome of the inspection visits without giving local, geographical details shall also have to be refused.

In the case of requests for access to such more general documents which in themselves do not contain sensitive information, but which do contain references to documents, that can not be released to the public for reasons of public security, the General Secretariat of the Council may be confronted with a dilemma, where the balance between transparency and confidentiality is considerably harder to strike.

VI. Conclusions

As seen from the above,

– the existing legal framework provides the citizens with a general right of access to the documents of the EU institutions, although this right of access is not unlimited;
– to cater for the need to ensure adequate protection for major public or private interests, a regime of exceptions is established in Article 4 of Regulation (EC) No 1049/2001, which places certain limits on the general right of access;
the EU institutions are, however, required
• to apply the exceptions to the general right of access in a restrictive manner,
• to examine all documents requested with a view to determine whether the
documents concerned can be released in full or in part
• to state reasons for refusal, although this may be done in a way that does not harm
the interests to be protected;
the implementation, in parallel, of Regulation (EC) No 1049/2001 and of Council
Decision 2001/264/EC adopting the Council’s security regulations has not given
rise to any problems in practice;
the Council’s security regulations do not contain any additional exceptions to the
right of access, but merely define the treatment to be given to classified documents;
the distinction between “sensitive” documents as defined in Article 9(1) of
Regulation (EC) No 1049/2001 and the broader concept of “classified” documents
does not raise problems with regard to citizens’ right of access;
the so-called “harm test” is carried out on the basis of the provisions laid down in
Article 4 of Regulation (EC) No 1049/2001;
x in most cases, the outcome of the “harm test” is clear cut, whereas the institutions
may, in some cases, be confronted with a dilemma where it may be somewhat harder
to strike the balance between transparency and confidentiality.
Annex

The relevant provisions of the EU and EC Treaties as regards transparency and access to documents

General provision - Article 1(2) TEU

The principle of openness is established in Article 1(2) of the EU Treaty where it is stated that “this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizens”.

Specific provision - Article 255 TEC

This principle has been translated in Article 255 TEC which establishes that 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.

However, the citizens’ right of access to the documents of the EU institutions as established by Article 255(1) TEC is not unlimited. Thus, Article 255(1) explicitly states that this right is “subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3”. Hence, the purpose of Regulation (EC) No 1049/2001 (based on Article 255(2) TEC) is to determine “the general principles, conditions and limits on grounds of public or private interest governing [the] right of access”.

Specific provisions concerning documents related to the “second” and the “third pillar” - Articles 28(1) and 41(1) TEU

As regards the scope of the public’s right to access to the documents of the institutions, it follows from Articles 28(1) and 41(1) TEU that this right of access does also apply to documents relating to the common foreign and security policy and to the police and judicial co-operation in criminal matters.

98
Specific provisions concerning greater access to Council documents, when the Council is acting in its legislative capacity - Article 207(3) TEC

**Article 207(3) TEC** provides that “The Council shall adopt its Rules of Procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council adopts legislative acts, the results of votes and explanations of vote as well as statements in the minutes shall be made public.”
This paper has been drafted jointly by Jakob Thomsen (attached to the Unit on Transparency and Access to Documents of the DG F (Press, Communication, Protocol) of the Council Secretariat) and Wouter van de Rijt (attached to the Unit on Horizontal Issues within the DG H (Justice and Home Affairs)) for the purpose of the conference on “Transparency in Europe” to be held on 25-26 November 2004 in The Hague. The information presented in this paper reflects the views of its authors and does not necessarily represent the opinion of the General Secretariat of the Council.

5 It should be recalled that all decisions refusing even partial access to a document may be the subject of an administrative appeal to the institution concerned. Following a confirmatory application, the institution is required to re-examine the request for access. Reasons must be given for a confirmation of the refusal, and the applicant is then entitled to institute court proceedings pursuant to Article 230 TEC or to make a complaint to the European Ombudsman.
6 See the judgment in the WWF v. Commission case above, point 56, as well as the above cases Netherlands and van der Wal v. Commission, point 27 and Council v. Hautala, C-353/99 P, ECR 2001, p. I-9565, point 25.
7 See in particular Hautala v. Conseil, point 87 and Kuijer v. Conseil, T-188/98, point 54. This case law was expressly confirmed by the Court in the Council v. Hautala case, C-353/99 P, points 27 et 31, and in the Mattila v. Council and Commission case, C-353/01 P, points 29-32.
9 See the judgment in WWF UK v. Commission, above, points 64 and 74.
11 This obligation to state reasons has the two-fold objective, on the one hand, of informing interested parties of the justification for the decision taken so that they can protect their rights and, on the other, of enabling the Community judicature to exercise its power to review the legality of the decision. See the judgments in WWF UK v. Commission, T-105/95, ECR 1997, p. II-313, point 66, Interporc v. Commission, T-124/96, ECR 1998, p. II-231, point 53, Svenska Journalistförbundet, above, point 116, Kuijer v. Council, T-188/98, ECR 2000, p. II-1959, point 36 and JT’s Corporation v. Commission, T-123/99, ECR 2000, p. II-3269, point 63.
15 See also Recital 7 of Regulation (EC) No. 1049/2001, as well as its Article 2(3): “This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.”
Workshop III - A Public Access to Documents
and Security

Chairman: Mr. Jan Willem Severijnen of the Dutch Ministry of the Interior and Kingdom Relations
Speakers: Jakob Thomsen, Unit on Transparency and Access to Documents, DG F, EU Council
Wouter van de Rijt, Unit on Horizontal Issues, DG H, EU Council
Reporter: Marga Groothuis of the Dutch Ministry of the Interior and Kingdom Relations

Report of the discussion

The first theme in the discussion in this workshop was whether the European Court of Justice has the right of access to documents concerning the process of categorization within the EU Institutions. Some participants of the workshop argued that such access is necessary for the Court to perform its judiciary task. According to them the Court is hindered in its task, if it cannot determine in an independent way how the process of categorization of documents has taken place. Mr Thompson and Mr Van de Rijt explained that the Court does not have the right of access to documents concerning the process of categorization. In theory, they said, it is possible that the involved EU Institution refuses to give the Court information about the categorization process. The participants at the workshop concluded that there is a lack of transparency in this respect. Mr Thompson and Mr Van de Rijt stressed, however, that in practice the Court is nearly always given access to documents concerning the process of categorization, when it asks for such access.

A second theme in the discussion concerned the way in which national authorities deal with EU documents which are classified as ‘EU restricted’, ‘EU confidential’ or ‘EU secret’. Several participants in the discussion argued that in practice the instructions for officials of the national authorities, such as ministries, are not clear. The participants told of practical examples in which an ‘EU confidential document’ or even an ‘EU secret document’ circulated at a national level, e.g. among hundreds of officials within a ministry, when – as was concluded later – this should not have happened. Sometimes, it was argued, such errors occur because the officials at the national level, e.g. within a ministry, do not yet have sufficient knowledge of the EU Regulation regarding public access to European Parliament, Council and
Commission Documents ((No 1049/2001). This regulation is complicated and officials at the national level do not always know what a particular EU classification means. In other cases, it was said, errors occur because the instructions on the EU classified document are not clear or contradictory. In such situations, it was concluded, the national authorities should consult the EU Institution that has published the document.

A third issue in the discussion was the period in which an EU document remains classified. Once a document is classified as ‘EU restricted’, ‘EU confidential’ or ‘EU secret’, for how many years does it remain so? And is there a system to review the classifications?

Mr Thompson and Mr Van de Rijt explained that the decision to classify a document is reviewed every five years. Until recently, such a ‘review system’ did not exist. Even now, there is no formal rule on declassification of documents, but EU Institutions have adopted internal rules on this issue.

Some participants of the workshop argued that in their experience EU classifications last many years in most cases: it seemed to them that in practice the classification is “for ever”. In reaction to this, Mr Thompson recognized that classification of EU documents often has a long duration. This is partly due to the fact that the ‘review system’ has been introduced only recently: it will take some time before a majority of classification decisions has been reviewed by the EU Institutions: only then the effects of the ‘review system’ will be more visible.

There were several questions in the workshop on the motive of the applicant: is it – legally – relevant why a citizen asks for access to a certain EU classified document? In other words: does it matter what his or her motive is? And does it make a difference who asks access to a document, for example a journalist, a student, or a person in detention? Mr Van de Rijt and Mr Thomson answered that under EU Regulation 1049/2001 the motive of the applicant does not matter for the decision whether or not to give access to a classified document. The EU Regulation specifically prescribes that the motive of the applicant may not play a role in the decision on the request for access.

A number of participants at the discussion expressed their surprise or concern about this. They explained that in their national legislation the ‘motive of the applicant’ plays an important role in the decision whether or not give access to public documents. In their view, it is important why an applicant asks access to the document. They explained that it is difficult for citizens in their member states to understand the difference between on the one hand the national legislation on access to public documents and on the other hand EU Regulation 1049/2001 with
regard to this issue. This can cause confusing and misunderstanding, both among citizens and among government officials at the national level.

Another issue that was raised in the discussion concerned the balance between on the one hand the interest of transparency of European institutions and on the other hand the interest of counter-terrorism measures. One of the participants of the workshop argued that, under the increasing threat of terrorism – both at national and at a European and international level – there is a tendency to categorize more EU documents as ‘secret’ or ‘top secret’. A discussion in the workshop developed on the question how to find a good balance between on the one hand transparency of EU institutions and on the other hand the fight against terrorism. Several participants argued that transparency of public institutions is a precondition for democracy, and that transparency should not be put aside, no matter now serious the threat of terrorism is. Other persons stressed that the under EU Regulation 1049/2001, as well as national legislation on access to public information, access to documents can be limited on the ground that this is necessary in the interest of security. The EU Regulation, and the legislation in most EU member states, thus already offers a legal framework in which the interest of ‘transparency of public institutions’ and the interest of ‘protection against terrorism’ can be balanced.

A separate discussion evolved in the workshop on the role that ‘transparency of public institutions’ can play to support the fight against terrorism. Several participants stressed that transparency of public institutions can strengthen democracy and increase the support for government measures at the European and national level. More concretely, they argued, European and national institutions need to be as transparent as possible about counter-terrorism measures, in order to gain support from the citizens for those – often far-reaching – measures.

Two participants coming from new EU member states pointed out that it takes a long time to change the ‘culture’ towards transparency within their national institutions. In the years of communism, they said, there was a tradition of ‘secrecy’. According to these participants, it takes more than one generation to change this culture of closeness. Even though many of the new member states have new and modern laws on access to public information, more will be needed to reach real transparency within their government institutions. Similarly, these participants argued, it is often difficult for government officials within their member states to understand the ‘ratio’ behind EU Regulation 1049/2001. This applies, they said, especially to government officials in small municipalities and rural areas. The workshop concluded that training of government officials is important in this respect.
Finally, a number of participants at the workshop stressed the importance of informing the citizens in the EU member states about their rights of access to EU documents, as well as their rights of access to national government documents. “Citizens need to be informed about their rights”, was a general conclusion. It was stressed that education, at schools and university, was important in this respect, and that television, Internet and other new media should be used to inform citizens – young and older – about their rights.
Workshop IV

Harmonisation of the EU and Member State Legislation

Speakers:
Bart Driessen
Marc Maes

Chairman: Jon Schilder
Rapporteur: Nynke Kramer
I should like to express my gratitude for being here and to have a chance to explain the Council’s policy as regards access to documents and Member State views. This conference is timely since, in our daily practice, we in the Council’s General Secretariat observe there are differences between the Member States’ approaches on access to documents in their national practice. Some Member States have a quite open policy in providing access to their documents. Others are more prudent. Without taking a position on the philosophy behind each policy, I will just say that either position is defensible. Similarly, the Council’s General Secretariat takes each Member State’s national policy as a given.

Even though it is an entirely different policy framework, Member States naturally tend to project their national policy inclinations to the access of EU documents. This is where the problem arises, since divergent policies—each consistent and defensible on their own—can clash when they meet.

Before discussing the issues that flow from this, I will first provide some background on the kind of work and the types of documents that are at issue here. That will be followed by an analysis of the legal situation and of the Council’s current practice. As will become clear, the problem of interaction with the Member States is very different in the Council compared with the Commission, both procedurally and substantively.

Access to documents in the Council and the Member States

As regards the procedure for granting access to Council documents, the legal framework consists of Regulation 1049/2001 and Annex II to the Council’s Rules of Procedure. The first principle of these rules is that access must be as broad as possible. The Council’s Rules of Procedure provide that documents that are fully or partially accessible must be made available on the Council’s internet site.

For documents that are not fully public, the rules lay down a two-step procedure in which initially requests for documents are answered by the General Secretariat.
Contrary to the Commission, the Council centralised its procedures for dealing with requests for documents. The Secretariat’s Transparency Unit initially assesses the request—in co-ordination with the relevant service in the Council—and replies to the applicant.

If no full access to the requested documents has been given, the applicant may submit a confirmatory application. The decision on this second request is taken by the Council through its normal decision-making procedures. As virtually all Council work, the decision is prepared in a preparatory body (the Council’s Information Working Party) consisting of representatives of all Member States. The Information Working Party is one of few such preparatory bodies that are chaired by the Secretariat rather than by the Council presidency. Another peculiarity compared with other Council preparatory bodies is, that the draft Council replies are prepared by the General Secretariat. Once the reply is finalised at the Working Party level, it is adopted by COREPER and the Council. Although either body can discuss the draft reply, in practice this virtually never happens.

This procedure provides Council Members with a say on the reply to the confirmatory application. Although the draft can be adopted by a simple majority (i.e., thirteen out of twenty-five), an effort is made on all sides to achieve as large a consensus as possible and, in most cases, the vast majority of Council Members concur with the draft reply.

The procedure used in the Council does not directly involve Member States with the handling of the initial application, which—in the terms of Article 7 of Annex II—-is a matter of the General Secretariat. However, two comments are in order. Firstly, the Secretariat’s decision on the initial reply is legally attributable to the Council. Secondly, the Secretariat tends to adapt its policies on the handling of initial applications in function of the practice that is developed by the Information Working Party and approved by the Council.

As far as substance is concerned, the main principle of the legislation referred to before is that documents are public unless an exception applies. Article 4 of the Regulation lays down the exceptions that can be invoked. I will focus on three paragraphs of this Article, namely paragraphs (3), (4) and (5).
To start with paragraph (5), this provides that ‘[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement’. This restrictive rule, however, is itself interpreted restrictively.

Firstly, the Council’s Rules of Procedure require requests to apply paragraph (5) to be made in writing to the General Secretariat.

Secondly, the interpretation of Article 4(4) is relevant. This provides that ‘[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed’. Contrary to the system in force before the Regulation, it is clear from the wording that Article 4(4) is not an exception in itself; nor does the fact that the document emanates from the third party exclude it from the scope of the rules on access to Council documents. Rather, the issue is whether that third party (or the Council) is entitled to refuse the document on the basis of one of the grounds of paragraphs (1) or (2). Paragraph (4), then, is more of a procedural than a substantive provision.

There is a difference between the situation at the Commission and that of the Council where this provision is concerned. The Commission deals with many private parties in the context of its work: competition procedures, tendering procedures, lobbyists, etc. The Council’s clientele is different, in function of its more legislative rather than executive institutional role. In Council’s case, third parties tend to be mostly states or other public parties such as international organisations.

Of course, many of the documents circulated by the Council come from the Member States and it is on this point that an important interpretative rule was developed.

An argument could be made that Member States are ‘third parties’ within the meaning of paragraph (4). Such an interpretation would have far-going consequences: many of the documents circulated in the Council are contributions drafted by Council Members or their delegates as contributions to the institution’s (legislative) work. Considering such documents to be third-party documents would imply that the Member State concerned would be given a droit de regard on the public access to documents underlying the Council’s legislative work.

The Council opted for another interpretation and in 2002 decided that, when participating in the work of the Council and its committees and bodies, Member State
representatives are not persons or entities outside the institution, but part of it. Consequently, parts of documents summarising oral statements by members of the Council or their delegates within the Council or one of its preparatory bodies submitted in the context of the institution’s discussions even when contained in a separate document are not third-party documents. They are Council documents.\textsuperscript{9} The same applies to the written positions of delegations. That interpretation fits with the logic behind Article 207(3) TEC.\textsuperscript{10} Such documents are therefore not covered by Article 4(5).

On the other hand, documents that are not clearly submitted ‘in the context’ of the Council’s work do benefit from the protection of Article 4(5)—although the all-encompassing nature of the institution’s work greatly reduces the size of this category.

Article 2 of Annex II of the Council’s Rules of Procedure adds further rules on the handling of such documents. In short, it may be clear that the document ‘shall not be disclosed’, in which case no consultation takes place. In other cases, particularly

– when the document is ‘sensitive’ (as per Article 9(1) of the Regulation), or
– where it was submitted to the Council before 3 December 2001, or
– when the Member State concerned requested that it not be released without its prior agreement,
consultation is necessary. If the Member State refuses release, the Council is to refuses access on the basis of Article 4(5).

During the consultation procedure, the Member State is given a reasonable time to reply which, however, cannot hold up the mandatory deadlines to reply to the applicant. Consultations therefore require diligence on the part of all parties concerned.

3 Member State positions in footnoted documents

The issue of Member State documents has also come up in the context of Article 4(3). The first sub-paragraph of this provision obliges the Council to refuse access to a document

– ‘drawn up by an institution for internal use or received by an institution’,
– which relates to a matter where the decision has not been taken by the institution,
– if its disclosure would seriously undermine the institution’s decision-making process,
– unless there is an overriding public interest in disclosure. This last criterion leaves the Council with some discretion, which the Courts tend to respect.\textsuperscript{11}
If the document contains ‘opinions for internal use as part of deliberations and preliminary consultations within the institution concerned’, access must be refused even after the decision has been taken if disclosure would seriously undermine the institution’s decision-making process, again unless there is an overriding public interest in disclosure.\textsuperscript{12}

In practice this has led to two different problems. Firstly, the situation can occur that documents drafted by the General Secretariat refer to Member States’ positions. Typically, such positions or reservations are mentioned in the footnotes. The difference with Member State contributions is that the document is authored by the General Secretariat and normally reveal positions adopted by several delegations.

The first principle here is that, where possible, partial access must be granted in accordance with Article 4(6) of the Regulation.\textsuperscript{13} This provision, which essentially\textsuperscript{14} codifies into the Regulation consistent case law\textsuperscript{15} ruled under the preceding law, precludes the institution to simply block the whole document. An additional difficulty arises because different Member States have different policies in this respect. Some Member States are concerned that their negotiation margin will be drastically reduced if their reservations are made public before a (political) agreement is reached. Others take a different position and favour the publication of their positions at any time.

It is neither for the Council as an institution, nor for its General Secretariat to approve or condemn what are essentially differences between the Member States in cultural outlook. However, it is essential that the Council’s policy—obviously within the margins of the law—is consistent.

That policy is laid down in a document approved by COREPER in 2002. Since that time, the Council will release the full document, including delegations’ positions, but will delete the delegations’ names. As a consequence, the public gets to know that one delegation had a problem with Article X, but is left in the dark who exactly was involved. This solution is a compromise between the need to maintain space for compromises whilst trying to make the debate itself as public as possible. I should note a few caveats: scrutiny reservations and parliamentary reservation (meaning there is not necessarily any difference of opinion) are made public with the identity of the delegation concerned. Of course, it remains possible to withhold part of the document on the basis of another exception of Article 4 of the Regulation.\textsuperscript{16}
The second situation under Article 4(3) is a different figure. It often occurs that Member States’ delegations submit contributions, amendments, position papers, etc., in the context of a particular legislative file. Under the previously mentioned Council interpretation, such documents, even though authored by a Member State, become Council documents and, consequently, the decision to release them is the Council’s.

Yet the Member State concerned may have strong feelings about the need to disclose or not disclose its contribution. It may be subjected to pressures from lobby groups or other parts of society. It can be genuinely concerned that its negotiating position is compromised if the proposal is made public. The Member State may lose some of its ability to give in without losing face. This, in turn, can have a serious impact on the chances of finding an acceptable compromise. On the other hand, in some Member States, government contributions to the Council’s work are made available to the public. Indeed, as long as a Member State does not reveal the positions of other Member States, it is of course free to publish its own input. In fact, in some Member States the government is even obliged to do so under national legislation. Thus a problem arises, because the Council policy must be consistent and independent from any particular Member State’s wishes.

The Regulation contains many exceptions, but the policy view of a particular Member State does not feature among them. Article 4(4) documents (i.e., those not related to Council business) can be blocked by the authoring Member State, but precisely these are not at issue.

In practice, the General Secretariat uses a logic that deals with such issues as follows. When requests for such national contributions are received, the General Secretariat of the Council will in such cases not ask the Member State concerned whether it agrees to disclosure, but rather, whether the document has been made public in accordance with the Member State’s national legislation. If this is the case, then that Member State’s negotiating position is obviously not affected and the presumption is that there is no reason to apply Article 4(3).

Access to Council documents and the Member States: quo vadis?

The Council’s practice under the Regulation is, of course, not more than a few years old. Nevertheless, as a result of the vast number of documents that are requested
from the institution, considerable experience has been gained in that short span of
time. It is well possible that the Council may further refine or change that practice,
of course whilst respecting the Regulation and the Rules of Procedure. Since the
Council’s practice develops on a case-by-case basis, it is difficult to predict with any
precision what the system will be like five years from now.

Still, I would like to make one prediction. The European Constitution requires the
Council to meet in public when considering and voting on a draft legislative act.¹⁸
The ramifications of this provisions are the subject of another working group at this
congress, so I will limit myself to a brief comment. Firstly, there is likely to be a ‘spill-
over’ effect to the documents that the Council is debating and voting on. Secondly,
there may be a spill-over to the Council’s preparatory bodies. Taking this into
account, and if the last years are anything to go by, it is likely that more access to
documents will be provided in the future.
Notes

1 Member of the Legal Service of the Council of the European Union, doctoral candidate, University of Leuven. The author would like to thank Martin Bauer for his helpful suggestions. However, this contribution represents only the views of its author and may not be attributed to the Council or to its Legal Service.


4 Articles 10 and 11 of Annex II to the Council’s Rules of Procedure. Currently, some 300,000 out of a total of about 500,000 documents can be directly downloaded: doc. 12860/04 of 1 October 2004 at 5.

5 ‘Subject to Article 9(2) and (3) of Regulation (EC) No 1049/2001, any application for access to a Council document shall be handled by the General Secretariat.’

6 T-211/00, Kuijer vs Council, [2002] ECR II-485, § 55.

7 Article 4 of Annex II to the Council’s Rules of Procedure.

8 Article 2(2) of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, OJ (1993) L 340/43: ‘Where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but directly to the author’.

9 Note from the General Secretariat of the Council to Coreper (Part II)—Public access to documents—Issues of principle, Council doc. 6203/02 of 1 March 2002, approved by Council doc. 6898/02 of 23 July 2002, at point 22.

10 This provides in its relevant part that as follows: ‘The Council shall adopt its Rules of Procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.’

11 Kuijer vs Council, § 53.

12 This logic also applies where the deliberations are not political negotiations: Decision of the European Ombudsman on complaint 573/2001/IJH against the Council.

13 ‘If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.’

14 In Kuijer vs Council, § 57 the Court of First Instance allowed for ‘exceptional cases’. No such exception was included in the Regulation.

15 Ibid., and lately C-353/01P, Mattila vs Council and Commission, Judgment of the Court (Sixth Chamber) of 22 January 2004, §§ 30-32.


17 And the Courts have consistently ruled that the exceptions of Article 4 are to be interpreted restrictively: Kuijer vs Council, § 55 and T-191/99, Petrie and others vs Commission, [2001] ECR II-3677 at § 66.

18 Article I-50.2.
EC and national Legislation

- EC Treaty Article 255 and Regulation 1049/2001:
  - Right of access to documents of
    - the European Parliament,
    - the Council
    - the Commission
- Member State legislation:
  - Access to documents or freedom of information
**International Rules**

- Convention of Århus and EC Directive 2004/3:
  - Access to environmental information
- Council of Europe:
  - Recommendation (2002) 2 of the Committee of Ministers on access to official documents
  (not binding)

**Legal situation**

- No EC competence on access to information/documents except environmental information
- EC rules apply to EC institutions only
- Each Member State has its own rules
**Interaction of Access Rules**

- Regulation 1049/2001 grants access to all documents held by an institution (drawn up or received by it)

- In most Member States, access rules also apply to documents received by the authorities

- How do EC institutions and Member States handle requests for access to each other’s documents?

**Position of Member States**

- Third parties vis-à-vis EC institutions
  - [Art. 3(b)]

- Member State documents:
  - fall within the scope of Regulation 1049/2001 when held by an EC institution [Art. 2(3)]

- Member States may request:
  - an EC institution not to disclose documents sent to that institution without their consent [Art. 4(5)]
Access requests to the Commission

- The Member State must be consulted unless:
  - the document has already been disclosed
  - access will be refused under Reg. 1049
- Access must be refused if the Member State opposes disclosure
  [Art. 4(5) and Judgment of the Court of First instance in case T-76/02]

Member States and Reg. 1049

- The Regulation does not interfere with national rules [Recital 15]
- Member States are bound by principle of loyal cooperation [Art. 10 EC Treaty]
  - they shall consult the institution from which a document originates unless it is clear whether or not the document should be disclosed [Art. 5]
How does the Commission proceed?

1. Does any of the exceptions of Regulation 1049/2001 apply?

   - YES: access is denied without consultation
   - NO: Member State is consulted (unless the document is already public)

Practical Cases

- Infringement proceedings [Art. 226, 228 EC]
- Competition cases [Art. 81, 82 EC]
- State aids [Art. 87, 88 EC]
- Notifications of technical standards [Directive 98/34/EC]
- Information on projects funded by EC Funds
Authorship of documents

- Mixed documents, drafted jointly by the Commission and a Member State
- Commission documents based on information supplied by Member States

The supplier of the content is the author

Infringement proceedings

Letters of formal notice, reasoned opinions

1. **Ongoing proceedings:**
   - presumption of no access
   - (protection of the investigation)

2. **Closed cases:**
   - documents are disclosed, unless:
     - other exceptions apply
     - Member State opposes disclosure of its documents
Harmonisation of Access Rules?

• Should access rules be harmonised by way of a Directive? (there is no legal base)

• Is voluntary harmonisation by Member States possible? Desirable?

• What are the consequences of «Forum shopping» and «Peer pressure»

Access requests to Member States

• The Member State consults the Commission in case of doubt (practice varies from one State to another)

• If the Commission objects, the Member State may still overrule the Commission
Workshop IV: Harmonisation of the EU and Member State Legislation

Chairman: Mr. Jon Schilders of the Dutch Ministry of the Interior and Kingdom Relations.
Speakers: Mr. Marc Maes of the European Commission and Mr. Bart Driessen of the European Council.
Reporter: Ms. Nynke Kramer

Report of the discussion

The chairman, Mr. Schilders, opened all three discussion sessions of workshop four by asking the participating delegates to share their views on the questions Mr. Maes explicitly put forward during his presentation. These questions included the following:

- Should access rules be harmonised by way of a directive?
- Is voluntary harmonisation by Member States possible? Is it desirable?
- What are the consequences of ‘forum shopping’ and ‘peer pressure’?

In explaining why he put forward these questions, Mr. Maes reiterated that there is currently no legal basis by which Member States should and could harmonise their national legislation on the public access of government documents. The inability to harmonise may consequently give rise to such phenomena as ‘forum seeking’, where experts (lobbyists, NGOs, firms etc.) search for the document they are looking for at the institution where they are most likely to obtain it, and ‘peer pressure’, where individual Member States with deviating legislation on public access to documents may feel pressured to adjust their positions to that of the majority of Member States, a benchmark for best practice.

The majority of remarks from the participating delegates were directed towards the question whether voluntary harmonisation by Member States was desirable and possible. During all three sessions of the workshop, there was a general consensus that voluntary harmonisation is in fact already taking place, despite there not being a lawful basis for it. Amongst the Member States, there is a general trend towards greater transparency. Mr Maes reminded delegates that the principles of access to documents are in fact quite similar between Member States and EU institutions. Any difference would therefore most likely be found in the implementation of these principles.
Arguably, a directive is therefore redundant. Indeed, a number of delegates voiced concern that a directive on the harmonisation of Member State legislation would not be a blessing. A directive would undermine the subsidiarity principle, national culture and loyalties. Moreover, delegates pointed out that thus far there have been no major problems with regulation 1049 and its implementation due to deviating Member State legislation. One delegate stated that focusing on harmonisation of transparency legislation would not necessarily promote democracy. Indeed, the majority of people using Regulation 1049 to obtain documents are experts, not ordinary citizens. Perhaps the EU should focus on promoting the access of documents to the ordinary citizen. The question of whether the EU would be the right institution to draft legislation on the harmonisation of transparency legislation in the first place was also put forward. The EU is not in a legal position to change the concept of European integration from economic integration to that of governance. It would require a change in the goals of the EU.

Nevertheless, some delegates maintained that some sort of legal basis for harmonisation of legislation may still be needed. Voluntary harmonisation of legislation may be short-lived without a solid legal basis. Indeed, experience with applying Regulation 1049 is still relatively little. Thus, time will have to tell whether a legal basis for harmonisation is necessary. For example, a delegate reserved doubt on the strict application of Article 4(5) of the Regulation where Member States have the absolute right to refuse the disclosure of information provided to the EU, including court pleadings. The delegate referred to cases before the European Court of Justice where some Member States allowed for the disclosure of their pleadings, but other did not. This puts those states that do not wish to disclose their pleadings in a difficult arguing position.

If a directive were to come into place, it should only give a minimum standard of transparency so as to not disadvantage those countries with high levels of transparency. It was noted by a delegate that if a directive were to be drafted with an absolute standard, signing up to the directive would prove impossible for some Member States because lowering their standards of public access to information would go against the constitution of these Member States.

There were also some technical issues raised during the discussions which related to Regulation 1049. These include questions on what the Commission and the Council perceive to be a document. Mr. Maes and Mr. Driessen noted that the Regulation 1049 does not provide for any rules on what constitutes a document. Therefore, any paper, however informal, is a document to which access may be
requested. Another delegate asked how the Court of Justice can verify whether a document is lawfully classified as top secret when judges are themselves excluded from viewing top secret documents. Some Member States have provisions available when such situations arise, for example. Mr. Maes noted that the Court normally does not require viewing of the restricted document in question. The Court generally looks at the legality of the procedure or motivation of refusal for public access. Mr. Driessen further noted that the classification of restricted documents is found in the Council’s Security Regulations, to which Regulation 1049 refers to in Article 9. The fact that a document is restricted does not exclude it from the scope of Regulation 1049. The security regulations and Regulation 1049 are applied together.

Thus, to conclude on the discussions held during the workshop, one could say that thus far Regulation 1049 works well in practice. No major problems relating to the deviation in national legislation and the Regulation have so far occurred. The need for a legal basis for harmonisation is generally not advisable at this point. However, the Regulation is still very new. Time will have to tell whether harmonisation by way of a directive is desirable. Indeed, it is important to continue to understand and exchange views and experiences on the issue by way of organising conferences such as this one.
Speech by Mr. H. Brunmayr

Transparency

When I started to work at the Council almost ten years ago, I was the first in the Council Secretariat at this time to deal specifically with transparency. The Council was perceived like the fortress of secrecy, being as closed as the Central Committee of the Chinese Communist Party. A few years later the comparisons changed, and the Council was considered being as secretive as the North-Korean Communist Party Central Committee, because the Chinese Communist Party had opened up somewhat in the meantime. But people in general did not realise that the Council had started to open up. In the beginning the concept of transparency appeared to be very difficult to digest for the Council, the argument being that we cannot keep our working methods, if we introduce transparency. This changed very swiftly, and what I would like to do now is to show you where we stand, and where we should go.

What are the main aspects of transparency in the Council’s work? There is first the public access to documents. As you all know, the applicable texts are actually Article 255, and the regulation 1049/2001. The Council, just like Parliament and the Commission, has adapted its rules of procedure, and I must say that our overall assessment is that regulation 1049/01 and its implementation by the Council function rather well. The Council was the first institution of the three to introduce an electronic register of documents. This came rather as a reflex, we tried to survive. We were flooded with demands for documents, we had some favourite clients – who have become real friends in the meantime – who asked for hundreds of documents, and we had to find the documents, to discuss with the competent services. This was very cumbersome, given that the Council has a system of continued numbering of all its documents, it was rather easy to create a register. This is more difficult for the Commission, I admit. So we started already in 1998 to prepare a register. Since 1999 the register is functioning, we have continuously improved it and now it provides an automatic update upon production. On the register you will find all documents, the numbers, and, at least the title. We have given instructions, and we are giving training to our civil servants. The ‘rédacteur’, the one who drafts the document, when establishing the document has to assess whether there is anything in its contents which has to be protected. If not, the full text of the document goes directly to the register, so you will find the full text on the register, at the same time as delegations receive the document in electronic form. If there is something to be protected, then the ‘rédacteur’ would put ‘limité’ on it. This means that only the title
and the document number of the document will appear on the register. Of course the interested citizen may ask for the document.

**The release following a request.**

If an interested person asks for a non-public document, the Transparency Unit in my DG deals with the application. Jacob Thomsen and his team assess whether the document can be given. If it is released the applicant receives the text, but the full text goes also on the register, so other people interested need not ask, they can find it directly.

The Council tries to ensure utmost transparency in the legislation field. This means when the Council concludes a phase in the legislative procedure, for instance adopting a common composition, all documents leading up to the common position are retroactively made public, full texts are put on the register, and the same goes, of course, for the final approval of the text.

I will just briefly show you the search mechanisms in the register. There are various search possibilities such as title, text and subject matter, which are all intended to make it more user-friendly, and there are icons. The icons indicate whether the document is already accessible, so you can step over and get the full text in PDF or HTML; whether the document is partially accessible: for this we have created a specific part in the register database where you can find the partially accessible document. You may find that the icon says that the document is not accessible and then you can introduce a demand. The statistics are rather impressive, we have now almost 550,000 listed documents on the register in the 20 official languages. The register is a multilingual tool, and the full text of 59 percent of the documents is on the register; over 50 percent of these documents are already public at the moment of the drafting. The additional percentage comes through release following demands made by interested citizens. The statistics on the visits of the register show about 3,000 visits a day, we have altogether 6 million requests a year.

**Which reply may be given?**

First of all, release. This happens in roughly 73 percent of the cases. You have to take into account that the documents whose content we consider non-sensitive, are already full text on the register from the beginning, so the demands nowadays concern foremost documents, in sensitive areas like security and defence policy, or Justice, Home Affairs and fight against terrorism.

The second possible reply is partial access. Those here present who are long-standing members of the information working party, and in particular our Nordic colleagues know very well what we are speaking about, because we have had lengthy discussions on partial access. In the beginning partial access was refused
categorically in order to safeguard the overall balance of the document. But the Court of First Instance has forced us to reconsider our position. The Council lost Court cases, because it had not granted partial access. Now we do, and since the entry into force of Regulation 1049, we have developed a practice of blanking out which is very progressive, because we only blank out the names of the delegations, and the remainder of the document becomes already public during an ongoing procedure. The interested people can follow what is in our documents in totality, and those really interested know very well who is behind the footnotes. The partial access accounts for between 10 and 15 percent of the overall releases of documents.

The third possible reply is motivated refusal. There also the Court rulings contributed to the evolution of the Council’s policy. Block refusals of documents in sensitive areas had to be abandoned. Later on, the Court also said that any exception should be interpreted and applied strictly, and sufficiently motivated. We lost Court cases because our motivation had been insufficient, but now apparently the Council has learnt from this, as can be seen from the last case on the opinions of its Legal Service which the Council won. We won because our motivation had been extensive and we had even given partial access, this had living up to the demands in the previous rulings of the Court.

The procedure in the Council for confirmatory requests of documents we did not release in the first instance, is a very complicated and cumbersome one, but it functions. The answer is prepared by the Secretariat, then the information working party discusses the answer, and then Coreper has to approve; normally the draft answer passes Coreper without discussion, and finally the Council adopts as an A point. The whole procedure has to be accomplished within 15 working days. This is very tight, but it functions. The question is that the reply to a confirmatory request has to be adopted by the Council. This leads me to the next part of openness in the Council which concerns the publicity of the decision-making process and legislative transparency. There are three key elements: open deliberations, open debates and the publicity of the Council votes and the statements, plus the minutes. As a follow-up to the Seville European Council, the Council has introduced new rules on open deliberations, which means that when the Council acts on a co-decision act, it has first one open deliberation, when the Commission presents the proposal, and a second one when the Council wants to come to a decision on the proposal. In practice, these are very often the two only times that ministers discuss proposals, so you could say there is already full publicity. Open deliberation means that the ministerial debate is transmitted via an internal TV circuit, and it is also taken over by Europe by Satellite. In the future, we want to introduce video streaming so that all interested persons can follow the deliberations directly on our website.
In the Council Rules of Procedure it is also stated that we should have open debates, at least one on all other important proposals. In addition a list of open debates on other interesting topics is adopted at the beginning of every Presidency, so we have now already a considerable number of open deliberations. The publicity of votes has already been existing for a couple of years. The Council Secretariat produces monthly summaries of all decisions and votes. We keep statistics of the votes and also reproduce the statements given as well as the explanations of votes.

In addition the Council Secretariat carries out information activities with the objective of developing an active information policy and explaining the Council’s work, and making access to our information sources easier. The main tool is of course the website. As an important complement to the register of documents you can find on our website the agendas of the Council and the Coreper in the form of standard documents, but there are also all the other agendas of Working Group meetings which are sent out in the form of communications. In addition, our press service prepares background notes for briefings which are given before the Council meetings, normally by the Permanent Representative or the deputy. These background notes give detailed information about what is to be discussed. We also put these notes on the Internet. We are the only institution to do so and journalists and lobbyists are very interested in these notes. After the Council meetings, the press service draws up the press release and in practice, the press release is then used for the Council minutes almost without any changes. This explains maybe why there is not a big interest for Council minutes, as everything is already in the press release. Furthermore, we have a co-decision database which refers particularly to the legislative procedure between Council and European Parliament, where you can find where we stand in the negotiation of new legislation and, of course, you have the references to all the relevant documents. In addition, we have a service “Information to the public” dealing with demands other than access to documents. We have stepped up the interinstitutional cooperation with the Commission in this field. The Commission has created a very performing call centre, Europe Direct, and we have now collaborators working at this call centre. Difficult specific questions are transferred to the Council and the collaborators at the information to the public service answer these questions. A new project in Brussels, which just shows the good interinstitutional cooperation concerns the creation of a new info point at Rond-Point Schumann, a joint info point Council/Commission plus a multimedia centre and a visitor centre, which should be operational from May 2005 onwards.

**A few words on future perspective:**
The main article of the Constitutional Treaty concerning transparency is, of course, Article I 50 which firstly confirms the principle of good governance meaning that the
institutions have to conduct their work as openly as possible. This is a strong mandate, it is a guideline and for us, of course, it is a permanent endeavour to live up to this. The main change for the Council will be in the implementation of the second paragraph: “The European Parliament shall meet in public, as shall the Council when considering and working on the draft legislative act.” This means, in normal language, that the Council should meet in public when acting as legislator, and this has of course big incidences on access to documents, because if the Council meets in public, all the relevant documents have to be public. The main divergence of opinion between the European Parliament and the Council so far is whether we could apply Art. I 50 already now, or whether we should wait until the Constitution is ratified. The actual Treaty gives us already the possibility and from a procedural point of view, a simple majority would be enough to change our rules of procedure. The other question is whether there is the political will, and another question also is this, whether the effects would be as positive as some think.

Finally, Art. I 50 enshrines the right of access to documents, which we had already on the previous treaties. My personal opinion is that we have made a lot of progress since the adoption of Regulation 1049. We should continue at this moment the this step-by-step approach which has given very positive results, and I would personally rather hesitate to press for a too early revision of Reg. 1049. When you proceed to a revision you have to be ambitious, and when you are very ambitious the contradictions and the diverging positions will come up again, and it will certainly not be very easy to get an ambitious proposal adopted. On the other hand, if we continue with our pragmatic approach, I am sure that we can still make a lot of progress.

Coming to an end, I think that we can say very objectively that we have made big progress since the Maastricht Treaty. Transparency has developed from a rather nebulous, and for many suspect, concept into a guiding principle of the Council. We have assisted in a change of cultures. I still see transparency as a continuous process of overcoming prejudices, unjustified fears, traditional patterns of behaviour. The challenge for the Council is always the same: being transparent whilst remaining efficient, striking the right balance between openness and public interest with respect to sensitive areas like security, defence or fight against terrorism. Transparency today is certainly a key principle and also a key principle for the Council and, as Ms Van Bysterveld called it very rightly yesterday in my opinion, a new counterpart of the principle of legality. I think it will also in the future remain a permanent building site.
Main aspects of transparency

• I. Public access to documents
• II. Publicity of the decision-making process
• III. Information on Council’s activities
I. Access to documents: applicable texts

Article 255 of the EC Treaty

Regulation n° 1049/2001 of the EP and of the Council of 30.5.2001

The public register of Council documents

Since its creation on 1 January 1999, the register has been regularly updated to respond to the increasing need for information expressed by citizens

- automatic update upon production
- release following request for public access
- release following adoption of new legislation
The public register of Council documents

The register can be searched by different criteria, such as words in title or text ...
...or by **subject matter**...

Different icons in the register

- indicate whether the documents mentioned in the register are accessible to the public (in PDF or HTML format),
- partially accessible
- or not accessible
On 16 November 2004, the register contained references to **549 249** Council documents in the 20 official languages of the European Union.

**326 231** documents (59% of the references of the register) are accessible full text.
Access to Council documents

• A request for access to non accessible documents may be submitted by e-mail to the General Secretariat of the Council:

APPLICATION FOR ACCESS to a document in conformity with Regulation No 1049/2001

Which reply may be given?

- release: FULL TEXT ACCESSIBLE ON THE REGISTER
- Partial access: PARTIAL ACCESS VERSION ACCESSIBLE ON THE REGISTER
- MOTIVATED REFUSAL
II. PUBLICITY of the decision-making process

Applications for access to a document

- Confirmatory applications and complaints to the European Ombudsman are examined by the Council’s Working Party on Information and by the Permanent Representatives Committee (Part 2).

- Replies are adopted by the Council.
Public access to the decision-making process

- Open deliberations (Article 8 of the Council's RoP)
- Open debates (Article 8 of the Council's RoP)
- Publicity of votes (Article 9 of the Council's RoP)
III. INFORMATION ON COUNCIL’S ACTIVITIES

Council Website - Welcome page
Provisional agendas for the meetings of the Council

Sources of information that can be accessed via the website of the Council

- The Press Office provides information on particularly important issues prior to the Council meetings, in the form of **Background Notes**
Sources of information that can be accessed via the website of the Council

- Press releases of the different Council’s sessions:

Council Website
The co-decision database

- Allows the public to follow the procedure for legislation adopted jointly by the European Parliament and the Council. It includes references to the public register of Council documents.
Future perspectives
Public access to the decision-making process

• In order to ensure good governance and the participation of civil society, the EU Institutions, bodies and agencies shall conduct their work as openly as possible
• The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

Future perspectives
(Article I-50 of the Treaty establishing a Constitution for Europe)

• Any citizens of the Union….shall have…a right of access to documents of the Union institutions, bodies, offices and agencies, whatever the medium. European law shall lay down the principles and the limits...
End of presentation
Closing Speech by Mr. A. Nicolaï

Minister for European Affairs

– During the two days of this conference we have, once again, discussed transparency in the European Union, this time with new Member States at the table.

– Even though the national traditions of transparency of our countries differ, we all feel that we carry on our shoulders the duty to inform the public about our work in the European Union. This is a clear indication of what transformation Europe and its Member State have gone through the past years.

– While working closely together on transparency issues, our views on transparency had the chance to slowly grow towards each other. As a result, we can now say that we gave birth to a European notion of transparency.

– On 29 October, I witnessed the signing of the Constitutional Treaty in Rome. Insiders say that the project of a Constitutional Treaty will make the Union more transparent. Not only was the drafting process a model of transparency, but the provisions of the Constitutional Treaty are also designed to boost transparency even further.

– For example, the new Treaty clearly sets out a division of powers between the Union and its Member States. And it simplifies the decision-making process considerably. Under the new Treaty, the Council’s meetings are open to the public when it deliberates and votes on draft legislative acts. And public access to documents is extended to include the products of all institutions, bodies, offices and agencies of the Union.

– But it is not enough that politicians and members of national governments, like us, see the drafting process and the Constitutional Treaty as shining examples of transparency. It is of overriding importance for our citizens to feel the same way.

– When citizens talk about Europe, we often hear them say that the treaties, institutional framework and decision-making process lack transparency. It may seem clear to us that transparency has become a central focus of the European Union, but what the citizens believe often counts more than what is actually happening.
Winning the hearts and minds of our citizens over to Europe is therefore one of the key challenges we face. With the upcoming referendums on the Constitutional Treaty, that challenge has become even more pressing. To win hearts and minds we must ensure that the Union delivers. We must ensure that it delivers on the issues that matter to our citizens.

Transparency is one of them. Debating crucial issues, taking far-reaching measures and functioning effectively as a Union are extremely laudable activities. But they are not enough. Reaching historic decisions and carrying out far-reaching reforms are admirable steps. But people need to know about them in order to appreciate them.

That brings me to another theme of the Dutch Presidency: “communicating Europe”. The Irish Presidency took the initiative to organise a first informal meeting on “communicating Europe”. We followed up this initiative during our Presidency and organised an informal ministerial meeting on the fifth of October in Amsterdam.

At that informal meeting there was consensus on the importance of European values. Besides being a market and political union, the European Union is an area of freedom, security and justice. Values like democracy lie at the heart of European integration; we expect new members to abide by this principle.

As Mr De Graaf pointed out in his opening speech, transparency is a function of democracy. Transparency is therefore at the heart of the European Union.

Another major conclusion of the informal meeting was that national governments and politicians bear a special responsibility for communicating Europe and bringing the Union closer to its citizens. They have the weighty task of winning public approval for the European project.

The important role of members of national governments is an especially pertinent topic in this distinguished company. Many of us here today deal with transparency issues on a daily basis, at both national and European level.

Transparency is as crucial in the relationship between Europe and its citizens as it is in the relationship between national governments and their citizens. It is an indispensable part of bringing the Union closer to its citizens. And today, I would like to ask your support for making the Union more transparent, not only on paper but also in practice.
That brings me to a proposal that I am sure you are aware of. It is the proposal by the Dutch Presidency to disclose documents on European Political Cooperation, or EPC documents.

In my hand is a volume of EPC documents. These are European non-papers, covering informal European political cooperation in the years 1970 to 1993. Most of us may have forgotten, but in that period the Ministers of Foreign Affairs of the Member States, along with senior officials and experts, met regularly to discuss political matters. The scope of those informal meetings was unrestricted and left room for a variety of initiatives and activities.

Because the meetings were informal and took place outside the framework of the treaties, the EPC meetings were confidential. The outcomes of the meetings were also confidential and were not made public. Each Presidency collected documents setting out common positions and these collections were circulated, exclusively among Member States, at the end of each Presidency. Consequently, between 1970 and 1993 a series of fifty volumes was produced containing both public and confidential information.

The EPC discussions contributed to the development of the European Union, which was established by the Maastricht Treaty. That Treaty created a second pillar of European cooperation, the Common Foreign and Security Policy, which replaced the EPC. As the EPC came to an end, the volumes of EPC documents disappeared into the confidential files of the Member States.

The Netherlands believes that making the contents of these volumes public would not damage relationships between Member States or be incompatible with any other interest. I am convinced that by making these EPC documents public we can do our part for European transparency. To that end, the Dutch Presidency has presented a proposal to the Member States concerned for disclosing the fifty volumes of EPC documents.

Some Member States, however, have shown resistance to making these volumes public. Even if that plan turns out not to be feasible at this time, I sincerely hope that the EPC volumes will at least be handed over to the Council, so that their contents will become official European Union documents. Citizens can then request access to them as they do other official EU documents. At the same time, the Netherlands will keep on trying to find a way of making the EPC volumes public, one that is acceptable to every Member State concerned.
– In conclusion, the European Union has come a long way. Transparency now has a central place within the EU; the Constitutional Treaty makes access to documents a fundamental right. Now we must shoulder our responsibility to win the confidence of our citizens; that effort is fundamental to building a new Europe. A Europe that citizens will feel they can rely on. As I rely on your cooperation in taking this step.

Thank you.
Access to information is an element of transparency (not the equivalent)

Transparency vital to bridge the democratic deficit

Present situation: stepping up from “access to information” to “transparency of government”
Access to information: a multi-layered principle

- Legal principle (constitutional)
  - right to know, obligation to inform the public (mirror), safeguard against arbitrariness, etc.
- Democratic principle
  - participate, control, legitimacy, prevent corruption
- Principle of good governance
  - boosting efficiency, communication, legitimacy, implementation, etc.

EU-Member States by comparison

- 21 out of 25 have legislation in place
- Common EU-tradition emerging
  - lot of similarities
  - differences in detail (definitions, exceptions, remedies, etc.)
  - different levels of sophistication (High level of new Member States)
  - little or no specific rules on how to release information actively (spontaneous release)
**Traditions: mr. Tallo**

- **Anglo-American model:**
  - Leviathan: government as necessary evil
  - foil-model: explicit mistrust
- **Continental model:**
  - Père Goriot: daddy knows best
  - foil-model: implicit trust
- **Nordic model:**
  - Buddy: Government as a partner
  - foil-model: informed trust

**Workshops**

- 1. Transparency in the New Treaty
- 2. Public access to information in the new Member States
- 3. Public access to documents and security
- 4. Harmonization between Member States & EU Institutions
**Transparency in the New Treaty**

- Art. I-50 Treaty from access to information to a comprehensive regime on transparency
- ‘Pre-implementing’ it?
  - Is it pre-implementing (possible now)
  - Leap forward or step-by-step?
- Increased transparency may contribute to positive referenda (chicken-egg situation)

**Public Access in new Member States**

- *Balancing* the interest of access to information and other interests
  - (unless there is an overriding public interest in disclosure) (art. 4 Reg.)
- Legal remedies
  - Commissioner (Ombudsman, Courts)
- Roll back-effect?
  - Old member states - lenient Union-regime
Public Access in new Member States II

- Publicly financed = public information
- Active release of information, employing ICT

Public access & Security

- War on terrorism at the cost of transparency?
  - Reg. 1049/2001 robust safeguard
- Race to the bottom?
  - increase secrecy-acts in Member States
- Security-regime EU-adequate
- Culture shift sometimes needs a push
### Harmonization Member States & Union I

- Regulation 1049/2001 - work in progress - ‘rooting’
- Council and Commission applying articles 4 and 5 - building case law
  - jointly drafted documents (status of received)/vetoing of Member States/Institution-docs (positions), etc.
  - forum shopping (Brussels/Stockholm) - article 5 - follow up on advice of Commission is invisible

### Harmonization Member States & Union II

- Court proceedings
  - Commission releases pleadings?
  - *Sub judice* info/equality of arms
  - Sensitive documents: how can the CoJ check whether documents are lawfully classified ‘top secret’- ‘secret’- procedural?
- Do we need/want to harmonize MS legislation?
  - diverging practices
  - prevent roll back effect
The road ahead?

- **Article 50 of the Treaty**
  - pre-implement - upstream?

- **Boosting transparency by**:
  - consolidating the access to information -acquis (Rule of law – War on terror)
  - exploit ICT to the full extent - enhance spontaneous information
  - exchanging best practices – peer pressure
  - prevent roll back-effect
Access to information in the European Union: a comparative analysis of Member State legislation

H.R. Kranenborg and W. Voermans

Introduction

In order to promote discussions during the EU Conference, ‘Transparency in Europe – II’ on 25 and 26 November 2004, the Dutch Ministry of the Interior and Kingdom Relations asked us to create an inventory of the transparency legislation of the 25 EU Member States and to make a comparative analysis of this data. We gladly undertook the task in the six weeks we had prior to the start of the Conference. The results of our efforts are presented below. Because of the short notice in preparing this report, we will finalise the document only once the Conference is ended. In this way, we may adjust or supplement the survey following the input of Conference participants. Therefore, we welcome your suggestions and comments. In addition to this introduction, the document consists of a comparative analysis and the Member State survey.

Preliminary remarks

Defining the scope of the research

The current research focused on one aspect of transparency, namely access to documents. In particular, the study was concerned with access to documents held by government bodies; it did not address documents held by the judiciary or legislature. However, as can be seen in the Member State Survey, Part II, this distinction was not always clear.

The research further excludes access to personal data and information concerning the environment. National legislation in these fields stems mainly from European legislation. Access to environmental information is addressed by directive 90/313/EEC, which will be repealed by directive 2003/4/EC on 15 February 2005. The latter directive implements the obligations formulated in the Århus Convention, which was signed by the EC in 1998. Access to personal data forms part of the rules on protection of personal data as laid down in directive 95/46/EC. In a majority of Member States, access to these two sorts of information is governed by separate
legislation. However, general legislation often contains provisions referring to these fields, especially as regards access to personal data. While the present study did not attempt to examine separate regulations pertaining to environmental and personal information, where these issues were addressed in general provisions they have been included.

The study does not examine how access to information relates to national rules on freedom of expression. This subject falls outside of the scope of the present research. Only with regard to the Malta, which is one of the three countries without legislation in the field of access to information, has the relationship between freedom of expression and the right to access documents briefly been discussed, including an analysis of the European Court of Human Rights case law regarding article 10 of the European Convention on Human Rights.

**Terminology**

As noted above, research was restricted to ‘government bodies’. We also used the notion of ‘public authority’ or ‘administrative authority’. Within the scope of the research, these words are interchangeable. The latter is also true for the words ‘information’ and ‘document’, although we are aware that the word ‘information’ has a broader meaning than the word ‘document’. We will discuss these differences in wording used in different national legislation only with regard to the question of whether an applicant may either request information or must specifically indicate the requested documents. In other words, whether a country makes use of an information or document-based system.

**Methodology**

We have only analysed relevant Member State legislation. Case law on the practical application of the law is generally not accessible in English. Additionally, in many cases statistical facts are not obtainable. For these reasons, the survey and analysis are theoretical in nature. Naturally, the true effectiveness of access to information laws can only be determined through their practical application.

Data was compiled firstly through answers to a questionnaire that was sent to different country representatives. The Internet was a second source of information. Most countries have made English translation of legislation on access to documents available on the Internet; as far as we know, Lithuania and Spain are the only exceptions. The Member State Survey, Part II, references all relevant addresses on
the World Wide Web; these were accurate through 24 November 2004. We have also used existing surveys on national legislation on access to information. The ‘Overview of Member States’ National Legislation Concerning Access to Documents’, created by the European Commission in 2000, proved very useful.\textsuperscript{10} Another valuable document was ‘The freedominfo.org Global Survey’, which was written by David Banisar and completed in May 2004.\textsuperscript{11} The last source of data worth mentioning are the results of a questionnaire that was posted last year under the auspices of the Council of Europe. This questionnaire was drawn up by the Steering Committee for Human Rights in order to foster the discussion within the Council of Europe on the question of whether Recommendation Rec(2002)2 on access to official documents\textsuperscript{12} should be transformed into a legally binding instrument. Upon request, the Secretary of the Steering Committee sent these results to us.\textsuperscript{13} Of course, in footnotes we have referred to the specific literature that we used.
Part I  Comparative Analysis

§ 1  Introduction

In this analysis, we have tried to highlight the common features of the national legislation on access to documents. Of course, we did not want to lose sight of the individual characteristics of Member State legislation. For this reason, we have combined the common features of national legislation with its most striking differences.

This analysis is structured in the same way as the individual Member State surveys in Part II. It starts with general remarks on existing legislation in the field of access to information (§ 2). It then looks at the scope of the legislation (§ 3) and addresses exceptions (§ 4). In § 5, the procedural requirements that applicants and public authorities must fulfil are described in general, and § 6 is dedicated to legal remedies. Following remarks on institutional structure (§ 7) and certain remaining characteristics of national laws (§ 8), a conclusion is presented in which the question is addressed whether general differences exists between the ‘old’ en the ‘new’ Member States (§ 9).

§ 2  Legislation on access to information

National constitutions and access to information

At the European level, discussion exists as to whether the right to access to documents, as laid down in article 255 EC-treaty and regulation 1049/2001, is of a fundamental nature. Can one speak of a fundamental right or human right to access to documents in the European legal order? According to article 6 EU-treaty the Union shall respect fundamental rights ‘as they result from the constitutional traditions common to the Member States’. For this reason, it is interesting to find that ten out of the 24 countries possessing a constitution have enshrined the right to access to documents in their constitution. In the constitution of Austria, the Czech Republic, the Slovak Republic and Spain accessibility of documents is formulated as a duty for public authorities rather than as a right for individuals. However, the duty of authorities to provide access to documents can constitute a right for an individual to access documents when the individual can hold an authority accountable for failure to perform its duty. Of the remaining countries the constitution is silent on access to documents.
Secondary legislation on access to information

A substantial majority of Member States have specific acts on general access to information. In a few countries, general rules on access to documents are part of legislation of a broader scope. For instance, in Greece and Spain access to documents forms part of the general law on administrative procedure. In Sweden, rules on access are laid down in the Freedom of the Press Act, which forms an integral part of the Swedish Constitution.

In Germany, an act on freedom of information at the federal level is expected to enter into force in mid-2005. Until then, federal legislation is absent and only four of the Länder have legislation in the field of access to public documents. Cyprus, Luxembourg and Malta do not have any legislation on general access to information.

Where ten out of 24 national constitutions grant a right to individuals to access to information, this amount is increased by six if we include secondary legislation. Moreover, secondary legislation in Latvia and the United Kingdom (UK) states that individuals are ‘entitled to obtain information’ (Latvia) or are entitled to have information communicated to them (UK). Also in the secondary law of the Czech Republic, a right for individuals does not exist. However, a duty to provide information does in many cases correspond with a right for individuals, where the law states that public authorities have to provide information in response to an individual’s application. The Austrian Federal Information Act states that anyone may ask for access to information, and the Danish Act states that ‘any person may demand that he be apprised of documents’.

§ 3 Scope of legislation

Beneficiaries

Most Member States that grant individuals the right to access to documents, either through their constitutions or secondary legislation, grant this right to everyone, including foreigners and legal persons. In some countries, this right is only given to persons having a specific interest. In Italy, one has to have a ‘personal concrete interest to safeguard in legally relevant situations’ and in Slovenia applicants have to show ‘a well founded legal interest’. In Greece, the right seems to be granted only to interested parties. It is unclear whether one actually has to show a specific interest. Case law of the Greek Council of State seems to suggest that a justified interest is required. On the other hand, the Greek Committee that prepared the relevant law
stated that no legal interest need be proven. In Latvia, a distinction is made between
generally accessible information and restricted information. The former will be
disclosed to anyone wishing to receive it. Only individuals who describe the specific
purpose for which the information will be used can gain access to restricted
information. Lastly, Spain seems to grant the right to access to documents only to
Spanish citizens.

**Official documents**

The meaning of the term ‘document’ is defined in many different ways. In the
broader sense, it refers to any information available in whatever format. Some
countries limit the definition to finalised documents, excluding preparatory
documents from the scope of access. Sometimes, special rules apply to documents
drawn up for internal use (‘internal documents’). In the Netherlands, for example, no
information is disclosed concerning personal opinions on policy contained in
internal documents. A few Member States provide a list of documents that are not
considered (official) documents. Portugal, for example, excludes personal notes,
memos and other records of a similar nature. On the other hand, Hungarian
public authorities are obliged to ‘create’ documents, by making notes on any
information received by word of mouth that is important to a pending decision and
which is not already contained in a document. The Danish law explicitly states that
the right to access also applies to duplicate copies of letters issued by an authority.

Rules on access to documents mostly apply to official documents. In general, this
means documents held by public authorities, including documents originating from
and received by a public authority. Greek rules on access to documents are an
exception. In principle, these rules only apply to documents drawn up by a public
authority. These so-called ‘public documents’ are different from ‘private
documents’. The latter are only accessible by individuals who have a specific case
pending before the public authority holding the documents and to whom the
documents relate. Some countries explicitly restrict access to documents that relate
to the course of activities of a public authority. In the Czech Republic and the Slovak
Republic, the obligation to disclose information upon request applies only to
documents that regard an authority’s decision-making power.

A few Member States provide a non-exhaustive list of what is meant by ‘official
documents’. The disclosure of these documents is mandatory.
Public authorities

‘Public authority’ is also defined in a variety of ways. Member State legislation tends to define these authorities in two ways. Firstly, a general definition may be given as to what constitutes a ‘public authority’. Secondly, national legislation may provide for a list of bodies that it considers ‘public authorities’.

Most countries provide a general definition. To speak in terms of the well known theory of the separation of powers, ‘public authority’ is generally perceived and defined as the ‘executive’. The judiciary and legislature are exempted. Some exceptions do, however, exist. In Finland, courts are included in legislation on access to documents; in Lithuania and Poland, political parties are also considered to be ‘public authorities’. The notion of ‘bodies belonging to the executive’, however, requires further clarification. In this respect, Member State laws vary in scope from narrow to broad. The scope is narrow if, for instance, ‘public authorities’ is restricted to bodies that are created in accordance with public law. A broad interpretation is given when ‘public authorities’ includes private bodies performing an administrative function or financed with public funds. Some countries even go further, including trade unions, banks and non-profit organisations that are in some way supported by the government.

Ireland, Slovenia and the UK have chosen to list all relevant authorities with the possibility of expanding this list. In Ireland, this list was initially twenty pages long, containing 67 bodies. Today, this list includes nearly 400 entities. Adjustments to the three lists has led to a rather wide range of public bodies; these entities are, however, connected to the executive power in some way.

Other features

Finland and the Czech Republic distinguish between information that has entered the public domain (‘already disclosed information’) and documents that have not. Consequently, in the Czech Republic, when an authority receives an application for access to already disclosed information, the authority can simply provide the applicant with information on how to access the information. If however, the applicant insists on receiving the requested information directly, the authority is obliged to provide it. In Finland, rules on access to documents relate firstly to documents in the public domain. Documents that are not yet in the public domain are disclosed at the public authority’s discretion.
Czech and Slovak laws distinguish between ‘disclosed information’ on the one hand, and ‘accompanying’ or ‘associated information’ on the other. The first kind of information is always accessible. The second is information that is closely related to the requested information. Information also includes knowledge of the mere existence of the requested information, its origin or number, and also of the reasons for denial of access and the period of denial. Although not explicitly stated, it seems likely that this second form of information must always be given to an applicant. An exception exists where the protection of a certain interest requires absolute secrecy, and the accompanying information itself would reveal details of the substance of the requested information.

§ 4 **Exceptions**

*Preliminary remark*

Before describing possible exceptions to access to documents, we first want to state that it is not always possible to draw a clear distinction between the *scope* of national legislation on access to documents, as described above, and the *exceptions* to these rules. This is especially the case when exceptions have a mandatory and absolute character, which means that public authorities *shall* deny access to a document when the exception applies (see below). A possible consequence of this distinction is the way in which public authorities have to answer a request for information. It seems likely that when a document falls outside the scope of the law, the public authority may end the process by simply communicating this fact to the applicant. While, if the document is covered by an exception, the national law may require that public authorities give reasons for their denial. Another consequence concerns the possibility of administrative appeal and/or judicial review. In most cases it seems unlikely that a denial of access to documents based on the fact that the document falls outside the scope of national legislation cab be challenged. Although we are aware of these consequences, we have chosen to follow the distinction that is generally found in Member State law.

*General features*

Many acts on access to documents contain *mandatory* and *discretionary* exceptions. If a document is covered by a ‘mandatory’ restriction, an authority must refuse access. Mandatory restrictions are usually formulated as ‘access *shall* be denied’. ‘Discretionary’ restrictions leave it to the discretion of the authority to decide whether information will or will not be disclosed. These restrictions are formulated
using the word ‘may’ or ‘can’. Another distinction can be drawn between absolute and relative restrictions. Documents whose access is ‘absolutely’ restricted are unconditionally inaccessible, which is, of course, only possible in combination with mandatory restrictions. ‘Relative’ restrictions require that certain conditions be fulfilled before access is granted. This relative character can be given to mandatory as well as to discretionary exceptions. In general, one can distinguish between three relativity clauses: the harm test, a balancing of interests and the requirement of approval.31

The harm test implies that access shall or may be restricted when disclosure would be harmful to certain interests. The harm test appears in different wordings and intensities in national legislation. With regard to the wording, formulations used are ‘damage’, ‘prejudice’, ‘jeopardise’, ‘injure’, ‘compromise’, ‘endanger’, ‘cause detriment’ or ‘have an adverse effect’. The intensity of the test differs depending on the wording used in the national legislation. In some acts, access shall or may be denied when disclosure could harm a certain interest;32 in other acts, access shall or may be denied when disclosure would harm a certain interest.33 In other regulations, the test seems to be stricter. In Austria, the interest may not be seriously prejudiced and in Poland only where there is substantial damage to certain interests shall access be denied. Additional requirements can be found in Ireland, where disclosure shall or may in some cases be refused if it is reasonably expected or would be likely to harm a certain interest.

The second relativity clause, the balancing of interests, implies that a public authority has to balance the general interest of transparency and the interest protected by the exception. Only when the latter outweighs the former, access shall or may be denied.34 Mostly, a formulation is used like ‘when the interest of transparency is outweighed by any of the following interests...’.

The requirement of approval means that access to certain documents will only be granted when a person, company or other entity explicitly approves access. An example is access to documents containing personal data. Some countries require prior approval from the person concerned.35 This is not the case in all countries; some make accessibility of documents containing personal data subject to a harm test or a balancing of interests.36 In addition, some countries formulate access to personal data as a mandatory and absolute exception, whereas others place these documents outside the scope of general rules on access to documents.
In this analysis, it is not our ambition to summarise all the grounds on which access in a given Member State can or shall be denied. We refrain from doing so because of the wide variety of national rules in this respect and the limited nature of this survey. Below, we will only discuss Secrecy Acts. For more in-depth knowledge, we refer you to the Member State survey in Part II.

More than half of the Member States have some sort of Secrecy Act. These acts apply to information whose disclosure is considered harmful to fundamental interests of the state. These interests include national security, defence and the territorial integrity of the state. Mostly, these acts fulfil the requirements of international information security agreements, for instance, within the context of (accession to) NATO. These acts contain certain general features. Firstly, documents labelled as ‘state secret’ or ‘restricted’ (or some other wording) fall either outside the scope of the general law on access to documents or are considered to be mandatory exceptions having an absolute character. Secondly, according to the Secrecy Acts, classified documents are inaccessible to the general public. Thirdly, individuals may only access such information if they have a special permit, which is only issued after a security clearance. The person applying for a permit must show an interest and in most cases, must be a citizen of the state concerned. Fourthly, employees of public authorities who are competent to deal with this information can be prosecuted when the information is disclosed contrary to the rules of the Secrecy Act. Fifthly, the power to classify documents is granted to certain authorised persons or to a special Commission.

In some countries, classification of a document is subject to time limits. In Portugal, for instance, the term of secrecy can be set for a maximum of four years, which can be extended by another four years if the reasons for secrecy still apply. In Sweden, the time limit can vary form two to seventy years, depending on the protected interest. In Hungary, a distinction is drawn between ‘state secrets’ and ‘official secrets’. One of the consequences of this distinction is that documents belonging to the first category can be kept secret for a maximum of ninety years, whereas documents labelled ‘official secrets’ can be kept secret for a maximum of twenty years.

It is not always clear whether the legal remedies provided for in national law on access to information (see below) are also applicable to the decisions of public authorities concerning documents covered by the Secrecy Acts. The range of protected interests grounds may sometimes be formulated in a broad way. For
instance, in the Czech Republic, documents relating to important economic and political interests, rights and liberties of natural and legal persons and the life and health of natural persons can under certain conditions also be classified.

**Other features**

In addition to refusing access on substantive grounds, some countries may deny access on procedural grounds. The information acts of Ireland, Latvia and Slovenia contain detailed procedural requirements that individuals must fulfil when applying for access to documents (see below). Failure to comply with these requirements can or shall lead to refusal of the application. In Belgium, a request will be denied when it is obviously formulated too vaguely. In some countries, access can be denied when the request seems obviously unreasonable or when the request is vexatious. In Sweden, a public authority’s obligation to disclose a document can cease to exist when the disclosure presents serious difficulties for the authority.

In a majority of countries, public authorities must grant partial access to documents if only some parts of a document are covered by an exception.

**§ 5 Procedural requirements**

**With regard to the applicant**

First, we want to make a few remarks with regard to the difference between access to information and access to documents. It clearly makes a difference if one can simply ask for information concerning a certain matter, or if individuals must indicate the documents they want to access. In this respect, it is not easy to find common features in Member State law. It all depends on how an individual’s right is formulated, how ‘information’ or ‘document’ is defined and how the conditions for making an application are described. However, if we nevertheless have to make some general remarks, we would conclude that according to most national information acts, applications have to contain a description, as detailed as possible, of the matter concerned and, where possible, a specification of the relevant documents. An exception can be found in Portugal, where requests for access must contain all references necessary for identifying the document. Only the Lithuanian Information Law explicitly distinguishes between information on the one hand and official documents on the other. The consequence of this distinction is that a request for access to official documents must be made in writing, were a request for access to information can also be made orally.
In most countries, applications can be done orally or in writing. In Belgium, Portugal, the UK and with regard to official documents in Lithuania, a request must be made in writing.

National legislation differs in regard to what an application must contain. Examples of detailed requirements can be found in the national laws of Estonia, Ireland, Latvia, Portugal and Slovenia. In Latvia, for example, applicants are required to give their name and surname, domicile or place of residence in Latvia and their signature. In the case of restricted access information (see above), applicants have to state reasons and specify the purpose for which the information will be used. In Ireland and Slovenia, the applicant may specify the form or manner of access. The only country that explicitly allows an anonymous application is Finland.

In most countries, the public authority can, when granting access, require that the applicant pay a fee that may not exceed actual costs made by the public authority. In order to combat abuse of access rules, the Irish FOIA was amended to make it possible for an authority to demand an application fee that can exceed the authority’s actual costs in producing the document. Applications can be denied or answers postponed so long as the applicant has not paid the fee. Similar rules apply in the UK.

Lastly, a remarkable feature can be found in Berlin’s Information Act which explicitly prohibits using acquired information for commercial purposes.

**With regard to the public authority**

Almost all the national laws on access to documents set time limits within which public authorities have to answer requests for access. These limits vary from five working days (Estonia) to eight weeks (Austria). When reasons justify doing so, this period can generally be prolonged by another fixed period. Almost half of the countries explicitly state that apart from the time limit the request must be dealt with ‘as soon as possible’, with ‘undue delay’, ‘immediately’ or ‘promptly’. Some countries apply different time limits for the granting of access and the denial of access. In Hungary, for instance, the granting of access must be done within fifteen days, while a denial must be communicated to the applicant within eight days. In practice, it often happens that an applicant sends his or her application to the wrong authority. Some countries regulate the manner in which an authority must confront this situation. Two possibilities exist: either the applicant must be informed of the error and the right authority must be indicated, or the application is
forwarded to the right authority. In the case of the latter, the authority is often required to inform the applicant of the transferral. If the application is incomplete, sometimes the public authority is obliged to request additional information. In Estonia, the authority has a general obligation to assist the applicant in every way and in the UK public authorities are obliged to provide advice and assistance.

Access to information in general means the possibility to immediately consult a document, obtain the original or a copy or extract of the document. Consultation or copying of the original document is sometimes made subject to the requirement that it will not damage the document.

Most countries do not require that information be transmitted in a specific form. In the UK, public authorities must consider an applicant’s preference of form, but only so far as is reasonably practicable. In Poland, information must be given in the form that the applicant requested, unless technical difficulties prevent the authority from doing so. In Sweden, an authority cannot be forced to disclose material recorded for automatic data processing in any other form than a printout.

Generally speaking, a decision to refuse access must be done in writing and some countries explicitly require public authorities to explain the reasons for denial. In Latvia, a notification denying access to information must also contain possible remedies that the applicant can invoke.

§ 6 Legal remedies

As a preliminary remark, this study has focused on possible legal remedies provided for directly by national laws that concern access to information. This study did not review general administrative legislation, simply because time was lacking. As was mentioned above, it is sometimes unclear whether legal remedies are available with regard to information falling within the scope of Secrecy Acts.

In general, Member State laws on access to documents contain three types of review procedures. Firstly, applicants may have the possibility of an administrative appeal. This appeal is generally lodged with the entity superior to the authority that refused access. In a few countries, the same authority will review a request that has been denied. Secondly, in some countries, applicants can file a complaint against denial of access with a supervisory Committee or Commissioner, whose purpose is to supervise the implementation of the rules on access to documents. Thirdly, applicants can ask for judicial review by lodging an appeal to an administrative court.
One of these legal remedies, a combination of two or all three of them can be found in almost all national legislation.

In the Czech Republic, applicants may appeal to an entity superior that is superior to the original authority. The decision of this superior entity cannot be judicially appealed. It appears that the Czech Republic is the only country that does not provide for judicial review. Some countries only allow for a possibility of judicial review. The substantial majority of countries use a combination of or all three review procedures.

Eight countries have some sort of supervisory Committee or Commissioner concerned with access to information (see in general below). The role of these authorities differs from state to state. In Italy, the Committee on Access to Administrative Documents seems to have no competence with regard to individual cases where access has been denied. In Portugal, before making an administrative appeal, an applicant can ask for assistance from the Committee of Access to Administrative Documents. This Committee draws up a report on the issue and sends a copy to both the authority and applicant. After receiving the report, the authority will review its decision. In Belgium, an administrative appeal is combined with a request for the opinion of the Commission for Access to Administrative Documents. Within thirty days, this Commission sends an opinion on the matter to both the authority and applicant. The authority is not bound by the opinion of the Commission. In France, an applicant is obliged to submit a complaint to the Committee of Access to Administrative Documents before lodging an appeal in an administrative court. The Committee can issue a recommendation, which is not legally binding. On the other hand, in Hungary, the Data Protection Commissioner may instruct an authority to change or annul its negative decision. This order is legally binding; the authority may challenge it before a court. The same applies to the Information Commissioner in Ireland and the Commissioner on Access to Information of Public Character in Slovenia. In the UK, in principle, the Information Commissioner can issue a legally binding ‘enforcement notice’, which specifies the steps that an authority must take in order to fulfil the requirements of the Information Act. If the authority concerned does not comply with this notice, the Commissioner can bring the case before a court. The Commissioner’s notice may also be subject to appeal to the Information Tribunal, after which, appeal on points of law is possible to the High Court of Justice.

It is not always clear whether the administrative court can order documents to be disclosed; only Hungary explicitly provides for this possibility.
A remarkable feature of the Slovenian Information Act is the possibility of fining a public authority employee when he or she is responsible for failing to disclose requested information within the set time limit. Some other countries provide for this possibility in their criminal laws.55

Finally, at least in Hungary and probably in Estonia, an applicant has legal remedies not only stemming from general access to documents but also regarding documents covered by Secrecy Acts.

§ 7 Institutional structure

In addition to the competences with regard to individual complaints as described above, most national supervisory authorities have broader competences in the field of access to documents. In general, these authorities are entrusted with supervising compliance with the national act on access to information. In this regard, they issue the above-mentioned opinions, recommendations and enforcement notices on their own motion. Some authorities are also entrusted with the task of promoting active publication of documents of relevance to the general public.56 Most authorities must publish an annual report in which they explain their activities and describe general compliance with information rules by the public authorities.

In Hungary, public authorities have to annually report their denials of access to information to the Data Protection Commissioner. In Italy, the Committee on Access to Administrative Documents can propose to the government amendments to the Italian legislation on access to documents.

§ 8 Other characteristics

Passive versus active disclosure

In many of the national information acts, provisions are devoted to the active disclosure of information. This form of disclosure must be distinguished from passive disclosure, which refers to publication of information upon request. Some laws contain categories of documents the disclosure of which is mandatory (see above). Generally, public authorities are, within their sphere of competence, obligated to inform the public on matters of public interest. In Hungary, public authorities have to publish or otherwise enable access to the most important information concerning their activities. In Lithuania, public authorities must prepare and publish information concerning their functions, structure and actual
questions. In the Netherlands, an authority must disclose information on its own accord if such disclosure is ‘in the interest of effective, democratic governance’. In Finland, public entities have the duty to promote access and good practice on information management. The latter concerns the quality of information and is regulated in more detail by separate legislation. The Polish Information Act is a mixture of provisions on active and passive disclosure of information. In accordance with this act, a Public Information Bulletin was created that discloses information to the general public. Slovak legislation requires that information be disclosed through ‘mass access’, meaning via telecommunications, especially the Internet. Similarly, Slovenia requires that information of public character be transmitted on the World Wide Web.

**Registers**

In order to inform people about the information or documents that public authorities possess, some countries oblige authorities to maintain a register of documents. Requirements with regard to the details of the information or documents are seldom provided for. In Latvia, authorities have to set out the class, designation and source of the information.

§ 9 **Concluding observations**

It is difficult to draw general conclusions with regard to the differences between legislation on access to information in the ‘old’ and the ‘new’ Member States of the EU. Perhaps the only possible conclusion is that at a general level these laws are predominantly similar. Differences only occur at a detailed level of legislation; however, even then it is difficult to distinguish between the two groups of States. Let us conclude that a comparison is in itself very instructive. Inspired by all the different legislation, we can formulate an ideal matrix within which access to information can best be modelled. The principle of the rule of law is taken as our point of departure.

First, we feel that under the rule of law, access to information must in one way or another be construed as a right for individuals, be it a positive right or be it (through the mirror situation) by way of obligating an authority to provide information. We refrain from discussing the status of this right. However, we would like to note that the discussion on the fundamental nature of the right to access information was invigorated through the new Treaty establishing a Constitution for Europe, signed October 2004. The right to access to documents is mentioned twice in the Treaty.
First, it is referred to in provisions addressing the elements of the ‘democratic life of the Union’ (article I-50). These provisions are contained in Part I – the constitutional part – of the Treaty. And second, it is referred to as a right contained in the Charter of Fundamental Rights, which forms an integral part of the Treaty (see article II-102).

Second, exceptions to the right to access to information must be provided for by law. The individual must be able to know on which grounds an application for information can or will be denied.

Third, an individual’s right to access has to be effective, implying that the right is enforceable before an independent authority. In order to form a realistic opinion on the denial of access, this independent authority must have access to the contested information, in spite of secrecy, labels and mandatory or absolute restrictions. An independent authority must also be able to annul the decision of a public authority and in the ideal situation, must be able to order disclosure of the information.

We close this analysis with the remark that our research was limited to national legislation. Therefore, no statements have been made about secondary Community legislation on access to documents. However, the matrix that was described above can, of course, be used to evaluate the European rules.
Part II  Member State Survey
* AUSTRIA *

Legislation on access to documents

- Article 20 § 3 and 4 of the Austrian Federal Constitutional Law (Bundes-Verfassungsgesetz)\(^5^8\)
- Federal Act on the duty to furnish information (Auskunftspflichtgesetz), no. 287/1987 of 15 May 1987\(^5^9\)

Scope

Article 20 § 4 of the Austrian Federal Constitutional Law reads:

(4) All functionaries entrusted with Federation, Länder and municipal administrative duties as well as the functionaries of other public law corporate bodies shall impart information about matters pertaining to their sphere of competence in so far as this does not conflict with a legal obligation to maintain secrecy; an onus on professional associations to supply information extends only to members of their respective organisations and this inasmuch as fulfilment of their statutory functions is not impeded. The detailed regulations are, as regards the Federal authorities and the self-administration to be settled by Federal law in respect of legislation and execution, the business of the Federation; as regards the Länder and municipal authorities and the self-administration to be settled by Land law in respect of the framework legislation, they are the business of the Federation while the implemental legislation and execution are Land business.

On the federal level, this article of the Federal Constitutional Law has led to the Federal Act on the duty to furnish information (the Federal Information Act, FIA). Anyone can ask for access to information (article 2 FIA). Access to information is not formulated as a right for citizens or persons; rather, competent authorities have a duty to answer requests for information, in so far as such requests do not conflict with a legal obligation to maintain secrecy. Therefore, public authorities are not obliged to impart the requested information. The FIA applies to Federal authorities and self-administrative authorities appointed by federal act. The scope of ‘information’ (‘Auskunft’) is not further clarified. Framework Act no. 286/1987 applies to the Länder and municipalities (‘Gemeinden’). In article 2 of the Act, the right to ask for information is granted to everyone (‘Jedermann hat das Recht, Auskünfte zu verlangen’). Legislation passed by the Länder provides for detailed rules.\(^6^0\)
**Point of departure**

Public authorities shall impart information in so far as this does not conflict with a legal obligation to maintain secrecy.

**Exceptions**

According to Article 20 § 3 of the Austrian Federal Constitutional Law, all functionaries entrusted with Federal, Länder and municipal administrative duties as well as the functionaries of other bodies created in accordance with public law are, save as otherwise provided by law, sworn to secrecy about all facts that they have obtained exclusively through their official activities. Such concealment may be justified in the interest of public peace, order and security, universal national defence, external relations, for the preparation of a ruling or as in the preponderant interest of the parties involved (official secrecy).

Information will be provided to the extent that it does not seriously prejudice the effective conduct of the public authority’s duties (article 1 § 2 FIA). Additionally, information is not distributed when the request has obvious abusive purposes (‘wenn sie offenbar mutwillig verlangt werden’, article 1 § 2 FIA).

If other federal acts contain special rules on the duty to provide information, they have precedence over the FIA (article 6 FIA).

**Procedural rules**

Applicants can make their request in writing or orally. If an oral request is unclear, the public authority can ask the applicant to restate their request in writing (article 2 FIA). Public authorities are obligated to answer requests for information within eight weeks (article 3 FIA). The applicant must be informed when, because of special circumstances, this time limit will be exceeded.

**Legal remedies**

If information is not imparted, the applicant can ask for a formal answer (‘bescheid’) to his request (article 4 FIA). An applicant may invoke the procedural rules laid down in the General Administrative Procedure Act, unless the requested information falls within the scope of another, more specific act.61
Institutional structure

Access to documents is not overseen by special supervisory authorities.
**BELGIUM**

*Legislation on access to documents*

- Article 32 of the Belgium Constitution
- On a federal level: Act no. 94-1724 of 11 April 1994 on the disclosure of information by the administration and Federal Act of 12 November 1997 on the disclosure of information by the administration is applicable to provinces and municipalities
- On a regional and community level there exist many decrees on access to documents: for instance the Flemish Decree of 27 March 2004, the Walloon Decrees of 30 March and 7 March 2001, the Decree of the French Community of 22 December 1994, the Ordonnance of the Brussels Region of 30 March 1995, the Decree of the French Community Commission of the Brussels Region of 11 July 1996, the Ordonnance of the Common Community Commission of the Brussels Region of 26 June 1997, the Decree of the German speaking Community of 16 October 1995

**Scope**

Article 32 of the Belgium Constitution reads:

Everyone has the right to consult any administrative document and to have a copy made, except in the cases and conditions stipulated by the laws, decrees or rulings referred to in Article 134.

The right to consult and make a copy of any administrative document is granted to everyone – including foreigners and legal persons. At the federal level, article 32 is implemented by the Act of 11 April 1994 on the disclosure of information by the administration (the Federal Information Act, FIA). According to the FIA, ‘administrative document’ means any information, in whatever format, that is at an executive authority’s disposal (article 1b, sub 2). According to article 1b, sub 1, the meaning of ‘administrative authority’ is further specified in article 14 of the Act on the Council of State, from which a broad notion can be extracted. The exact scope of this notion is subject to debate. At the moment the Federal Information Act is in revision.

**Point of departure**

Every administrative document is public unless one of the exceptions applies.
Exceptions

Article 6 § 1 FIA contains mandatory exceptions that must be applied after a balancing of interests. Access shall be denied when the administrative authority finds that transparency is outweighed by any of the following interests:

- public safety
- the freedoms and fundamental rights of citizens
- the federal international relations of Belgium
- public order, police matters or national defence
- investigation and prosecution of punishable acts
- a federal economic or financial interest, the currency or public finance
- confidential business information or information on manufacturing processes communicated to the authority
- secrecy of the identity of the person who communicated the document or the information to the public authority on a confidential basis so as to denounce a punishable act or one presumed to be so.

The exceptions in article 6 § 2 are obligatory after a harm test is applied. Access shall be denied if the disclosure of the requested information prejudices:

- personal privacy, unless the person concerned gives prior written authorisation to the consulting or copying of the document
- an obligation of secrecy established by law
- the secrecy of deliberations by the Federal Government and the Federal executive authorities or those associated with a Federal authority.

Article 6 § 3 contains optional exceptions that administrative authorities may invoke. Disclosure of a document may be rejected if the request:

- concerns an administrative document whose disclosure might be misunderstood because it is incomplete or not finalised
- concerns a confidential opinion that is freely communicated to the authority
- is obviously unreasonable
- is obviously formulated too vaguely.
Procedural rules

Requests for information must be made in writing (article 5 FIA). The application should include the relevant issue, and, where possible, the relevant documents. The administrative authority must reply within a period of thirty days after receipt of the application (article 6 § 5). A fifteen-day extension is possible and must be communicated to the applicant.

If part of a document does not fall within the scope of one of the exceptions, the administrative authority is obliged to make the document partially available (article 6 § 4).

Legal remedies

When access to information is denied, the applicant can, in accordance with article 8 § 2 FIA, reapply and request an opinion from the Commission for Access to Administrative Documents (see below). The Commission has thirty days to issue its opinion, which it sends to the applicant and the administrative authority. The latter has another fifteen days to reply to the second request. The public authority’s failure to decide upon the second request is considered a refusal. After this administrative appeal, the applicant can file a complaint with the Council of State (article 8 § 2).

Institutional structure

Article 8 § 1 FIA created the Commission for Access to Administrative Documents. The Commission has competence to issue an opinion on request of an individual, of an administrative authority or on its own motion. Since 1997, the Commission has had competence over provincial and municipal documents.69

Other characteristics

Under the FIA, individuals have a right to correct any inaccurate information contained in administrative documents, provided that such information relates to the individual concerned (article 7).
Article 17 of the Charter, under the heading ‘Political Rights’, reads:

(1) Freedom of expression and the right to information are guaranteed.

... 

(4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality.

(5) Organs of the State and of local self-government shall provide in an appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law.

This article is further delineated in Law No. 106/1999 Coll. on Free Access to Information (LAI). According to article 3 § 1 LAI, ‘applicant’ means any natural or legal person requesting information. Instead of formulating access to information as a right granted to everyone, the LAI imposes a general obligation on state authorities to disclose all information in their sphere of competence, unless restrictions apply. Natural or legal persons mainly have a right to obtain access to already published information. If an application is for access to disclosed information, the public authority must inform the applicant how to obtain the information (article 6 § 1). If an applicant insists on the direct distribution of published information, the responsible entity is obliged to provide it (article 6 § 2).

State authorities are considered to be state bodies, self-administrative territorial bodies and public institutions financed through public funds (article 2 § 1). These bodies are called ‘responsible entities’. Entities consigned by law to make decisions on rights, lawfully protected interests, or obligations of natural or legal persons in
the sphere of public administration are – in the scope of their decision making activity – also considered ‘responsible entities’ (article 2 § 2).

The LAI draws a distinction between ‘disclosed information’ and ‘accompanying information’. ‘Disclosed information’ means information that can be looked up and obtained, namely information published in print or in another format that can be recorded and stored, displayed in an official file, accessed remotely or housed in a public library (article 3 § 3). ‘Accompanying information’ is information that is closely related to the requested information (article 3 § 4).

**Point of departure**

Concerned entities are obliged to actively (upon their own motion) disclose information, unless such information is, in accordance with legal regulations, labelled as secret or prohibited by provisions of the LAI.

**Exceptions**

The LAI contains a number of mandatory and absolute restrictions. Information labelled as ‘secret’ shall not be disclosed by the responsible entity (article 7). Detailed rules are laid down in Law No. 148/1998 Coll., on the protection of Classified Information (LCI). According to article 3 § 1 LCI, ‘classified information’ is information whose unauthorised disclosure could cause detriment to the interests of the Czech Republic or to those interests which the Czech Republic has undertaken to protect, or which could be unfavourable to these interests, and which is included in the register of classified information. According to article 2 § 1 LCI, it is in the interest of the Czech Republic to preserve its constitutionality, sovereignty, territorial integrity, defence of the state, public safety, protection of important economic and political interests, rights and liberties of natural persons and legal entities and the life or health of natural persons. Four categories of security classification are distinguished: ‘top secret’, ‘secret’, ‘confidential’ and ‘restricted’ (article 5 LCI). This classification plays an important role throughout the LCI. Access to classified information is only possible for persons for whom access is essential in order to carry out their activities and who fulfil certain conditions (article 17 LCI). These conditions vary from being a citizen of the Czech Republic (article 18 LCI) to being a person of suitable integrity (article 20 LCI).
Another mandatory and absolute restriction is laid down in article 9 LAI: information labelled as ‘trade secrets’ shall not be disclosed. This is further specified in section 17 of Law No. 513/1991 Coll., the Commercial Code.

Article 11 LAI contains both mandatory and discretionary restrictions. With regard to internal and preparatory documents:

(1) A liable entity may restrict the provision of information if:
   a) it relates exclusively to the internal guidelines and staff regulations of the liable entity,
   b) new information is at issue that emerges in the preparation of a decision of the liable entity, unless the law stipulates otherwise; this applies only until such time as the preparation ends in a decision.

With regard to information originating from other persons or entities, responsible entities shall not provide information, unless the person consents (§ 2).

(3) When providing information that a liable entity has obtained from a third party to fulfil tasks pursuant to a separate law, under which such information is subject to the obligation of confidentiality or other process protecting it from publication or abuse, but which can be provided under this Act, the liable entity shall provide only such information that relates directly to the fulfilment of its task.

Liable entities shall – according to § 4 – not provide information on:

a) criminal proceedings in progress,
   b) the decision-making activities of courts,
   c) the fulfilment of the tasks of intelligence services,
   d) the preparation, course, and discussion of the results of inspections within the bodies of the Supreme Inspection Office,
   e) the activities of the respective organisational unit of the Ministry of Finance under a separate legal regulation.

The provisions of separate laws on the provision of information in the stipulated areas are not hereby affected.

The exception laid down in article 8 LAI concerning protection of personal data and privacy was deleted after the adoption of Law No. 101/2000 Coll. on the Protection of Personal Data of 11 June 1998. Now, according to article 2 § 3 LAI, the LAI does not apply to the protection of personal data.
After applying the restrictions, a responsible entity is obliged to disclose the remaining information, including accompanying information (article 12 LAI).

**Procedural rules**

An application for access to information is submitted either in writing or orally (article 13 § 1 LAI). If following an oral application the information is not disclosed or the applicant is of the opinion that the information provided for is insufficient, the application must be submitted in writing (article 13 § 2).

If an application for access to already published information is made, the responsible entity must as soon as possible inform the applicant how to obtain the information; the entity must provide this information at the latest within seven days (article 6 § 1). If the applicant insists on obtaining the information directly, an application has to be submitted. This application must include the applicant’s name and must make clear to which responsible entity it is directed (article 14 § 2). If an application is considered too vague, the responsible entity shall invite the applicant to clarify the request within seven days (article 14 § 3a). If the application is sent to the wrong entity, the applicant shall be so informed within three days (article 14 § 3b). If the application is valid, the responsible authority shall provide the requested information within fifteen days (article 14 § 3c). For significant reasons, this time limit can be extended, maximally by ten days (article 14 § 5).

**Legal remedies**

The responsible entity must issue a decision if it fails to satisfy an application (article 15 LAI). Within fifteen days, the applicant can lodge an appeal to the responsible entity (article 16 § 1). The entity immediately superior to the responsible entity decides on the appeal (article 16 § 2). No appeal can be lodged against this second decision (article 16 § 4).

**Other characteristics**

According to article 5 § 19 and 18 LAI, each responsible entity must publish an annual report on its activities in the provision of information under the LAI.
Legislation on access to documents

- The Danish Public Administration Act no. 571 of 19 December 1985

Scope

With regard to the broader concept of transparency, the Danish Constitution (‘Grundlov’) states that meetings of the national parliament (‘Folketing’) shall in principle be public (article 49) and that in the administration of justice all proceedings shall to the widest possible extent be public (article 65). However, the Danish Constitution does not contain any provisions on freedom of information or access to documents. Initially, the rules on public access to government information only concerned individuals – as interested parties. Subsequently, the scope of this right broadened, but separate rules for interested parties still remained to exist. This history explains why access to documents in Denmark, since 1985, is found in two acts: the Danish Public Administration Act no. 571 (Act 571) and Act no. 572 on Access to Public Administration Files (Act 572). As this research focuses on access to documents based on public interest, the latter will be more closely examined.

Act 572 applies to all public administrative activities, except for matters relating to criminal justice (articles 1 § 1 and 2 § 1). Matters relating to the making of laws are addressed in Act 572 (article 2 § 2). According to article 2, Act 572 also applies to any public utility generating, transmitting or distributing electricity at voltages of 500 volts or more; to natural gas suppliers and to any collective district heating plant falling under the Danish Heating Act and having a capacity of 10 MJ/s or more. By order, the concerned minister can, upon consultation with the Minister of Justice, provide that Act 572 also apply to entities that can not be classified as part of public administration, provided that the operating expenses of such entities are mainly covered by government funds or are statutorily empowered to make decisions on behalf of the government (article 1 § 3).
Article 4 § 1 Act 572 reads:

Subject to the exceptions listed in Sections 7-14 of this Act, any person may demand that he be apprised of documents received or issued by an administration authority in the course of its activity. An administration authority may allow wider access to documents save where this is not allowed under the rules on secrecy etc.

According to article 5 § 1, the right to access administrative files applies to all documents relating to the matter in question, including duplicate copies of letters issued by the authority concerned (where such letters are assumed to have reached the addressee), journal entries, registers, and other pertinent lists. Except for the latter records, the right of access to administrative files does not apply to registers or other systematic records processed electronically (article 5 § 2).

With regard to different provisions of Act 572, the Act gives the minister concerned the competence to expand, reduce or further specify the scope of these provisions.

**Point of departure**

All information shall be accessible, unless exceptions provided for by Act 572 apply.

**Exceptions**

Articles 7 and 8 Act 572 concern the right to access to internal case material. This right shall not apply to any document prepared by an authority for its own use; to correspondence between units within one and the same authority and to correspondence between a local government council and its committees departments and other bodies, or between these bodies (article 7). However, the right of access to files shall comprise internal case material available in final form where such documents render exclusively the substance of the authority’s final resolution on its decision in a matter; render exclusively information that the authority was bound to make a note of pursuant to the provision of Section 6 (see below) of Act 572; are self-contained instruments prepared by an authority for the purpose of producing evidence or clarity with respect to the facts of a matter; or contain general guidelines for the consideration of specified classes of matters (article 8).

According to article 10, the right of access shall not apply to records of meetings of the Council of State; minutes of meetings of ministers, and documents prepared by
an authority for use at such meetings; correspondence between ministries relating
to the making of laws, including Appropriation Bills; documents exchanged in
connection with the secretarial function of one authority on behalf of another
authority; correspondence between authorities and outside experts for use in court
proceedings or in deliberations on possible legal proceedings; material gathered for
the purpose of public statistics or scientific research. If factual information
mentioned in article 10 – except for public statistics or scientific research materials
– and article 7 is of material importance to the matter in question, such information
shall nevertheless be disclosed (article 11).

The right of access to administrative documents shall not apply to personal data and
information on technical plants or processes or on operating or business procedures
or the like, provided it is of material importance to the economy of the person or
enterprise that the request be refused (article 12).

According to article 13, the right of access to administrative files may be subject to
limitations where protection is essential to:

1° the security of the State or the defence of the realm;
2° protection of Danish foreign policy or Danish external economic interests, including
relations with foreign powers or international institutions;
3° prevention and clearing-up of any infringement of the law, prosecution of offenders,
execution of sentences and the like, and protection of persons accused, of witnesses or
others in matters of criminal or disciplinary prosecution;
4° implementation of public supervision, control, regulation, or planning activities, or of
measures planned under taxation law;
5° protection of public financial interests, including interests relating to public
commercial activities; or
6° protection of private or public interests where secrecy is required because of the special
nature of the matter.

The duty to disclose information is limited by special provisions regarding secrecy
laid down in specified legislation (article 14).

Where the provisions of article 12 and 13 apply to only part of a document, the person
requesting disclosure shall be apprised of the rest of the contents of that document
(article 12 § 2 and 13 § 2).

199
Procedural rules

A request for information shall specify the documents or the matter that the applicant wants to be apprised of (article 4 § 3 Act 572). The authority deciding upon the issue concerning the requested matter shall give a reply to the application, or else the request shall be dealt with by the administrative authority possessing the document (article 15 § 1). The authority shall decide upon the request as soon as possible (article 16 § 1). Where a decision has not been made within ten days of receipt of the application, the relevant authority shall inform the person requesting disclosure of the reason why and of the date when a decision may be expected (article 16 § 2).

Legal remedies

According to article 15 § 2 Act 572, a ‘separate appeal shall lie to the authority otherwise empowered to hear appeals from the consideration given to or the decision made in the matter to which the request for disclosure is related’. The minister concerned may ‘by Order’ lay down rules derogating from the provisions laid down in article 15 § 1 and 2 (article 15 § 3).

Other characteristics

Under article 6 § 1 Act 572, administrative authorities have the special duty to take notes:

In any matter to be decided by an administration authority, an authority receiving information by word of mouth on facts of importance to the decision or in other manner having notice of such facts, shall make a note of the substance of such information, always provided that such information is not contained in the documents of the matter.
* ESTONIA *

**Legislation on access to documents**

- Article 44 of the Estonian Constitution of 28 June 1992\(^7\)\(^8\)
- Public Information Act of 15 November 2000, RT I 2000, 92, 597\(^7\)\(^9\)
- State Secrets Act of 26 January 1999, RT I 1999, 16, 271\(^8\)\(^0\)

**Scope**

Article 44, the right to information, of the Estonian Constitution reads:

(1) Everyone shall have the right to freely receive information circulated for general use.

(2) At the request of Estonian citizens, and to the extent and in accordance with procedures determined by law, all state and local government authorities and their officials shall be obligated to provide information on their work, with the exception of information which is forbidden by law to be divulged, and information which is intended for internal use only.

(3) Estonian citizens shall have the right to become acquainted with information about themselves held by state and local government authorities and in state and local government archives, in accordance with procedures determined by law. This right may be restricted by law in order to protect the rights and liberties of other persons, and the secrecy of children’s ancestry, as well as to prevent a crime, or in the interests of apprehending a criminal or to clarify the truth for a court case.

(4) Unless otherwise determined by law, the rights specified in Paragraphs (2) and (3) shall exist equally for Estonian citizens and citizens of other states and stateless persons who are present in Estonia.

As this article makes clear, the right to access to documents applies to everyone in the territory of Estonia. Paragraph 2 has led to the Public Information Act (PIA). The PIA contains very detailed rules on access to public information. Only the main characteristics will be discussed below.

According to article 3 § 1 PIA ‘public information’ means information which is recorded and documented in any manner and on any medium and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof. Holders of information are state and local government agencies and legal persons in public law (article 5 § 1). The obligations of these public authorities extend to legal persons in private law and natural persons if the persons
perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services, – with regard to information concerning the performance of their duties (article 5 § 2). Equal to public authorities are companies which have a dominant position in the market or have special or exclusive rights or which are natural monopolies – with regard to information concerning the conditions and prices of the supply of goods and services and changes thereto, and non-profit associations, foundations and companies of which the state, a local government or a legal person in private law is a member or the founder or in which the state, a local government or a legal person in private law is a participant, – with regard to information concerning the use of funds allocated from the state or a local government budget (article 5 § 3).

Article 2 § 2 states that information classified as a state secret falls outside the scope of the PIA. The same applies to information subject to special rules concerning access as laid down in specific legislation, for example the Archive Act or international agreements. Access to state secrets is addressed in the State Secrets Act, which will be discussed below.

The PIA distinguishes between access to information on the basis of requests for information (chapter 3) and disclosure of information on individual motion (chapter 4). With regard to the latter, article 28 PIA contains a detailed list of information that must be disclosed.

**Point of departure**

Every person has access to information *intended for public use* under the conditions and pursuant to the procedure provided by law (articles 1 and 3 § 1 PIA).

**Exceptions**

According to article 34 PIA, a public authority may classify information as ‘internal’. Article 35 provides eleven cases in which an authority is required to classify information as intended for internal use:

1) information collected in criminal or misdemeanour proceedings until the case is referred to a court but not for longer than until end of the limitation period;
2) information collected in the course of state supervision proceedings until the entry into force of a decision made thereon;
3) information the disclosure of which would damage the foreign relations of the state;
4) information on the armaments and location of military units and personnel of the Defence Forces, unless this information is a state secret;
5) information the disclosure of which would endanger objects protected under heritage conservation;
6) information the disclosure of which would endanger the preservation of protected areas or protected species or varieties and their habitats;
7) information including a description of security systems, security organisations or security measures;
8) information on technological solutions if disclosure of such information would damage the interests of the authority concerned or if classification of such information as internal is prescribed in a contract entered into with a person in private law;
9) any other information provided by law;
10) information which contains private or sensitive personal data;
11) information which contains personal data if it significantly breaches the inviolability of private life of the data subject.

The head of a state, a local government agency or a legal person in public law may classify the following as information intended for internal use:

1) draft legislation of general application before it is sent for approval or presented for passage;
2) draft administrative legislation of specific application and its accompanying documents before passage or signature of the administrative legislation;
3) in justified cases, documents addressed to persons within the agency which are not registered in the document register (opinions, notices, memoranda, certificates, advice, etc.).

A state, local government agency or a legal person in public law shall not classify the following as information intended for internal use (article 36):

1) results of public opinion polls;
2) generalised statistical surveys;
3) economic and social forecasts;
4) notices concerning the state of the environment;
5) reports on the work or the work-related success of the holder of information and information on the quality of the performance of duties and on managerial errors;
6) information which damages the reputation of a state or local government official, a legal person in private law performing public duties or a natural person, except sensitive or private personal data;
7) information on the quality of goods and services arising from protection of the interests of consumers;
8) results of research or analyses conducted by the state or local governments or ordered thereby, unless disclosure of such information would endanger national defence or national security;
9) documents concerning the use of budgetary funds of the state, local governments or legal persons in public law and remuneration and compensation paid from the budget;
10) information concerning the proprietary obligations of the holder of information;
11) information on the property of the holder of information;
12) precepts which have entered into force and legislation which is issued by way of state supervision or supervisory control or under disciplinary procedure and information relating to punishments in force.

This prohibition also applies to:

1) non-profit associations, foundations or companies which are founded by the state, local governments or legal persons in public law or in which the state, local governments or legal persons in public law participate;
2) information pertaining to the use of funds allocated and assets transferred to legal persons in private law from the state or a local government budget.

According to article 38 § 4, the head of an agency may decide to grant access to internal information to persons outside the agency if this does not damage the interests of the state or local government. If the grant of access to information may cause the disclosure of restricted information, it shall be ensured that only the part of the information or document to which restrictions on access do not apply may be accessed (article 38 § 2). According to article 42, a public authority is required to invalidate a restriction on access if the reasons for the restriction cease to exist.

**State Secrets Act (SSA)**

State secrets are divided into four different categories: ‘restricted’, ‘confidential’, ‘secret’ and ‘top secret’ (article 3 SSA), pursuant to the importance of secrecy. Detailed rules are laid down on what information falls within each category (articles 4-7 SSA). State secrets are protected from disclosure in the interest of the national security (article 2 § 1 SSA). Access to state secrets can only be obtained by virtue of a person’s office,
on the basis of a permit for access, by order of a preliminary investigator or prosecutor or on the basis of a court ruling (article 22 SSA). The access permit is issued based on a person’s need for access (article 27 § 1 SSA). The exact procedure is laid down in the Government of the Republic Regulation No. 216.81 A person applying for an access permit must be an Estonian citizen at least eighteen years old or a legal person in private law registered in Estonia (article 28 § 2 SSA). The applicant must pass a security check (article 29 SSA). Grounds on which the access permit can be refused are listed in article 31 SSA.

**Procedural rules**

General principles laid down in article 4 PIA state that access to information shall be ensured for every person in the fastest and easiest manner possible. Conditions for the applicant are laid down in article 13 et seq. A request can be made orally or in writing. The application must contain the applicant’s name and surname, details of the applicant through which the public authority can release the information, the content of the information requested or the type, name and content of the document requested and the manner in which the request must be complied with. Public authorities are obliged to clearly explain the procedure, to assist applicants in every way, to promptly send the applicant to a competent official if the applicant has addressed the wrong official and to promptly ask for additional information if the request is incomplete (article 15). A request for information shall be complied with promptly, but not later than within five working days (article 18 § 1). The term can be extended by fifteen working days (article 19). The applicant shall be informed about this and the underlying reasons within five working days.

According to article 23 PIA a public authority shall refuse to comply with a request for information if the authority does not possess the requested information, does not know who possesses it, and is unable to identify the holder of the requested information; compliance with the request for information is impossible because the request does not specify what information is needed; the applicant has not paid the relevant state fee or other expenses relating to the request. A public authority may refuse a request if the has already been issued the requested information and does not justify the need to obtain the information for a second time; the information requested from a natural person or a legal person in private law does not concern the performance of public duties; compliance would require a change in the organisation of work of the holder of information, hinder the performance of public duties imposed thereon or require unnecessarily disproportionate expenses due to the large volume of requested information; the request for information cannot be
complied with by a single release of information; compliance would require the information to be additionally systematised and analysed and new information would have to be documented. The latter requests are deemed to be petitions and are addressed pursuant to the procedure prescribed in the Response to Petitions Act. Access may also be denied if the person making the request for information has been divested of active legal capacity by a court or if there is no address or phone number concerning the person making the request for information. When possible, refusal shall be communicated to the applicant within five working days (article 23 § 3 PIA).

**Legal remedies**

According to article 4 § 5 PIA, every person has the right to contest a restriction on access to information if such restriction violates the individual’s rights or freedoms. Article 44 § 2 states that, within the limits of competence, a superior body or agency shall exercise supervision over compliance with the PIA. A person whose rights under the PIA are violated may challenge the relevant decision before this supervisory body or commence a procedure before an administrative court (article 46).

With regard to state secrets, the SSA does not contain any legal remedies for persons wanting to challenge a negative decision upon their request for an access permit. However, where an administrative court procedure is possible, the SSA amends the Code of Administrative Offences allowing judges by virtue of their office to access state secrets in order to perform duties which have been assigned to them (§ 39 SSA).

**Institutional structure**

The Chancellor of Justice is an independent official who reviews legislation of general application of the legislative and the executive powers and of local governments for conformity with the Estonian Constitution. Each year, the Chancellor of Justice presents his findings in a report to the National Parliament. The report contains information on legislation of general application regarding the right to information, article 44 of the Constitution.
* FINLAND *

Legislation on access to documents

– Article 12 of the New Constitution Act of Finland of 11 June 1999


Scope

Article 12, Freedom of expression and right of access to information, of the New Constitution Act of Finland reads:

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programs that are necessary for the protection of children may be laid down by an Act. Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

Rules concerning access to documents are laid down in the Act on the Openness of Government Activities (Openness Act). According to article 5, of the act ‘document’ is defined as a written or visual presentation, and also as a message relating to a given topic or subject-matter and consisting of signs which, by virtue of the use to which they are put, are meant to be taken as a whole, but are decipherable only by means of a computer, an audio or video recorder or some other technical device. Access is, however, limited to ‘official documents’, which are defined as documents in the possession of an authority and prepared by an authority or a person in the service of an authority, or documents delivered to an authority for the consideration of a matter or otherwise in connection with a matter within the competence or duties of the authority.

The following documents are not considered as ‘official’:

(1) a letter or other document sent to a person in the service of an authority or to an elected official because of another task performed or position held by the recipient;
The Openness Act applies to documents prepared for negotiations or communications between persons in the service of authorities or between authorities and private individuals or corporations acting on their behalf, or for other comparable internal activities of such authorities, only if the documents contain such information that, according to the archives legislation, they are to be archived. However, if the documents are archived, the authority may order that access to them may be granted only by permission of the authority.

According to article 4 Openness Act, ‘authorities’ are defined as state administrative authorities and other state agencies and institutions, courts of law and other bodies for the administration of law, state enterprises, municipal authorities, the Bank of Finland, Parliamentary agencies and institutions, but not Parliament. Also considered as authorities are independent boards, consultative bodies, commissions, committees, working groups, investigators, as well as auditors of municipalities and federations of municipalities, and other comparable organs appointed for the performance of a given task on the basis of an Act, a Decree or a decision of some of the aforementioned authorities. The provisions for the authorities also apply to corporations, institutions, foundations and private individuals appointed for the performance of a public task on the basis of an Act, a Decree or a provision or order issued by virtue of an Act or a Decree, when they exercise public authority.

The Openness Act distinguishes between documents that have entered the public domain and those that have not. Access to official documents in the first place relates to access to official documents in the public domain. Article 6 of the Openness Act lists the ways in which a document is supposed to have entered the public domain. Access to documents that have not yet entered the public domain shall be granted at the discretion of the authority (article 9). Access to secret documents or their contents shall not be granted, unless specified otherwise in the Openness Act. Secrecy obligations are provided for in chapter 6 of the Openness Act and will be
discussed below. Articles 11 and 12 deal specifically with access to documents of importance for parties in a judicial procedures and access to personal data.

Point of departure

Under the Openness Act, official documents are in the public domain unless specifically provided otherwise by law.

Exceptions

According to article 22 of the Openness Act, an official document shall be secret if it has been so provided for in the Openness Act or another act, or if it has been declared secret by an authority by virtue of an act, or if it contains information covered by the duty of non-disclosure as provided for in an act. Article 24 contains a list of 32 categories of documents that are, in principle, secret. The interests protected are:

- personal integrity and other important personal interests in health care, social services, taxation or public supervision;
- protection of private business interests;
- the economic interests of the State and the municipalities;
- protection of the environment;
- prevention and prosecution of crime;
- safeguarding judicial proceedings and data protection;
- the security of the state and its relations with foreign powers; and
- national defence.\(^85\)

Some of the 32 categories of secret documents are absolute. However, the majority are subject to one of two harm tests. The first states that access shall be denied if access would injure or compromise the interest invoked. The second test has the opposite presumption: access shall be denied, unless it is obvious that access will not violate or compromise the interest invoked. According to article 23, authorities are under a duty to not disclose secret documents. However, special circumstances can justify granting access (chapter 7). When only a part of the document is secret, where possible, access shall be granted to the public part of the document (article 10).

On July 2004, Act no. 588/2004 on International Information Security Obligations (Security Act) entered into force.\(^86\) This act contains provisions on official measures for the fulfilment of international information security obligations. According to section 3 of the Security Act, the provisions of the Openness Act apply, in so far as
not provided otherwise in the Security Act. Once information is marked as protected information, it shall be kept secret (section 6 Security Act). An authority processing protected information shall see to it that only persons who need the information for the performance of their task have access to it (section 6 Security Act).

**Procedural rules**

A request for an official document must be sufficiently detailed. The applicant must be able to use official diaries and indexes to specify the document. Applicants are not obliged to identify themselves nor do they have to provide reasons for their request, unless provisions in the Openness Act require so (article 13 Openness Act). Access to a document in the public domain shall be granted as soon as possible, and in any event within two weeks from the date on which the authority received the application (article 14). Because of practical difficulties, this time limit can be extended to one month. Applications made to the wrong authority may be forwarded to the right authority (article 15).

**Legal remedies**

An authority’s decision is subject to appeal to an administrative court, as provided in the Act on Administrative Judicial Procedure (Act no. 586/96).

**Institutional structure**

It is common practice in Finland that major law reforms are regularly evaluated. In accordance with this practice, the Openness Act was evaluated in 2003.87

**Other characteristics**

Chapter 5 of the Openness Act contains provisions on the duty of the authorities to promote access and good practices in information management. According to these provisions, authorities must actively produce and disseminate information on their activities. Good practices in information management deals with the obligation to see to the appropriate availability, usability, protection, integrity and other matters of quality pertaining to documents and information management systems (article 18). More detailed rules concerning good practices in information management are laid down in decree no. 1030/1999.88
Other activities in the field of transparency

In order to enhance public authorities’ compliance with the Openness Act, a compilation of guidelines, instructions and recommendations has been put into force. Guidelines on the active promotion of transparency and the encouragement of civil participation have also been issued.90
Legislation on access to documents

- Act no. 78-753 on various measures for improved relations between the civil service and the public on various arrangements of administrative, social and fiscal nature of 17 July 1978 as amended by Act no. 79-587 and Act no. 2000-321912
- Act no. 79-18 on the consultation of archives of 3 January 1979 as amended by Act no. 2000-32192

Scope

Article 1 of Act no. 78-753 part 1 of the Act specifies and guarantees ‘the right of everyone to information as far as the freedom of access to administrative documents is concerned’. The right applies to all administrative documents held by public authorities (article 2).

‘Administrative documents’ mean ‘any files, reports, studies, records, minutes, statistics, orders, instructions, ministerial circulars, memoranda or replies containing an interpretation of positive law or a description of administrative procedures, recommendations, forecasts and decisions originating from the State, territorial authorities, public institutions or from public or private-law organisations managing a public service’ (article 1). These documents may be written, audio or video recordings, documents on a data-processing medium or documents obtainable through any currently used automated process (article 1).

Acts of parliamentary bodies, opinions of the Conseil d’État and administrative courts, certain documents of the State Audit Office (Cour des comptes) and the regional audit chambers and documents regarding the investigation of complaints referred to the national Ombudsman are not considered as ‘administrative documents’ (article 1).

Article 2 limits the scope of the right of access to finalised documents. Furthermore, preparatory documents relating to an administrative decision fall outside the scope of the right to access prior to the final decision. The right to access cannot be exercised with regard to documents that are already public or documents created in connection with service contracts involving one or more specific persons.
Point of departure

Everyone has access to finalised administrative documents held by public authorities, unless exceptions provided by law apply.

Exceptions

Exceptions are listed in article 6 Act no. 78-753. The first set of exceptions are mandatory and are subject to a harm test. Access shall not be granted when disclosure would be harmful to:

- the secrecy of the deliberations of the Government and the executive authorities;
- national defence secrets;
- the conduct of France’s foreign policy;
- State security, public safety or security of individuals;
- the currency and public finance;
- the proper conduct of proceedings begun before jurisdictions or of operations preliminary to such proceedings, unless authorisation is given by the competent authority;
- investigations by the competent authorities to detect tax and customs offences;
- in general, secrets protected by the law

The following documents shall not be disclosed, where:

- disclosure would prejudice the secrecy of personal life and personal files, medical secrets or to business or industrial secrets;
- documents provide an evaluation or value judgement on a natural person, referred to by his/her name or easily identifiable;
- documents describing the behaviour of a person, the disclosure of which could harm the latter.

In these instances access can only be granted to the person concerned.

Procedural rules

Act no. 78-753 contains no rules on the way in which an application must be made. Article 2 gives authorities the possibility to deny a request for disclosure when requests appear unreasonable, because of the number of documents requested or because of the repetitive or systematic nature of the requests.
Access can be given on the spot, without any cost, unless preservation of the documents prevents this. Access can also be given by handing over a copy at the applicant’s expense, provided that the expense does not exceed the reproduction costs (article 4).

Refusal of access must be notified to the applicant in writing and must state reasons for the refusal (article 7). Act no. 78-753 does not contain any time limits for the authorities.

**Legal remedies**

Applicants can lodge an appeal against a decision of an authority to an administrative court. Before doing so, the applicant is obliged to submit a complaint to the Committee of Access to Administrative Documents (Commission d’Accès aux Documents Administratifs, CADA). The CADA can issue recommendations (article 5 Act no. 78-753).

**Institutional structure**

The CADA was created in accordance with article 5 Act no. 78-753. The CADA oversees compliance with freedom of access to administrative documents and public archives under the conditions of Act no. 78-753 and Act. No. 79-18 on the consultation of archives. The CADA may issue recommendations following the complaint of a person who claims to be the victim of an unjustified refusal of access to an administrative document. Moreover, the CADA may advise competent authorities on any subject related to the implementation of the two acts. The CADA produces an annual report on the way in which effect is given to the rules on access to administrative documents.


**GERMANY**

*Legislation on access to documents*

- Article 29 of the Act on administrative procedures (Verwaltungsverfahrensgesetz) of 25 May 1976\(^94\)
- For the Länder:
  - **Berlin**: Berliner Informationsfreiheitsgesetz (BIFG) of 15 October 1999, GVBl. 1999, 561
  - **Brandenburg**: Akteneinsichts- und Informationszugangsgesetz of 10 March 1998, GVBl. I, 46
  - **Nordrhein-Westfalen**: Informationsfreiheitsgesetz Nordrhein-Westfalen of 27 November 2001, GVBl 2001, 806
  - **Schleswig-Holstein**: Informationsfreiheitsgesetz of 9 February 2000, GVOBl. 166\(^95\)

*Scope*

At the federal level, no general right of access to documents exists. According to article 29 of the Act on administrative procedures, only persons involved in an administrative procedure have a right to access documents; this relates strictly to the procedure and to the defence their legal interest. Currently, a Federal Act on Freedom of Information (Federal Information Act) is being discussed. The German Parliament has completed the first reading of this new law on 17 December 2004\(^96\). Its entry into force is likely in mid-2005\(^97\). The Act will grant an enforceable right of access to official information permanently held by the federal administration in the exercise of its functions according to public law.

Of the Länder, only four have specific rules on freedom of information: Berlin, Brandenburg, Nordrhein-Westfalen and Schleswig-Holstein. States without an act on access to documents justify their inaction by referring to the discussions about the new law at the federal level. This review will restrict itself to the Berliner Freedom of Information Act (Berliner Informationsfreiheitsgesetz, BIFG). This restriction does not imply that no differences exist between the four acts of the Länder\(^98\).

The BIFG grants everyone (*Jeder*), i.e. also legal persons, a right to access to or information on documents that are held by public authorities\(^99\). Documents mean all written, electronic, optical, acoustic or differently held information and other
recordings, in particular papers, magnetic tapes, diskettes, films, photographs, audio tapes, plans, diagrams, images and maps, as long as they serve an official purpose.

**Point of departure**

In Germany, the principle of official secrecy has traditionally blocked access to official information. According to this principle all information held by the public administration is secret. At the federal level, access is only possible when a special interest justifies the disclosure of information. On the other hand, in the four Länder everyone has the right to access, unless a restriction applies.

In the future, the Federal Information Act will in principle grant access to all documents, unless exceptions apply.

**Exceptions**

In the BIFG, exceptions are laid down in articles 5 through 12. A distinction can be drawn between mandatory and discretionary exceptions.

With regard to business information, article 7 prohibits the disclosure of information if it is confidential business information, or if the disclosure causes damage to the company concerned, unless the interest in disclosure counterbalances the interest of the company. The same test applies to the protection of personal data (article 6). Disclosure is also forbidden if it would prejudice the proper course of judicial procedures and criminal prosecution (article 9). Another exception is made for the protection of the decision-making process (article 10). If a decision is not yet finalised, access to documents which are directly related to the decision cannot be accessed.

Apart from these exceptions, access shall be denied when disclosure of the requested document would cause severe disadvantages to Germany or one of the Länder (article 11). However, if denial of access only pertains to certain parts of a document or file, the rest of the document can in principle be made available (article 12).

The future Federal Information Act creates exceptions for the protection of public interests (if a negative impact can be proven by the administrative authority), decision-making (if the aim of the decision would be defeated), personal data (requires a balance of interest) and trade secrets (requires consent by the affected
person). Access to classified information or information held by the security and intelligence agencies shall be denied.

**Procedural rules**

Article 13 BIFG contains rules concerning the form and the substance of a request for access to documents. A request can be made in writing or orally. The document requested must be described and the application must be sent to the competent authority. If a wrong authority is addressed, that authority is obliged to send the application immediately to the right authority.

The publication, storage or collection of the received information for commercial purposes is prohibited (article 13 § 7).

While a request for access to documents must be dealt with immediately, it must be preceded by an examination of admissibility (article 14 § 1). Where a request is admissible and the rights of third parties are not involved, access can be granted upon an oral or written request. Following a justified oral request, access must be granted or information on the substance must be given immediately. Following a justified written request, the applicant will receive a decision with information on how to obtain access.

A refusal to grant access must be communicated in writing, within two weeks. In its reasoning, the public authority must inform the applicant about the content of the withheld documents, insofar as this does not lead to the disclosure of confidential information. If the initial request was oral, the refusal must also be in writing if the applicant so requested (article 15 § 1).

**Legal remedies**

If an application is rejected, the applicant can lodge an administrative appeal to the administrative authority superior to the one which refused the access. If the decision was made by the highest regional administrative authority, appeal to an administrative court is possible (article 14 § 3 BIFG).
**Institutional structure**

According to article 18 BIFG and the other three acts on freedom of information of Brandenburg, Nordrhein-Westfalen and Schleswig-Holstein, Commissioners for Data Protection and Access to Information are appointed. Everyone has the right to contact these Commissioners. The Commissioner can give (non-binding) recommendations.\textsuperscript{102}
**GREECE**

*Legislation on access to documents*

- Article 5A and 10 of the Greek Constitution of 1975
- Article 5 of Act no. 2690/1999, the Administrative Procedure Code, of 9 March 1999
- Article 16 of Act no. 1599/1986 on the Relations between citizens and the state and other provisions

*Scope*

Article 5A § 1 of the Greek Constitution reads:

> All persons are entitled to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.

Article 10 § 3 adds:

> The competent service or authority is obliged to reply to requests for information and for issuing documents, especially certificates, supporting documents and attestations within a set deadline not exceeding 60 days, as specified by law. In case this deadline elapses without action or in case of unlawful refusal, in addition to any other sanctions and consequences at law, special compensation is also paid to the applicant, as specified by law.

Rules on access to documents are further specified in article 5 of Act 2690/1999. According to § 1 of this article *any interested party* is entitled, by written application, to be informed of administrative documents. The official report of 9 June 1999 of the Committee that prepared the draft Code explicitly states that every natural or legal person enjoys the right of access to administrative documents, without any legal interest having to be proven. However, preceding case law of the Greek Council of State based on Act 1599/1986 (see below), suggests that the Council will require something like a ‘justified interest’.

‘Administrative documents’ are documents *drawn up* by public authorities, such as reports, studies, minutes, statistical data, circulars, replies of the Administration, opinions and resolutions. Article 1 of Act 2690/1999 declares the Act applicable to the State, local communities and other legal entities under public law. Access to
documents drawn up by private legal entities that belong to the public sector is subject to the rules of article 16 of Act 1599/1986, which was – until the entry into force of Act 2690/1999 – the only Act containing rules on access to documents and which was until then applicable to public authorities as well. In Act 2690/1999, administrative documents are discerned from private documents. However, a clear definition of private documents is not given. According to article 5 § 2 any person having a special legal interest is entitled, by written application, to be informed of private documents held by public authorities. The documents must be related to a case pending before or handled by the public authority.

**Point of departure**

Act 2690/1999 allows every interested person access to administrative documents, unless exceptions under Act 2690/1999 apply. Persons with a special legal interest are entitled to have access to private documents, unless exceptions under Act 2690/1999 apply.

**Exceptions**

Exceptions can be found in § 3 of article 5 Act 2690/1999. Firstly, absolute exceptions are cases where the document concerns the private or family life of a third party or where there is a violation of confidentiality created by special provisions. The right to access is not applicable in these cases. Secondly, where documents refer to discussions of the Council of Ministers, competent authorities may refuse access. The latter is a discretionary exception, requiring the competent authority to balance the interests involved. Lastly, if the disclosure would substantially obstruct the investigation of judicial, police, military or administrative authorities regarding criminal or administrative offences, access may be refused. This exception requires a harm test and a balance of interests.

**Procedural rules**

Right to access is exercised by studying the document on the spot or by issuing a copy, unless reproduction prejudices the original (article 5 § 4 Act 2690/1999).

Refusal of a request for access shall be sent to the applicant in writing within one month after the submission of the application (article 5 § 6 Act 2690/1999).
Legal remedies

General rules on judicial protection apply. Firstly, administrative appeal to the same authority that refused access is possible, but an appeal can also be lodged to an authority hierarchically superior to the refusing authority. Finally, judicial appeal to an administrative court is possible.

According to article 10 § 3 of the Greek Constitution, a person may claim special compensation in cases of unlawful refusal or expiry of the time limit.

Other characteristics

Article 5 § 2 of the Greek Constitution reads:

All persons are entitled to participate in the Information Society. Facilitation of access to electronically handled information, as well as of the production, exchange and diffusion thereof constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.

Articles 9, 9A and 19 of the Greek Constitution provide rules concerning the protection of a person’s home, private and family life (9), personal data (9A) and the secrecy of correspondence (19).
**HUNGARY**

**Legislation on access to documents**

- Article 61 of the Hungarian Constitution
- Act LXIII on the Protection of Personal Data and the Disclosure of Data of Public Interest of 27 October 1992
- Act LXV on State Secrets and Official Secrets of 31 December 1995

**Scope**

Article 61 § 1 of the Hungarian Constitution reads:

> In the Republic of Hungary, everyone has the right to the free declaration of his views and opinions, and has the right of access to information of public interest, and also the freedom to disseminate such information.

In Hungary, protection of personal data and freedom of information are jointly regulated in Act LXIII on the Protection of Personal Data and the Disclosure of Data of Public Interest (Act LXIII). Article 2 § 4 defines ‘data of public interest’ as any data (information), not falling under the definition of personal data, processed by an organ or person performing a state or local government function or other public function determined by a rule of law, or any information pertaining to the activities thereof. Specified rules on public access to information of public interest can be found in chapter III of this Act.

**Point of departure**

Everyone has the right to access to information of public interest, unless legally defined exceptions apply.

**Exceptions**

General rules on exceptions are found in article 19 § 3 Act LXIII. Information classified as ‘state’ or ‘official secrets’ are exempted from the right to access. These state and official secrets are regulated by Act LXV on State Secrets and Official Secrets (Act LXV). Another exception is made for data that is classified on grounds of an obligation resulting from an international agreement. By order of law, other restrictions may apply to protect interests of:
a) national defence;  
b) national security;  
c) criminal investigation and crime prevention;  
d) financial or foreign exchange policy of the State;  
e) international relations and relations to international organisations;  
f) judicial proceedings.

Information prepared in connection with decision-making will not be made public within twenty years of its creation (article 19 § 5 Act LXIII). However, upon request the head of the authority may grant access to this information.

Act LXV distinguishes between a state secret and an official secret. Information considered a ‘state secret’ is information contained in a list of 149 categories (attached to Act LXV) and where the classifying authority has determined that disclosure would without doubt damage or jeopardise the interests of the Republic of Hungary related to defence, national security, criminal investigation and criminal prevention, central finance and exchange policy, foreign affairs, international relations and judicature (Chapter II subsection 1, section 3 Act LXV). The length of secrecy of state secrets may not exceed ninety years. ‘Office secrets’ are so classified by competent authorities if they would damage the orderly operation of an organisation fulfilling a state or public duty, and would prevent it from completing its scope of tasks and exercising its competence (Chapter II, subsection 1, section 4 Act LXV). Official secrets may be kept secret for a maximum of twenty years. Unclassified information will not be considered a state or official secret, even when the information meets the requirements of Act LXV.¹¹²

Access to classified information can be granted by an examination or accessibility permit which can be given to a person with a special interest, e.g. the information contains personal data or access is needed for the purpose of performing a state or public duty (Chapter IV, subsection 2 Act LXV). If the law does not provide otherwise, a concerned person may access data classified as an official secret without restriction (Chapter IV, subsection 3 Act LXV). However, authorised persons are under a ‘secret keeping obligation’; they are not allowed to transfer the information to unauthorised persons (Chapter V, subsection 1, section 16 Act LXV).

Procedural rules

An application to access information of public interest must be completed as soon as possible, at the latest within fifteen days (article 20 § 1 Act LXIII). If the application...
is rejected, the applicant has to be notified in writing within eight days (article 20 § 2 Act LXIII). Actual costs may be charged.

**Legal remedies**

If an application is refused, within thirty days an applicant may institute court proceedings (article 21 § 1 Act LXIII). The burden of proof lies with the authority. If the applicant’s claim is granted, the court shall order the authority to disclose the requested information (article 21 § 7 Act LXIII). Legal remedy rules under Act LXIII also apply to the rejection of an application for access to state secrets and official secrets (Chapter IV, subsection 1, section 15, subsection 3 and 4 Act LXV).

Applicants can also complain to the Data Protection Commissioner (article 27 Act LXIII).

Section 177/B of Act IV on the Criminal Code of 1978 states that any person who in violation of the statutory provisions governing access to public information, fails to comply with the obligation to provide any public information, falsifies or renders inaccessible any public information or conveys or publishes any public information that is untrue or has been falsified, is guilty of a misdemeanour punishable by up to two years imprisonment, community service or a fine. These penalties shall be upgraded if they are committed for unlawful financial gain or advantage.

**Institutional structure**

According to article 23 Act LXIII, the Parliament shall elect a Data Protection Commissioner (DPC). The DPC shall

a) supervise compliance with this Act and other rules of law on data processing;

b) investigate complaints lodged with him;

c) ensure the maintenance of the data protection register;

d) promote a uniform application of statutory provisions on the processing of personal data and on public access to data of public interest; and

e) exercise the powers and perform the tasks as laid down in this Act.

The DPC has the power to call on the competent authority to change or annul a contested decision if it determines that refusal of access was unjustified (article 26 § 4 Act LXIII). Within thirty days, the competent authority may challenge the DPC’s decision before the Metropolitan Court of Justice.
The authorities shall annually report to the DPC on refused applications and the reasons for their refusal (article 20 Act LXIII).

**Other characteristics**

Act LXIII contains a few provisions on the active promotion of open government. Article 19 § 1 requires that authorities promote and ensure accurate and prompt information for the general public concerning matters within their sphere of competence. Under § 2, these authorities shall regularly publish or otherwise enable access to the most important information about their activities.

**Other activities in the field of transparency**

In 2002, the Ministry of Informatics and Communication was created. The Ministry’s central mission is to find solutions to the new challenges of the information age as well as to aid and facilitate the emergence of the knowledge economy and knowledge society. In order to reach this objective, the Ministry has identified five strategic goals, this includes requiring that all public information be available online, providing equal access to information for all citizens and protecting personal, human, social and community rights. The Ministry maintains a homepage devoted to ongoing deliberations on the electronic freedom of information Act.
IRELAND

Legislation on access to documents

- Freedom of Information Act, Act no. 13 of 21 April 1997
- Freedom of Information (Amendment) Bill of 9 April 2003
- Official Secrets Act, 1963

Scope

The Freedom of Information Act (FOIA) contains rules for access to information in the possession of public bodies in general and for access to personal information in particular. The FOIA entered into force on 21 April 1997. Nearly five years later, the FOIA was substantially amended by the FOIA (Amendment) Bill. One of the main reasons for this amendment was the fact that Cabinet Documents would be available after five years. With the amendment this period was extended to ten years. Below, the FOIA including its amendments will be described.

According to the sub-title the FOIA

ENABLE[S] MEMBERS OF THE PUBLIC TO OBTAIN ACCESS, TO THE GREATEST EXTENT POSSIBLE CONSISTENT WITH THE PUBLIC INTEREST AND THE RIGHT TO PRIVACY, TO INFORMATION IN THE POSSESSION OF PUBLIC BODIES

Section 6 § 1 FOIA confers a right to every person to access to any record held by a public body. By ‘record’ is meant:

any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data (within the meaning of the Data Protection Act, 1988) are held, any other form (including machine-readable form) or thing in which information is held or stored manually, mechanically or electronically and anything that is a part or a copy, in any form, of any of the foregoing or is a combination of two or more of the foregoing and a copy, in any form, of a record shall be deemed, for the purposes of this Act, to have been created at the same time as the record.

The FOIA provides a list of what constitutes a ‘public body’. The list consists of 67 central governmental agencies. However, the FOIA foresaw additions to this list and in December 2003 the number of bodies was approaching 400.
Section 46 FOIA lists seven categories of records that are excluded from the scope of the FOIA. Excluded are, e.g., records held by the courts, records relating to the President and records whose disclosure would lead to the revelation of the identity of a person who has provided information to a public body in relation to the enforcement of criminal law.

The scope of the FOIA is also limited in time. Documents created before April 1998 are not covered by the FOIA, unless they contain personal information or are necessary to understand documents created after April 1998. \(^{126}\)

**Point of departure**

Subject to the provisions of the FOIA, every person has access to any record held by a public body.

**Exceptions**

First of all, access to records can be refused on administrative grounds. If an individual does not comply with the requirements listed in section 7, access may be refused (section 10 FOIA). The requirements are explained below under ‘Procedural rules’.

The FOIA contains a variety of exceptions, not only with regard to protected interests, but also concerning harm and public interest tests. The exceptions are set out in Part III of the FOIA. Twelve grounds for exemption can be distinguished; these include: \(^{127}\)

1. meetings of government (section 19)
2. deliberations of public bodies (section 20)
3. functions and negotiations of public bodies (section 21)
4. parliamentary, court and legal professional privilege (section 22)
5. law enforcement and public safety (section 23)
6. security, defence and international relations (section 24)
7. information obtained in confidence (section 26)
8. commercially sensitive information (section 27)
9. personal information (section 28)
10. research and natural resources (section 30)
11. financial and economic interests of the State and public bodies (section 31)
12. enactments relating to non-disclosure of records (section 32)
Some of the exceptions are formulated in mandatory terms, access shall be refused: see exceptions 1, 4, 6 (partly), 7, 8 and 9. The mandatory character of exception 9 depends on the substance of the special act concerned. The Official Secrets Act (OSA) – for example – forbids persons to communicate any official (secret) information, unless he or she is duly authorised to do so (article 4 § 1 OSA). The other exceptions are formulated in discretionary terms.

Subsequently, some of the exceptions are subject to a harm test. This test is formulated in different terms. Access shall or may be refused if disclosure could reasonably be expected to ‘prejudice’ (3, 5) or to ‘impair’ (5), to have ‘a significant, adverse effect’ (3), to ‘affect adversely’ (6), to have ‘a serious adverse effect (11) or if disclosure would be likely to ‘prejudice’ (7), to expose … to serious disadvantage’ (10). With regard to certain exceptions, public bodies shall grant access when the public interest would, on balance, be better served by granting than by refusing access. See the exceptions 3, 5 (partly), 7, 8, 9, 10 and 11. Access to records containing matters relating to deliberations of public bodies – exception 2 – may be refused if the disclosure would be contrary to public interest. Lastly, some exceptions require consultation with a third party before access can be granted (1, 7, 8 and 9).

With regard to exceptions 5 and 6, a Minister can issue a certificate declaring that a record is exempted from the rules on access. With a certificate, the record cannot be subject to internal review or review by the Information Commissioner (see below). However, an appeal on points of law to the High Court is possible (section 42 § 2 sub a FOIA). Appeal against certificates issued by heads of a Government Department under exception 2, deliberations of public bodies, is not possible.\textsuperscript{128}

**Procedural rules**

According to article 7 FOIA, a person who wishes to exercise the right to access shall make a request in writing addressed to the head of the public body concerned stating that the request is made pursuant to the FOIA (§ 1 sub a). The request must contain sufficient particulars in relation to the information concerned so as to enable the record to be identified through reasonable steps (§ 1 sub b), and must specify the form or manner of access (§ 1 sub c). If a person does not fulfil these requirements, access may be refused (section 10 § 1). In order to combat abuse of the access rules, the FOIA provides, since the entering into force of amendment 2003, for an application fee (section 47).\textsuperscript{129} A public body has ten working days to acknowledge receipt of a request (section 7 § 2) and must answer a request within twenty working days (section 8 § 1). Partial access must be granted, if it is practicable to do so (section 13).
Legal remedies

Where an application is refused, the applicant can generally appeal to the public body to re-examine the case internally. Someone more senior than the person who assessed the original request must review the appeal. This internal review must be completed within fifteen working days (section 14 FOIA). After a second refusal, the applicant may appeal to the independent Office of Information Commissioner (section 34 FOIA). Commissioner decisions are subject to appeal to the High Court and ultimately to the Supreme Court on points of law (section 42).

Institutional structure

Part IV of the FOIA contains rules on the Information Commissioner. Upon request, the Commissioner can review decisions of public bodies and affirm or annul a decision (section 34). Decisions of the Commissioner are binding for the public body concerned. In order to fulfil its duties, the Commissioner has, e.g., the power to enter premises occupied by a public body (section 37). The Commissioner shall foster and encourage the publication by public bodies of information of relevance to the general public (section 37). Each year the Commissioner shall prepare a report in relation to its activities (section 40). These reports include detailed statistics. 131

Inside the government, the FOI Central Policy Unit in the Department of Finance oversees application of the act. The Minister of State at the Department of Finance also publishes an annual report. 132
Legislation on access to documents

- Chapter V (on access to administrative documents) of Act no. 241 which establishes new norms in the administrative procedure and right of access to administrative documents of 7 August 1990.
- Act no. 801, establishment and regulations of the intelligence and security services and discipline of State secrecy, of 24 October 1977.

Scope of the legislation

The Italian Constitution does not provide a legal basis for the right to access to documents or information. The legal basis of this right is Act no. 241 on access to administrative documents (Act 241). Article 22 § 1 of this Act reads:

To provide for transparency in administrative activity and encourage impartiality in its performance, any person who has an interest to safeguard in legally relevant situations shall have the right of access to administrative documents according to the procedures laid down by the present law.

Thus, only persons with an interest have a right to access to administrative documents. Article 2 § 1 of Decree no. 352 (Decree 352), which specifies procedural rules by implementing article 24 § 2 Act 241, speaks of any person who has a personal concrete interest to safeguard in legally relevant situations.

An administrative document is considered to be any graphic, photographic, cinematic, electromagnetic or other representation of the contents of acts, including internal acts, produced by public administrations or used for purposes of administrative activity (article 22 § 2).

The right of access applies to the administrative bodies of the state, including special and autonomous bodies, public entities and the providers of public services, as well as guarantee and supervisory authorities (article 23).

Access is denied with regard to documents falling within the scope of article 12 of Act 801 of 24 October 1977 dealing with State secrecy (article 24 § 1 Act 241).
This article reads:

The documents, proceedings, information, activities, and any matter whose disclosure is apt to jeopardise the integrity of the democratic State, also in relation with international agreements, the defence of the constitutional order, the free exercise of the functions of the constitutional bodies, the independence of the State vis-à-vis other States and its relations with them, the military preparations and defence of the State, are covered by State secrecy.

**Point of departure of the legislation**

Any person with an interest to safeguard in legally relevant situations has a right to access administrative documents, unless exceptions based on Act 241 apply.

**Exceptions**

By issuing decrees, the government can regulate the refusal of access in order to safeguard:

- a) security, national defence and international relations;
- b) monetary and foreign exchange policy;
- c) public order, prevention and repression of crime;
- d) the privacy of third parties, persons, groups and enterprises, assuring among other things that the persons affected can inspect the acts involving administrative proceedings knowledge of which is necessary to advance or defend their legal interests.139

Also, individual administrative authorities are required to identify, in one or more rules to be issued, the categories of documents produced by them or in any case in their possession that shall be precluded from access owing to the needs set forth above (article 24 § 4 Act 241).

According to article 8 § 2 Decree 352, access to documents cannot be denied save when they may do *concrete damage* to the interests mentioned in Act 241. Administrative bodies shall *postpone* access when secrecy is necessary to ensure temporary protection of interests (article 7 § 2 Decree 352). They are also entitled to postpone access if disclosure can prevent or impede the performance of administrative action (article 24 § 6 Act 241).
**Procedural rules**

Requests for access must be motivated and addressed to the administrative body that produced or holds the document (article 25 § 2 Act 241). Administrative bodies have to answer within thirty days. If no response is given within this period, access is considered to be refused (article 25 § 4). The person responsible for the access procedure shall give reasons for the refusal. Specific reference must be made to the invoked interest and to the circumstances leading to the refusal (article 7 § 1 Decree 352).

**Legal remedies**

Within thirty days, an appeal against a negative decision is possible to the regional administrative court. The decision of the latter is subject to appeal – again within thirty days – to the Council of State (article 25 § 5 Act 241).

**Institutional structure**

Following article 27 Act 241, a Committee on Access to Administrative Documents was instituted under the Office of the Prime Minister. According to article 27 § 5 Act 241:

> The Committee shall take care that the principle of full public knowledge of the activity of the public administration is put into practice, in observance of the limitations set forth in the present law; it shall draft an annual report on the transparency of the activity of the public administration, which it shall communicate to the Houses of Parliament and to the Prime Minister; it shall propose to the Government amendments to legislative and regulatory texts useful to achieve the broadest possible guarantee of the right of access referred to in Article 22.

All administrative bodies are required to transmit to the Committee, by a deadline set by the Committee, information and documents that it requests, with the exception of those subject to State secrecy (article 27 § 6 Act 241).

**Other activities in the field of transparency**

The Ministry for Innovation and Technology has the task of steering, coordinating and encouraging action by (other) branches of the central administration with a view to defining specific projects, action plans and programs for the deployment of
information technologies so as to bring better, more effective and efficient services to citizens and business and, generally, to enhance the economic, social and cultural conditions of the country. The Ministry provides guidelines on the transparency of administrative action and on the management of document flows.
Legislation on access to documents

- Freedom of Information Law, adopted on 29 October 1998
- State Secrets Act of 29 October 1996

Scope

The Constitution of Latvia does not contain a specific provision on access to information. However, article 104 states in general terms that ‘everyone has the right to address submissions to State or local government institutions and to receive a materially responsive reply’. Rules on freedom of information are found in the Freedom of Information Law (FOIL) of 1998. Section 2 § 1 of the FOIL specifies ‘a uniform procedure by which natural and legal persons are entitled to obtain information from State administrative institutions and Local Government institutions, and to utilise it’.

‘Information’ is defined as information or compilations of information, in any technically possible format, that is stored or transferred (section 1 § 1 FOIL). Access includes information that is under the control of state administrative institutions and local government institutions for the performance of their functions as proscribed by regulation (section 2 § 1). The FOIL does not apply to information exchanged between institutions (section 2 § 4).

The FOIL draws a distinction between generally accessible information and restricted access information (section 3). According to section 4, ‘generally accessible information’ is any information not categorised as restricted access information. The latter is described below, under ‘Exceptions’. Generally accessible information shall be provided to anyone requesting for it. An applicant is not required to give reasons for a request. If information contains partly restricted access information, access to the portion containing generally accessible information is provided (section 10 § 3). If a person wants access to restricted access information, reasons for the request and the purpose for which the information will be used must be stated (section 11 § 4).
Point of departure

Information shall be accessible to the public in all cases, unless the FOIL specifies otherwise (section 2 § 3 FOIL).

Exceptions

Restricted access information is information that can only be used by a restricted group of persons as regards their work or official duties and the disclosure of which hinders or may hinder the activities of the institution concerned, or causes or may cause harm to the lawful interests of persons (section 5 § 1 FOIL). According to section 5 § 2, restricted access information shall be considered information:

1) which has been granted such status by law;
2) which is intended and specified for internal use by an institution;
3) which concerns trade secrets;
4) which concerns the private life of natural persons; or
5) which is related to certifications, examinations, submitted projects, invitations to tender and other assessment processes of a similar nature.

The creator of a document or the head of an institution may classify information as restricted (section 5 § 3).

The first exception refers to the State Secrets Act of 1996. This act regulates the protection of State secrets. Information, the disclosure of which would jeopardise national security or economic or political interests, is considered a state secret and can be qualified as ‘Very Secret’, ‘Secret’ or ‘Confidential’ (section 2 and 3 State Secrets Act). The Cabinet of Ministers determines these classifications (section 4 State Secrets Act). Only Latvian citizens with special permission (a security clearance) can access secret documents (section 9 State Secrets Act).

Other restrictions listed in section 5 § 2 FOIL, except for the last one, are further addressed in sections 6 through 8. Information for internal use is information that an institution requires for the preparation of decisions (section 6). This includes information prepared by advisors or experts, or documents originating from other institutions. Information qualifies as a trade secret, where disclosure would adversely affect the ‘ability to compete’ of the person who submitted the information (section 7). The Personal Data Protection Law of 2000 protects information regarding the private life of natural persons.145
Procedural rules

Section 11 FOIL lists the requirements of an application. Information may be requested in writing or orally. A written request must contain the applicant’s name and surname, domicile or place of residence in Latvia and signature. The request must be formulated as precisely as possible. If a request concerns restricted access information, the applicant has to provide grounds for the request and must specify the purpose for which the information will be used. Access may be refused if the applicant does not fulfil these requirements. Correspondence between the applicant and the institution is considered restricted access information.

Detailed rules on the way information is disclosed can be found in Regulation no. 275 of the Cabinet of Ministers of 3 August 1999. This regulation is based on section 10 § 2 FOIL.

When an institution refuses a written application, it must specify the grounds on which the request was refused and where and within what time period this refusal may be appealed (section 2 § 1 FOIL). If the institution does not possess the requested information, it must tell the applicant which institution has the information (section 2 § 2). Time limits are further specified in the law on Procedures for Reviewing Submissions, Complaints and Proposals in State and Local Government Institutions of 27 October 1994. An institution must answer a request within seven or thirty days, depending on whether the application requires additional information or verification.

Legal remedies

An applicant has the right to submit a complaint against a refusal to provide information either with the manager of the institution or with a superior institution (section 15 § 1 FOIL). An appeal to a court is possible for any natural or legal person where an institution has infringed the right to obtain information, and the institution:

1) has not provided an answer to the applicant within the time period proscribed by law;
2) has refused to provide information by taking a decision, without legal basis, to grant it the status of restricted access information; or
3) after receiving a written application, has refused to expunge or correct false, incomplete or illegally acquired information regarding a person.
**Institutional structure**

The Latvian National Human Rights Office prepares annual reports on the general human rights situation in Latvia. These reports also analyse transparency and questions concerning public access to documents.¹⁴⁹

**Other characteristics**

Each institution is obliged to register information, specifying its class, designation, source and for documents, prerequisites to conform with specified law (section 9 § 1 FOIL). Applicants may review the register of generally accessible information (section 9 § 2).

**Other activities in the field of transparency**

Research on how freedom of information works in practice is carried out by NGOs, for instance, ‘Delna’, the Latvian branch of Transparency International.¹⁵⁰
**LITHUANIA**

*Legislation on access to documents*

- Article 25 Lithuanian Constitution of 25 October 1992\(^1\)
- Article 6 Law no. I-1418 on Provision of Information to the Public of 2 July 1996\(^2\)
- Law no. VIII-1524 on the Right to Receive Information from State and Local Authorities of 11 January 2000\(^3\)
- Law no. VIII-1443 on State Secrets and Official Secrets of 25 November 1999\(^4\)

*Scope*

According to article 25 § 5 of the Lithuanian Constitution, citizens have the right to obtain all available information *which concerns them* from State agencies in a manner established by law. In article 6 of the law on Provision of Information to the Public (PIP), every person is granted:

the right to receive from state and municipal institutions and agencies as well as other budgetary institutions public information relating to their activities, their official documents (copies) as well as information held by the aforementioned institutions about the requesting person.

This right is granted to everyone, including non-citizens. State and municipal institutions and agencies must, according to the procedure under the Law on the Right to Receive Information from State and Municipal Institutions (Information Law) and other laws, provide both public and private information, except where laws specify that private information is not to be disclosed (article 6 § 3 PIP). According to article 6 § 7 PIP, institutions and enterprises as well as political parties, trade unions, political and public organisations, and other organisations shall provide creators of public information and other persons, with information relating to their activities in accordance with the procedures established in their articles of association (regulations). The Information Law draws a distinction between information and official documents. This distinction only has consequences for the way in which applications must be made. Requests for access to information can be made orally or in writing, whereas applications for access to official documents must be made in writing (article 6 Information Law).
**Point of departure**

Everyone has the right to access public and private information, unless exceptions apply.

**Exceptions**

A request for information shall be refused if the information is a state, official, trade or bank secret. Information protected by law, the disclosure of which would damage state security and defence, foreign policy interests and criminal prosecution is also exempted. Information endangering the territorial integrity of the state or that puts public order at risk can be withheld. However, information must be released if non-disclosure would result in serious violations of the law or cause harm to human health (article 13 § 1 Information Law). In all cases, the institution must verify whether the non-disclosure is necessary in a democratic society and whether the right of the applicant does not outweigh the protection of the interests mentioned above (article 13 § 2).

Rules on state and official secrets are further addressed in the Law on State Secrets and Official Secrets (State Secrets Law). Article 3 divides classified information into Top Secret, Secret, Confidential and Restricted information. This classification is based on possible damage to the State, its institutions or individuals, and the degree to which such information must be protected. Article 5 State Secrets Law lists categories of classified information. Only Lithuanian citizens that have been granted a special national personnel security clearance certificate can access state and official secrets (article 9 § 1 State Secrets Law). A special Commission for Secrets Protection Coordination was created through article 12 State Secrets Law. This Commission has, i.a., competence to issue certificates and to settle disputes concerning e.g., classification of information (article 12 § 3 sub 2 and 7 State Secrets Law).

**Procedural rules**

An applicant must submit a request for access to an official document in writing, including name and address. The institution concerned must reply within 14 days. If necessary, this term can be extended by another 14 days. The total period may not exceed one month (article 10 Information Law). An institution that refuses a request must clearly justify its refusal. If a request is addressed to the wrong authority, it will be forwarded within three working days to the right authority (article 12). According to article 11 § 2 Information Law, the applicant has the right to access the
original document when possible. Otherwise, the institution should provide a copy or an extract. If full access to a document is not possible, the applicant will receive partial information or the part of the document not covered by an exception (article 11).

Legal remedies

According to article 14 Information Law, the applicant has the right to appeal to the Administrative Disputes Commission.\textsuperscript{555} The decision of this Commission is subject to appeal to the Administrative Court.

Other characteristics

State and municipal institutions and agencies are – according to article 6 § 2 PIP and article 4 Information Law – obliged to inform the public of their activities. Institutions must prepare and publish information or otherwise disseminate information concerning their functions, structure and actual questions. Such information is publicly available and free of charge. Institutions have to maintain and make public a register of documents which they possess (article 4 § 2 Information Law).
General legislation on access to documents

Malta has no general legislation in the field of freedom of information or access to administrative documents. Freedom of information is addressed in two provisions: article 41 of the Maltese Constitution of 1964 and article 10 of the European Convention Act of 1987 (ECA). Both provisions concern the freedom of expression, which includes the freedom to receive ideas and information without governmental interference. This freedom, however, cannot be construed as granting individuals a right to access to documents that are not voluntarily disclosed by the government. Considering that the ECA incorporates the European Convention on Human Rights and fundamental freedoms (ECHR) in the Maltese legal order, and that article 10 of the ECA corresponds to article 10 of the ECHR, case law of the European Court of Human Rights (ECtHR) must be taken into account. The ECtHR ruled in *Leander v. Sweden* that article 10 ECHR is intended to protect the free flow of information between individuals. Article 10 ECHR does not obligate a government to disclose information to an individual. The ECHR does not exclude that disclosure is obligatory when the applicant can show a personal interest in the disclosure of certain information. However, this is not covered by article 10 ECHR, but in case of access to personal data by article 8 ECHR, the right to privacy, or in case of information which is essential to assess to what risk someone is exposed by article 2 ECHR, the right to life.

Specific legislation on access to documents

Five regulations are worth mentioning: the Press act of 1974, the National Archives Act of 1990 (NAA), the Ombudsman Act of 1995, the Environment Protection Act of 2001 and the Data Protection Act of 2002. The last two acts implement European legislation in this field and are not discussed here.

The Press Act states in article 47 that:

(1) The Government shall establish procedures to give representatives of the press the information which helps them fulfil their public tasks.
(2) Subarticle (1) shall not apply in the following cases:
   (a) where such information could foil, impede, delay or jeopardise the appropriate process of pending legal proceedings or where Government or another public
authority would be legally entitled to refuse to grant such information in a court or other tribunal established by law;

(b) where the granting of such information would entail the disclosure of information received by Government in confidence;

(c) where such information would violate an overriding public interest or a private interest warranting protection;

(d) where the information concerns matters related to national security or public safety;

(e) when the gathering of the information requested would place a disproportionate burden on the public administration.

(3) It shall not be lawful for the Government to issue general instructions that prohibit the giving of information to any newspaper or licensed broadcasting service holding a particular view or to any specified newspaper or licensed broadcasting service.

The Ombudsman may, in accordance with article 19 of the Ombudsman Act, from time to time require any person who in his opinion is able to give information relating to a matter that is being investigated by him to furnish him any such information, and to produce any documents or papers or things which relate to the investigation and which may be in the possession or under the control of that person. However, this competence is limited by article 20 Ombudsman Act. Information will not be disclosed to the Ombudsman where the Prime Minister certifies that the giving of information (a) affects the security or defence of Malta, or international relations, (b) is likely to damage seriously the national economy, or (c) involves the disclosure of the deliberations or proceedings of the Cabinet or any committee of the Cabinet or (d) prejudices the investigation or detection of offences. In principle, the Ombudsman shall not disclose obtained information (article 21 Ombudsman Act).

The national archives store administrative and departmental documents of the government of Malta, including all documents of the ministries, government commissions, authorities and boards. These documents are archived after a thirty-year period, as from the moment the document is no longer used for administrative purposes (article 4 § 1 sub e NAA). The head of an institution has discretion as to whether to archive materials.164 The Minister of education can limit access to certain archived documents where in his discretion they contain information that has been obtained by a public authority under an obligation of secrecy or confidentiality, or where the security of the State or the personal safety of any individual so require (article 8 NAA).
Conclusion

In Malta, all documents held by government bodies are secret, unless provided otherwise in specific legislation or unless they have been stored in the National Archives and access is not limited by the Minister of education.\textsuperscript{165}
THE NETHERLANDS

Legislation on access to documents

- Article 110 of the Dutch Constitution
- Act on the public access to government information of 31 October 1991

Scope

According to article 110 of the Dutch Constitution, government bodies shall – in the exercise of their duties – respect the right of public access to information in accordance with rules proscribed by the Act of Parliament on the public access to government information (Information Act). According to section 3, anyone may apply to an administrative authority, agency, or company carrying out work for an administrative authority, for information contained in documents concerning an administrative matter. According to section 1 sub a Information Act, ‘document’ means a written document or a material containing data that is deposited with an administrative authority. ‘Administrative authority’ is further specified in section 1a, namely:

a. The Ministers;
b. the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations;
c. administrative authorities whose activities are subject to the responsibility of the authorities referred to in subsection 1 (a and b);
d. such other administrative authorities as are not excluded by order in council.

The judiciary and the parliament are excluded. An ‘administrative matter’ is a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies (section 1 sub b Information Act).

An administrative authority is under the explicit obligation – in the exercise of its functions – to disclose information in accordance with the Information Act (section 2 Information Act).

Point of departure

Applications for information shall be granted, unless exceptions provided by law apply.
**Exceptions**

The Information Act only contains mandatory exceptions, i.e., disclosure **shall** not take place. Some of these exceptions are subject to a harm test and some require a balancing of interests.

According to section 10 Information Act, disclosure shall not take place where:

a. this might endanger the unity of the Crown;
b. this might damage the security of the State;
c. the data concerned relates to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.
d. the data is personal data, as meant in section 2 of chapter 2 of the Protection of personal data act, unless the disclosure clearly does not violate privacy.

Disclosure shall not occur where it does not outweigh one of the following:

a. relations between the Netherlands and other states or international organisations;
b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2;
c. the investigation of criminal offences and the prosecution of offenders;
d. inspection, control and oversight by administrative authorities;
e. respect for personal privacy;
f. the importance to the addressee of being the first to note the information;
g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

Special rules concerning internal documents are laid down in section 11 Information Act:

1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.
2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.
3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

**Procedural rules**

An applicant’s oral or written request must specify the administrative matter concerned or the relevant document (section 3 § 2 Information Act). The applicant does not have to state reasons. If the request is in writing and addressed to the wrong authority, the request shall be forwarded to the right authority and the applicant will be so informed (section 4).

An administrative authority must answer a written request in writing (section 5 § 2). If the request was made orally, the applicant can ask for a notification in writing. The authority must answer as soon as possible, and in any event within two weeks after receipt of the request (section 6). Taking into account the applicant’s preference, the authority can provide information by issuing a copy, permitting the applicant to take note of the contents of the document, supplying an extract from the document or by supplying the information contained in the document (section 7).

**Legal remedies**

General rules on administrative procedure apply. The applicant must formally object to the decision of the administrative authority. The administrative authority reviews the application and makes a new decision. If the applicant is still unsatisfied with the outcome, he or she can appeal to the administrative court. The decision of this court can be overruled by the Administrative Jurisdiction Department of the Council of State.

**Other characteristics**

If disclosure of information on the policy of an administrative authority is in the interest of effective, democratic governance, the authority must on its own initiative disclose the information (section 8 § 1). The authority must ensure that the information is supplied in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible in time to allow them to make their views known to the authority (section 8 § 2).
POLAND

Legislation on access to documents

- Article 61 of the Polish Constitution of 2 April 1997
- Act on Access to Public Information of 6 September 2001
- Classified Information Protection Act of 22 January 1999

Scope

Article 61 § 1-3 of the Polish Constitution reads:

1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.

2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.

3. Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.

This article has led to the adoption of the Act on Access to Public Information (Information Act). Where the Constitution uses the word ‘citizen’, article 2 of the Information Act grants anyone, including institutions, the right to access public information. The Information Act contains a mixture of active and passive distribution of information by public authorities.

According to the Information Act, the right to information includes the right to obtain public information, examine official documents and access the sessions of collective public authority agencies elected by ballot (article 3). The duty to disclose information applies to public authorities and other entities performing public tasks (article 4). These rules also apply to trade unions and political parties. The notion of ‘information’ or ‘documents’ is not further specified.
Article 6 provides an extensive list of information that is accessible. For example, accessible information on the operating framework of public authorities includes:

a) procedures of public authorities and their organisational units,
b) procedures of state legal entities and territorial local government legal entities in the scope of performing public tasks and their activities in the scope of budget and extra budget economy,
c) methods of issuing public law acts,
d) methods of accepting and handling matters,
e) the status of accepted matters, order of their handling or deciding,
f) registers, records and archives kept and methods and principles of accessing data contained therein.173

**Point of departure**

All information is accessible, unless exceptions provided by law apply.

**Exceptions**

According to article 5 § 1 Information Act, the right to public information is subject to restrictions as provided by law. One of these is the Classified Information Protection Act (CIPA), which is discussed below. The right to public information – according to article 5 § 2 Information Act – may be restricted by concerns regarding the privacy of natural persons or business secrets.

The CIPA defines the standards and requirements for safeguarding information expressed in whatever form and manner, including information that is being developed and which must be protected against unauthorised disclosure because it is a state secret or public service secret (together called ‘classified information’) (article 1 CIPA). A ‘state secret’ is information whose disclosure may gravely threaten expose to no less than a substantial damage fundamental interests of the Republic of Poland, in particular the independence or inviolability of the territory, national defence and the security of the state and citizens (article 2 § 1 CIPA). A ‘public service secret’ means classified information, other than a state secret, which has been obtained in connection with official duties or performance of agency contracts, whose unauthorised disclosure would damage interests of the state, public interests, or lawfully protected interests of citizens or organisations (article 2 § 2 CIPA). Classified information may only be disclosed to persons performing a specific duty or to those with special permission.
The classification of documents is done by the person authorised to sign a certain document (article 21 CIPA). Annex I to the CIPA contains a list of categories of classified information. Annex II has a questionnaire for persons requesting permission.174

**Procedural rules**

According to article 10 Information Act, public information that is not already disclosed shall be accessible by application. Public information that is immediately accessible can be requested either orally or in writing without need for a written application. Access is granted without undue delay, at least within fourteen days from the receipt of the request (article 13 § 1). If this time limit is exceeded, the authority must inform the applicant of the reasons for the delay and set another date, to be within two months (article 13 § 2). In principle, access must be granted in the form that the applicant requested, unless technical means prevent the authority form doing so (article 14). Refusal of access occurs by decision.

**Legal remedies**

The provisions of the Polish Code of Administrative Procedure apply to the (negative) decision of the public authority (article 16 Information Act). Applicants may request administrative review and eventually lodge an appeal to the administrative court.

**Institutional structure**

With the entering into force of the CIPA, the Council of Ministers’ Classified Information Security Committee was created in accordance with article 5 CIPA. This Committee gives opinions and advises on matters concerning classified information.
Legislation on access to documents

– Article 48 and 268 of the Portuguese Constitution
– Act no. 65/93 on access to administrative documents of 26 August 1993
– Act 6/94 on State Secrecy of 7 April 1994

Scope

Article 268 of the Portuguese Constitution states:

1. Citizens are entitled to be informed by the Public Service, when they so require, about the progress of proceedings in which they are directly interested and to know the final decisions that are taken with respect to them.
2. Citizens shall also enjoy the right to have access to administrative records and files, subject to the legal provisions with respect to internal and external security, investigation of crime and personal privacy.
3. Administrative action shall be notified to interested parties in the manner prescribed by law; it shall be based on stated and accessible substantial grounds when it affects legally protected rights or interests.
4. Interested parties are guaranteed effective protection of the courts for their legally protected rights or interests, including recognition of these rights or interests, challenging any administrative action, regardless of its form, that affects these, enforcing administrative acts that are legally due and adopting appropriate protective measures.
   […]
5. For the purposes of paragraphs 1 and 2, the law shall fix the maximum period within which the Public Service must respond.

Paragraph 2 of this article has led to the adoption of Act no. 65/93 on access to administrative documents (Act 65/93). At first sight, the right of access to administrative documents seems to be restricted to Portuguese citizens. Not only does article 268 of the Constitution speak of citizens, but also article 1 Act 65/93 states that access to administrative documents by the citizens shall be ensured by the public administration according to the principles of publicity, transparency, equality, justice and impartiality. However, according to article 7, everyone shall have the right to access information. The right to access applies to documents held or created by organs of either the State or the autonomous regions that perform administrative
functions, by organs of either public institutes or public associations, organs of the local authorities, organs of associations or federations of local authorities, as well as other entities that exercise public authority according to the law (article 3 § 1).

‘Administrative documents’ means any support of information, either graphic, aural, visual or computerised, or any record of another nature, augmented or held by the public administration, including files, reports, studies, opinions, minutes, official records, circulars, circular letters, internal orders, internal normative decisions, instructions and guidelines for the interpretation of the law or for setting the framework for an activity, as well as other pieces of information (article 4 § 1 sub a). Personal notes, memos or other records of a similar nature, or documents that do not regard administrative activities, in particular documents concerning the meetings of the Council of Ministers and Secretaries of State, or which regard preparation for such meetings, is not considered administrative information (article 4 § 2).

Access to documents concerning matters covered by secrecy of judicial procedures falls outside the scope of Act 65/93 and is regulated in special legislation (article 6).

Point of departure

Anyone may access administrative documents, unless exceptions provided by law are applicable.

Exceptions

According to article 5 Act 65/93, documents containing information whose disclosure would create a risk for or be harmful to the State’s internal or external security are classified according to special legislation. For a strict period of time, access to such documents may be denied or subject to authorisation. Act 6/94 on State Secrecy regulates this area. The denial of access to classified information is not automatic. A well-founded and concrete act of classification is necessary. A document may be considered secret for a maximum of four years. After the expiry of this period, secrecy can be invoked for another maximum period of four years.177

Act 65/93 draws a distinction between documents containing personal data, and documents that do not. Access to the first category is only granted to the person involved, or a third party which has either obtained written authorisation or can prove to have a direct, personal and legitimate interest (article 8). Access to documents not containing personal information is in principle authorised.
An administrative authority may refuse access to documents if disclosure jeopardises commercial or industrial secrets or secrets relating to a company's internal affairs (article 10).

**Procedural rules**

Requests for access to documents must be made in writing and must contain all references necessary for identifying the document, as well as the name, address and signature of the applicant (article 13 Act 65/93). Documents may be accessed through on the spot consultation or reproduction through photocopy or any other technical means (article 12).

Each ministerial department, regional department, local authority, institute and public association has an entity that is responsible for the implementation of Act 65/93 (article 14). This entity must answer a request within a period of ten days (article 15 § 1). If the request concerns documents that contain third party personal information and this party gave no prior authorisation, the responsible entity must request an opinion from the Committee of Access to Administrative Documents (CADA, see below).

**Legal remedies**

Within 20 days, an applicant may submit a complaint to the CADA regarding a public authority’s rejection of a request (article 16 § 1 Act 65/93). The CADA will draw up a report within 30 days, which will be forwarded to all interested persons (article 16 § 2). After receiving this report, the public authority gives a new answer. It must include reasons on which the decision is based (article 16 § 3).

The latter decision is subject to appeal to the administrative courts (article 17 Act). Also, failure to reply to an application is subject to appeal.

**Institutional structure**

In accordance with article 18, a Committee of Access to Administrative Documents was created. The Committee is entrusted with overseeing implementation of Act 65/93. The CADA can examine complaints, provide opinions on access, review practices and decide on the system of classifying documents. However, CADA decisions are not legally binding on public authorities (article 20). The CADA produces an annual report. All staff members working for public authorities are obliged to co-operate with the CADA (article 21).
Other characteristics

Both the Constitution and Act 65/93 contain rules on the active disclosure of information. In article 48 of the Constitution, this is formulated as every citizen’s right to objective information about state and public body activities and a right to be informed by the government and other authorities about the management of public affairs. According to article 11 Act 65/93, the administration shall publish through adequate means:

a) any documents, including internal normative decisions, circulars and guidelines, that contain structures for the administrative activity;

b) reference to any documents containing an interpretation of enacted laws or a description of an administrative procedure, including in that reference inter alia the title and date of the documents, the subject and the originator thereof, as well as the place where the documents may be consulted.
Legislation on access to documents

- Article 26 of the Slovak Constitution of 1 September 1992
- Act no. 211/00 on Free Access to Information of 17 May 2000, entered into force on 1 January 2001
- Act no. 241/01 on Protection of Classified Materials of 30 May 2001

Scope

Article 26 § 1 of the Slovak Constitution guarantees freedom of speech and the right to information. The scope of the latter must be seen in light of § 4 and 5:

(4) The freedom of speech and the right to seek out and spread information can be restricted by law if such a measure is unavoidable in a democratic society to protect the rights and liberties of others, state security, public order, or public health and morality.

(5) State bodies and territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner and in the state language. The conditions and manner of execution will be specified by law.

With regard to environmental information, article 45 of the Constitution grants everyone the right to timely and complete information about the state of the environment and the causes and consequences of its condition.

Detailed rules on access to information can be found in Act no. 211/00 on Free Access to Information (Act 211/00). According to article 3 Act 211/00, everybody – including legal persons – shall have the right to access information that obligees have available. ‘Obligees’ are entities obliged to provide access to information under Act 211/00. These entities consist of state agencies, municipalities, as well as legal entities and natural persons that have been given the power by law to make decisions on the rights and responsibilities of natural persons or legal entities in the area of public administration (article 2 § 1). This obligation applies only to the decision-making power of these entities.

Act 211/00 draws a distinction between ‘disclosed information’ – information that is always accessible – and ‘associated information’. The latter means information that is closely related to requested information, including information on the mere
existence of the information, its origin, number, but also possible reasons for denial of access to the requested information and the period of denial.

Article 5 contains an extensive list of information whose disclosure is mandatory. Disclosure must take place in a way that enables ‘mass access’, meaning accessibility by means of telecommunications, especially through the Internet (article 4 § 2 and 6 § 1).

**Point of departure**

Everyone has the right to access information that public authorities have made available, unless exceptions provided by law apply.

**Exceptions**

Exceptions to the right of access to information can be found in articles 8 through 11 Act 211/00. If the requested information is classified in accordance with Act no 241/01 on Protection of Classified Materials (Act 241/01), access on the basis of Act 211/00 shall be denied (article 8 Act 211/00). According to article 2 of Act 241/01, classified material is specified as such by the originator of the material. Classified information is information whose disclosure would be detrimental to the interests of the Slovak Republic or to interests that the Slovak Republic has been committed to protect. Only specifically authorised persons can access classified information.

Information containing personal data may be disclosed only when so ordered by a special act or by the prior consent of the person concerned (article 9 Act 211/00). Information classified as a state secret shall not be disclosed (article 10).

Furthermore, the obligee shall limit disclosure or not provide information if:

1. information was obtained from a person not required by law to provide information, who upon notification of the Obligee instructed the Obligee in writing not to disclose information. If the person authorized to give consent for disclosure of information fails to reply within 7 days upon notification, it shall be deemed that the person consented to disclosure of information. The person must be informed of the consequences in the notification,
2. information is to be disclosed under a special act; and if it is to be disclosed under such law within a period set in advance; and not later than such period,
3. it may violate intellectual property rights under a special law, except if the author consented to the disclosure of information upon notification of the Obligee,
The entitlement to refuse access to information shall last only as long as the reasons for non-disclosure exist (article 12).

**Procedural rules**

An application may be filed in writing or orally. A request must contain the details of the authority it is addressed to, the name of the applicant, what information is requested and in what way disclosure is to be made (article 14 § 1 Act 211/00). If an applicant fails to fulfill these requirements, the authority shall inform the applicant within seven days. The authority must instruct an applicant on how to complete a request (article 14 § 3). Applicants are not obliged to provide legal or other reasons or interests when applying for information (article 3 § 3).

In case the application is sent to the wrong authority, this authority shall pass on the request to the right authority (article 15). The authority has to answer the request with undue delay, but not later than ten days (article 17 § 1). For serious reasons this period can be extended by ten days (article 17 § 2).

**Legal remedies**

If access is granted, no appeal is possible against this decision (article 18 § 1 Act 211/00). If access is refused, the authority’s decision is subject to an administrative appeal by the authority’s superior (article 19 § 1 and 2). The superior body’s decision is subject to appeal to the administrative court (article 19 § 4). A public official violating the provisions of Act 211/00 can be fined up to SKK 50,000 (article 23).

**Other characteristics**

In accordance with article 20 Act 211/00, the obligees keep a registry of requests.

**Other activities in the field of transparency**

Research on how Act 211/00 works in practise is carried out by NGOs, for example, Aliancia Fair-Play.
SLOVENIA

Legislation on access to documents

- Article 38 and 39 of the Slovenian Constitution of 23 December 1991
- Act on the access to information of public character of 25 February 2003
- Classified Information Act, entered into force on 23 November 2001

Scope

Article 39 § 2 of the Slovenian Constitution reads:

(2) Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law.

A right to access to personal data is provided for in article 38 § 3 of the Constitution:

Everyone has the right of access to the collected personal data that relates to him and the right to judicial protection in the event of any abuse of such data.

The Act on the access to information of a public character (Information Act) is based on article 39 of the constitution. The aim of the Information Act is to ensure the publication and openness of the work of public bodies, as well as to facilitate the exercise of the rights of individuals and legal entities to acquire information of a public character. With a view to achieve the aim of this Act, public bodies try to inform the public on their work to the greatest extent possible (article 2). According to article 5 of the Act, legal entities and natural persons have free access to information of a public character that is held by public bodies.

Public bodies are state bodies, local government bodies, public agencies, public funds and other entities of public law, holders of public powers and public service contractors (article 1). Annually, the Slovenian government publishes a list of what entities are considered public bodies. ‘Information of public character’ means information originating from the work of public bodies and occurring in the form of a document, case, dossier, register, record or documentary material that is created in co-operation with other bodies, or acquired from other persons (article 4).
**Point of departure**

Information of public character is accessible, unless otherwise provided by law.

**Exceptions**

Exceptions on accessibility are listed in article 6 Information act. A public body shall refuse access if the application relates to:

1. Information which, pursuant to the Act governing classified data, is defined as classified for the purposes of public security, national security, confidentiality of international relations or confidentiality of intelligence and security activities of state bodies;
2. Information which is defined as a business secret in accordance with the Act governing companies;
3. Personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data;
4. Information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistics activities;
5. Information from the public archives material which is, in accordance with the Act governing archives material and archives, defined as confidential;
6. Information the disclosure of which would constitute an infringement of the tax procedure confidentiality in accordance with the Act governing tax procedure;
7. Information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanours procedure, and the disclosure of which would prejudice the implementation of such procedure;
8. Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;
9. Information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
10. Information from the document that is in the process of drawing up and is still subject of consultation in a body, and the disclosure of which would lead to misunderstanding of its contents;
11. Information on natural value which, in accordance with the Act governing the conservation of nature, is not accessible to public for the purpose of protection of natural value;
12. Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would lead to disturbances in operations or activities of an body.

Interestingly, article 26 Information Act states that public bodies may refuse a request if it finds the requested information or document to be an exception under article 6 Information Act. If only part of the information falls under an exception, this part shall be removed and the remaining part of the information shall be released (article 7).

Article 6 § 1 of the Act refers to the Classified Information Act (CIA). This Act provides rules on classified information for reasons of public security, defence, foreign affairs, intelligence and security (article 1 CIA). An authorised person may classify information under the conditions and manner specified by the CIA (article 10 CIA). Access to classified information is possible only with permission granted after a security clearance (chapter III CIA).

**Procedural rules**

Applicants may request access to information in writing or orally (article 12 Information Act). The request must indicate the public body where it is being filed, the applicant’s name (including the name of a company or legal entity) and address (article 17 § 1). In the request, the applicant must specify the desired information and the manner of transmittal (consultation on the spot, a transcript, a copy, an electronic record) (article 17 § 2). The applicant is not required to state legal grounds for the request or expressly characterise it as a request for information of public character. From the nature of the request, it follows that such information is of a public character under the Information Act. The public body must consider the request pursuant to the Information Act (article 17 § 3). If these procedural conditions are not met, the public body shall dismiss the request by order (article 19).

Each public body shall appoint one or more officials responsible for the transmission of information of a public character (article 9). These officials immediately decide upon a request, at the latest within twenty working days (article 23). Exceptional circumstances mentioned in article 24 can justify the extending of this period to a maximum of thirty working days. If the public body wholly or partly refuses access to the information, it shall issue a written decision (article 22). This decision must contain an explanation of the grounds for refusal as well as advice on legal remedies.
**Legal remedies**

An applicant has the right to appeal a decision refusing a request to the Commissioner on Access to Information of Public Character (article 27 Information Act). An appeal to a court can be lodged against the Commissioner’s decision (article 31). Public bodies non-compliance with the Information Act can lead to fines of at least SIT 250,000 (article 39).

**Institutional structure**

Since 2003, the Commissioner on Access to Information of Public Character has operated pursuant to articles 27 through 30 Information Act. Under these provisions, the Commissioner only appears competent to decide upon appeals (article 28 § 1).

In 2001, the Ministry of Information Society was established. Its main task was to promote the development and use of information and communications technology throughout Slovenia. The Ministry of Information Society dealt with matters pertaining to informatics and information systems, development of information technology, promotion of an information society and electronic commerce, post and telecommunications traffic, telecommunication links and systems, and innovation. In its broad field of information activities, the Ministry also dealt with the implementation and promotion of the Information Act. In November 2004 the Ministry ceased to exist. The tasks of the Ministry were distributed over different ministries.

**Other characteristics**

The Information Act contains provisions on the active disclosure of information of public character. According to article 8, every public body is obliged to maintain and make public a register of public information. Article 10 obliges public bodies to transmit to the World Wide Web information of public character. This includes consolidated texts of regulations that relate to the body’s activities, with regard to the state register of regulations on the Web, programmes, strategies, views, opinions, studies, and other similar documents relating to the body’s activities, proposals for regulations, programmes, strategies, and other similar documents, all publications and tendering documentation in accordance with regulations governing public procurements, information on administrative services and other information of public character. The scope of this obligation seems to be unlimited, since ‘other
information of public character’ also falls within the ambit of the obligation (article 10 § 6).

According to article 32, the Ministry shall promote and develop access to information of a public character i.a. by informing the public of the means and conditions of access to information and by providing counselling to other bodies on the proper application of the Information Act. Article 37 Information Act obliges public bodies to create an annual report on the implementation of the Information Act. Each year, the government publishes a joint report (article 37 § 3).
**SPAIN**

Legislation on access to documents

- Article 105 (b) of the Spanish Constitution
- Article 37 Act no. 30 on rules for public administration and administrative procedures of 26 November 1992

**Scope**

Article 105 (b) of the Spanish Constitution states that the law shall regulate citizens’ access to administrative files and records, except where they may concern the security and defence of the State, the investigation of crimes and the individual privacy.

This article has led to Act no. 30 on rules for public administration and administrative procedures (Act 30/92). This act provides that citizens have a right to access to records and documents that are part of a file and which are held in the administrative archives in whatever form, be it graphic, audio or visual (article 37 § 1 Act 30/92). The files must pertain to matters that have been concluded at the time of the request; accordingly, preparatory documents are not accessible (article 37 § 1 Act 30/92).

Access to documents containing information on the private lives of individuals is restricted to the persons concerned (article 37 § 2 Act 30/92). Article 37 § 3 grants access to documents with a nominative character that do not contain private information. These documents must be part of implementing legislation and must contain information that may be invoked through the exercise of civil rights. Such documents may be consulted by concerned persons or by third parties who prove a legitimate and direct interest, unless the material is of a disciplinary or penalising nature.

**Point of departure**

All documents are accessible to citizens, unless provided otherwise by law.
**Exceptions**

The right of access may be refused for reasons of public interest, for the protection of third party interests, or when provided for by law. The authority concerned shall give reasons for refusal (article 4 Act 30/92).

The right of access does not apply in the cases listed in § 5:

- to documents containing information on actions undertaken by the Government or the autonomous communities when exercising constitutional responsibilities which are not subject to administrative law;
- to documents containing information on national defence or State security;
- in connection with a criminal investigation, when disclosure of those documents might jeopardise the protection of the rights and freedoms of third parties, or the needs of the investigation being carried out;
- files relating to matters protected by business or industrial secrecy;
- files relating to administrative actions in connection with monetary policy.

Article 37 § 6 refers to situations that are governed by specific provisions, including i.a., access to archives containing classified material, access to documents and files that contain personal medical data, access to documents in the archives of the public administration when those who are trying to access are members of the parliament or are senators, and the consultation of documents housed in the Historical Archives.

**Procedural rules**

The right to access documents must be exercised with due regard to the efficacy of public administration (article 37 § 7 Act 30/92). Individuals must specify which document they want to access, or at least the topic on which they want information.

The right to documents entails the right to receive copies or certifications of the documents whose examination has been authorised by the administration (article 37 § 8).

**Legal remedies**

Refusals can be appealed administratively. The Spanish Ombudsman can also review cases.
Legislation on access to documents

- The Freedom of the Press Act (FPA) of 1766, amended in 1949 and 1976. This act forms – as chapter 2 – part of the Swedish constitution. Specific rules concerning access to official documents are laid down in chapter 2 ‘On the Public Nature of Official Documents’ of the FPA.
- The Secrecy Act of 1980

Scope

Article 1 of chapter 2 of the FPA reads:

Every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.

Although this article suggests otherwise, access to information is not restricted to ‘Swedish citizens’. Article 4 of chapter 14 of the FPA states that foreign nationals are equated with Swedish citizens, except as otherwise laid down in the FPA.

An ‘official document’, according to article 3 of chapter 2 of the FPA, is any written or pictorial matter or recording which may be read, listened to, or otherwise accessed through technical aids. A document is ‘official’ if it is held by a public authority, and if it is received or drawn up by such an authority. The Riksdag and local government assemblies vested with decision-making powers are public authorities (article 5). The government or local government assemblies have the ability to state by law that a document should remain official even where it is transferred to a private body which assumes public authority (article 17). These private bodies are equated with public authorities when applying articles 12 through 16, which lay down procedural rules. Internal documents (for example memoranda, preliminary outlines or drafts of decisions) that have not been dispatched by a public authority are not considered to be ‘official documents’, unless they have been filed and registered (article 9).

Point of departure

The Freedom of the Press Act suggests that openness is the rule and secrecy is the exception.
Exceptions

The exceptions are laid down in article 2, chapter 2 FPA:

The right of access to official documents may be restricted only if restriction is necessary having regard to:

1. the security of the Realm or its relations with another state or an international organisation;
2. the central fiscal, monetary or currency policy of the Realm;
3. the inspection, control or other supervisory activities of a public authority;
4. the interest of preventing or prosecuting crime;
5. the economic interest of the public institutions;
6. the protection of the personal or economic circumstances of private subjects;
7. the preservation of animal or plant species.

This limited list of – initially discretionary – restrictions is formulated in a general way. Before restrictions can be invoked, they must ‘be scrupulously specified in a provision of a special act of law, or, if this is deemed more appropriate in a particular case, in another act of law to which the special act refers’ (article 2 § 2). The Riksdag or the government may be empowered to permit the release of a particular document, as regards the circumstances of a case (article 2 § 3). The most important act in this respect is the Secrecy Act of 1980. This Act distinguishes between absolute and relative secrecy. Absolute secrecy means that access to documents is denied from the moment the relevant interest applies. However, the majority of the secrecy provisions are subject to a ‘requirement of damage’. This harm test implies that the authority concerned must ask itself, every time someone asks for access to an official document, whether disclosure would truly harm the interest that is being protected by confidentiality. Time limits on secrecy can vary from two to seventy years, depending on the protected interest.

Procedural rules

Article 12, chapter 2 FPA reads:

An official document to which the public has access shall be made available on request forthwith, or as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such a form that it can be read, listened to, or otherwise comprehended.
If part of a document contains classified material, the rest of the document is made available to the applicant in the form of a transcript or copy (article 12). If disclosure presents serious difficulties for the public authorities, the obligation to disclose ceases to exist (article 12). Applicants are entitled to obtain a copy or a transcript of the document, in return for a fixed fee (article 13). This request must be dealt with promptly (article 13). Public authorities are not obliged to disclose materials recorded for automatic data processing in any other form than a printout (article 13). Authorities are not permitted to inquire into a person’s identity or into the purpose of the request, except insofar as such inquiry is necessary to enable the authority to judge whether there is any obstacle to the release of the document (article 14).

**Legal remedies**

An applicant is generally entitled to appeal a negative decision on a request to access official documents. Appeals are usually presented to an administrative court of appeal. An appeal against a decision of the latter can be lodged with the Supreme Administrative Court. Decisions by the Riksdag and the government cannot be appealed (article 15). An appeal against a decision by a minister is lodged with the government (article 15 FPA). Complaints can also be made to the Parliamentary Ombudsman. Decisions of the Ombudsman are, however, not binding.

**Institutional structure**

There are no special supervisory authorities in the field of access to documents.

**Other characteristics**

Public authorities are obliged to register documents that they receive or create (chapter 15 of the Secrecy Act). Some exceptions to this obligation exist. Documents that are of obviously little importance to the authorities’ activities are exempted. Documents that are not secret and are kept in such a matter that it can easily be ascertained whether they have been received or drawn up by the authority are also exempted. Exceptions also apply to documents that the authority has large quantities of, documents that the government has exempted from the registration requirement according to special provisions, and Electronic Data Processing (EDP) recordings which the authority has by reason of another authority having already registered them in a common EDP register.
* UNITED KINGDOM *

Legislation on access to documents

– Freedom of Information Act of 30 November 2000
– Freedom of Information (Scotland) Act of 28 May 2002

Scope

The Freedom of Information Act 2000 (FOIA) applies to the whole of the United Kingdom (UK) except for the public authorities of Scotland. Scotland has its own Freedom of Information Act. Below, the FOIA of the UK is described. With regard to the Scottish Freedom of Information Act, this inventory will only point to striking differences with the FOIA of the UK.

According to section 1 FOIA any person making a request for information to a public authority is entitled

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

‘Public authority’ means bodies, persons, or holders of an office listed in Schedule 1 or designated by order of Secretary of State (section 3 § 1 FOIA). The twenty-page list in Schedule 1 describes public authorities. The Secretary of State, through an amending order, may extend the list (section 5). Publicly owned companies are also considered public authorities (section 3 § 1 and 6). Information is held by a public authority if it is held by the authority otherwise than on behalf of another person, or if it is held by another person on behalf of the authority (section 3 § 2).

Section 87 states the date on which the FOIA will enter into force. Some sections enter into force on the day that the FOIA is passed, some at the end of a two-month period and others only after five years or on a such day before the end of that period as the Secretary of State may by order appoint. Section 1 and the sections containing the exceptions belong to the latter. These sections will apply on 1 January 2005, the date on which the whole FOIA will enter into force. Until that time, the voluntary Code of Practice on Access to Government Information of 1994 applies.
**Point of departure**

All information held by public authorities is accessible, unless exceptions provided by law apply.

**Exceptions**

An extensive list of exceptions is provided for in Part II (sections 21 to 44) of the FOIA. According to section 2, the grant of access to information does not apply if a) information falls within the ambit of mandatory exemptions, or b) the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The sections containing mandatory exceptions are exclusively listed in section 2 § 3:

- Section 21, information accessible to applicant by other means;
- Section 23, information supplied by, or relating to, bodies dealing with security measures;
- Section 32, court records;
- Section 34, parliamentary privilege;
- Section 36, prejudice to effective conduct of public affairs (this section is absolute so far as relating to information held by the House of Commons or the House of Lords);
- Section 40 § 1 and 2, personal information, (the absolute character of § 2 is subject to certain conditions);
- Section 41, information provided in confidence;
- Section 44, prohibitions on disclosure by or under any enactment or community law.

Apparently, all the other exceptions are subject to the balancing of interests. The remaining exceptions are:

- Section 22, information intended for future publication;
- Section 24, national security;
- Section 26, defence (h);
- Section 27, international relations (h);
- Section 28, relations within the UK (h);
- Section 29, the economy (h);
- Section 30, investigations and proceedings conducted by public authorities;
- Section 31, law enforcement (h);
- Section 33, audit functions (h);
- Section 35, formulation of government policy;
- Section 36, prejudice to effective conduct of public affairs (except for information held by the House of Commons or the House of Lords, see above) (h);
- Section 37, communications with Her Majesty, etc. and honours;
- Section 38, health and safety (h);
- Section 39, environmental information;
- Section 40, personal information (except for § 1, and § 2 under certain conditions, see above);
- Section 42, legal professional privilege;
- Section 43, commercial interests (h);

Public authorities do not have to comply with requests for information that are vexatious or where a request for information is made by the same person with regard to the same information, after the previous request was complied with (section 14).

**Procedural rules**

A request for information must be made in writing, must contain the name of the applicant and an address for correspondence and must describe the information requested (section 8 FOIA). The public authority concerned can – in accordance with a regulation made by the Secretary of State – charge a fee (section 9). A ‘fees notice’ must be given to the applicant. The public authority is not obliged to handle a request as long as the applicant has not paid the fee.

The public authority concerned must comply with a request promptly and in any event not later than twenty working days after the receipt of the application (section 10). The public authority shall so far as reasonably practicable, give effect to the preference expressed by the applicant for the way in which the requested information is communicated (section 11). Public authorities have the duty to provide advice and assistance (section 16). In case of refusal, the authority shall give the applicant a notice which specifies the exemption in question and states why the exemption applies.

**Legal remedies**

Any person may apply to the Information Commissioner for a decision whether a request has been dealt with by a public authority in conformity with the FOIA (section 50 § 1). The Commissioner can decide that the public authority has failed to fulfil its obligations under the FOIA and can specify which steps the authority must
take for complying with the requirements (section 50 § 4). This decision can have the character of an ‘enforcement notice’, which is legally binding (section 52). However, according to article 53 § 2, the enforcement notice shall cease to have effect if the accountable person in relation to the authority gives the Commissioner a certificate signed by him stating that he or she has on reasonable grounds formed the opinion that there was no failure to comply with the duty to make the information concerned available. In case of non-compliance with the enforcement notice, the Commissioner can bring the case before a court (section 54). When the Commissioner takes a decision, the applicant or the public authority may appeal to the Information Tribunal (section 57). Decisions of the Information Tribunal are subject to appeal on points of law to the High Court of Justice of England, the Court of Session of Scotland, or the High Court of Justice in Northern Ireland (section 59).

Institutional structure

By virtue of section 18 FOIA, the former Data Protection Commissioner is renamed Information Commissioner and the former Data Protection Tribunal is renamed the Information Tribunal. The Information Commissioner oversees, promotes and enforces the FOIA. On its own initiative, the Commissioner can give recommendations to public authorities (section 48). Competence with regard to individual complaint is described above. Annually, the Commissioner submits a general report on the exercise of its function to each House of Parliament (section 49).

Other characteristics

According to section 19 FOIA, every public authority is under the duty to adopt and maintain a scheme that relates to the authority’s publication of information. Such a scheme must be approved by the Commissioner. A publication scheme must specify classes of information which the authority publishes or intends to publish, specify the manner in which information of each class is, or is intended to be, published, and specify whether the material is, or is intended to be, available to the public free of charge (section 19 § 2). The powers of the Commissioner with regard to publication schemes are laid down in section 20.

Part VI of the FOIA contains rules concerning historical records. Historical records are records that are more than thirty years old. After the lapse of the thirty-year period, some of the exceptions may no longer be applicable (section 63 to 65).
Other activities in the field of transparency

One of the NGO’s active in the field of freedom of information is the Campaign for Freedom of Information (CFI). This NGO campaigns against unnecessary official secrecy. The CFI monitors existing access rights by publishing reports and provides practical guides to help people use their rights.208

Freedom of Information Act of Scotland

The Scottish FOIA is based on the UK FOIA and is considered to provide more transparency than the UK act.209 Some differences exist in the exceptions category. For example, the Scottish FOIA requires a (substantial) harm test in the case of information concerning national security and defence (section 31 FOIA), where the UK FOIA does not. Another difference between the two acts is the possibility for public authorities to give a certificate to the Commissioner, through which a Commissioner’s decision ceases to have effect. In the Scottish FOIA, only the First Minister of the Scottish Executive is granted this power.

Like the UK Act, the Scottish FOIA will enter into force on 1 January 2005. The Scottish system has its own Scottish Information Commissioner.210
Notes

1 Both authors work at the Faculty of Law at the University of Leiden. H.R. Kranenborg is a PhD-fellow in the European Law division of the Public Law department; he is currently working on a thesis concerning the relationship between access to documents and protection of personal data in Europe. W. Voermans is professor of Constitutional and Administrative Law in the department of Public Law. His current field of research expertise includes legislative studies, administrative and constitutional law. The authors would like to thank Angelynn Meya for assisting them with copy-editing. A digital version of this report, including all the hyperlinks in the footnotes, can be found at http://www.publiekrecht.leidenuniv.nl/index.php3?m=155&c=238.

2 The report was finalized on 12 January 2005. Developments in national law are processed up to 1 January 2005.

3 Adjustments, suggestions and comments are still welcome via e-mail: h.r.kranenborg@law.leidenuniv.nl.


6 The Århus Convention can be found at http://www.unece.org/env/pp/documents/cep43e.pdf.


8 See § 5.

9 The answers of the representatives of Austria, Belgium, Estonia, Finland, Germany, Hungary, Italy, Latvia, Malta, Poland, the Slovak Republic and Slovenia are processed.


12 This document can be found at http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm.

13 The results of the questionnaire, known as document DH-S-AC(2004)001 add, and other information on this topic are available at the secretariat of the Steering Committee, which can be reached via e-mail at mikael.poutiers@coe.int. Below, the results of the Council of Europe questionnaire are referred to as ‘the results of the Council of Europe questionnaire’.

14 OJ 2001, L 145/43.


16 Belgium, Estonia, Finland, Greece, Hungary, the Netherlands, Poland, Portugal, Slovenia and Sweden. In the case of Slovenia, only individuals with a well-founded legal interest can invoke this right.

17 Secondary legislation is understood here as subordinate legislation, i.e. not laid down in a constitution or a parliamentary act.

18 France, Ireland, Italy, Lithuania, the Slovak Republic and Spain. In the case of Italy, only individuals with a personal concrete interest have the right to access administrative documents.

19 See for example France and Spain. In Finland, preparatory documents only fall within the scope of the law when these documents contain such information that they are to be archived in accordance with national legislation.

20 Other countries having special rules on internal documents are amongst others Denmark, Estonia, Latvia and Sweden.
See also Finland.

See for instance Denmark.

See for instance Poland, the Slovak Republic and Slovenia.

See for instance Greece and Spain.

See Estonia, Finland, France, Hungary, Ireland, Italy, Lithuania, Poland, Portugal, the Slovak Republic and Sweden.

See for instance the Czech Republic and Estonia. In Denmark, the possibility of extending the scope to publicly funded entities is delegated to concerned ministers.

See for instance Lithuania.

See for instance Finland.

See for instance Estonia.

On the distinction between active and passive disclosure of information we refer to § 8.

In addition, Denmark and Sweden make use of a kind of necessity test, which requires that access be denied only when secrecy is essential or necessary for the protection of certain interests.

See for instance the Czech Republic.

See for instance Hungary.

See for instance Belgium, Greece, Ireland and the Netherlands.

See the Czech Republic, Ireland and the Slovak Republic.

See for instance some Länder in Germany and also the new Federal Information Act of Germany.

As far as we know, these acts exist at least in the Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, the Slovak Republic, Slovenia and Sweden. At this point, we would like to recall the discussions at the EU level surrounding the well-known ‘Solana’-decision that resulted in article 9 of Directive 1049/2001.

See for instance Estonia.

See for instance Italy.

See for instance Estonia.

An example of the latter can be found in Lithuania.

See Belgium respectively Austria, Ireland and the UK.

See for instance the Czech Republic, Denmark and Ireland.

See the Introduction at p. 6.

In Austria, the possibility of prolonging is not subject to a time restriction.

See respectively Denmark, Poland, Slovenia and the UK.

See the Czech Republic and Latvia.

See Estonia, some Länder of Germany, the Netherlands and the Slovak Republic.

See for instance the Czech Republic and the Slovak Republic.

See France and Greece.

See amongst others France, Italy and Slovenia.

Generally, the national Ombudsman also has competence within the field of access to information. Its decisions, however, always have a non-binding nature. In this analysis, we restrict ourselves to describing the authorities specially equipped with the task of supervision in the field of access to information.

See for instance Finland and Sweden.

Besides these eight countries, Lithuania has a general Administrative Disputes Commission and four German Länder have appointed a Commissioner for Data Protection and Access to information.

See for instance Hungary and the Slovak Republic.

See for instance Ireland.

See for instance Latvia and Slovenia.

An English translation of the Federal Constitutional Law can be found at http://www.ris.bka.gv.at/info/bvg_eng.pdf.

The German text of this Act can be found via http://www.ris.bka.gv.at/nol/.

The German texts of these acts can be found via http://www.ris.bka.gv.at/nol/. In the following only the Federal Information Act will be discussed.

See for a survey (in Dutch) on legislation on access to official documents in Belgium:


A Dutch text of this Act can be found via http://www.juridat.be/cgi_loi/legislation.pl.
A Dutch text of this Act can be found via http://users.online.be/~fschram/vind.html.
Dutch texts of this Acts can be found via http://users.online.be/~fschram/vind.html.


An English translation of the Charter can be found at http://www.psp.cz/cgi-bin/eng/docs/laws/listina.html.


Two diverging English translations can be found at http://www.env.cz/www/cenia.nsf/c/d19324a65433f5281256e270050d5f2?OpenDocument and http://home.online.no/~wkeim/files/foia-czech.htm, both translations are used.


A moderate English translation of this Act can be found at http://aabenhedskomite.homepage.dk/07love/forvaltningsloven_paa_engelsk.htm.

An English translation of this Act can be found at www.privacyinternational.org/countries/denmark/dk-foi-85.doc.


An exception for documents prepared in connection with consideration of proposals for adoption by the EC or relating to interpretation and construction of or compliance with EC-rules, was deleted.


An unofficial English translation of the Finnish Constitution can be found at http://www.finlex.fi/pdf/saadkeaan/E9990021.PDF.

An English translation of this Act can be found at http://www.om.fi/1184.htm.


The English text of this act was provided by the Finnish representative in answer to the questionnaire.

The Government report can be found in Finnish and in Swedish at the website of the Finnish Parliament http://www.eduskunta.fi.

An unofficial translation can be found at http://www.finlex.fi/pdf/saadkeaan/E9991030.PDF.

These can be found at the website of the Finnish Ministry of Justice http://www.om.fi/131.htm.
See the Guidelines for Government Communication to be found on the website of the Prime Minister's Office [http://www.government.fi/vn/liston/vnk.lsp?r=1069&amp;en&amp;old=1100] and see the Civil Participation Policy Programme at [http://www.government.fi/vn/liston/base.lsp?r=40242&amp;en]. The consolidated text of Act no. 78-753 with regard to access to administrative documents is translated in English and can be found at [http://www.cada.fr/uk/center2.htm]. The consolidated text in French is available at [http://www.legifrance.gouv.fr/texteconsolide/PPEAV.htm]. The French text of Act no. 2000-321 can be found via [http://www.legifrance.gouv.fr].

The very informative website of the CADA can be found at [http://www.cada.fr]. The German text can be found via [http://www.gesetze.2me.net/vwvf/]. The German texts of these acts can be found at [http://www.hfy-speyer.de/hill/akteneinsicht.html#nationale%20gesetze]. A press release can be found at [http://www.datenschutzzentrum.de/material/themen/presse/20041217-ifg.htm].

This information is distracted from the German answers to the questionnaire. In the following, all the information on the proposed Federal Information Act is distracted from these answers. An inaccurate proposal of the new Freedom of Information Act (originating from 2000) can be found at: [http://www.transparente-verwaltung.de/ifgbund.pdf].

See for an extensive comparison and for other information about the German access rules S. Frenzel, Zugang zu Informationen der deutschen Behörden. Mit einander Dokumentation aus- und inländische Rechtsquellen, 2000, found at [http://www.hfy-speyer.de/publ/frenzel131.pdf]. This refers to courts and the Public Attorney’s Office only insofar as they deal with administrative tasks. See the German results of the Council of Europe questionnaire, p. 78. See the German results of the Council of Europe questionnaire, p. 81. An English translation can be found at [http://confinder.richmond.edu/greek_2001.html]. An English translation can be found at [http://www.gspa.gr/inetdhes/EUP/procedure_code.doc]. A German translation can be found at [http://www.uni-frankfurt.de/~sobotta/greece.htm]. General information about this law is distracted from the Report of the European Commission of 9 October 2000, p. 9-11.

As regards personal data, disclosure is also prohibited if access to documents is mainly pursued for private interests. See the German results of the Council of Europe questionnaire, p. 81. An English translation can be found at [http://www.gespisametropolis.gr/programs/library/hungary_secrecy_95.pdf]. See on this topic and for a general analysis of freedom of information in Hungary László Majtényi, Freedom of Information in Hungary, to be found at [http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006566.pdf], pp. 145-150.

An English translation of these sections of the Criminal Code can be found at [http://abiweb.obh.hu/dpc/legislation/1978_IV_177a.htm]. The website of the Data Protection Commissioner can be found at [http://abiweb.obh.hu/dpc/index.htm]. Article 24 Act LXIII.

See the website of the Ministry of Informatics and Communication at [http://en.ihm.gov.hu/]. To be found in Hungarian at [http://www.ihm.gov.hu/infozabadsag/konferencia].

A separate act on data protection exists since 1988. This Data Protection Act also contains rules on access to personal information. Both acts can be invoked by individuals. The Data Protection Act (including the amendment of 2003) can be found at http://www.dataprivacy.ie.

See M. McDonagh, The Honeymoon is over: Ireland rows back on FoI, in Freedom of Information Review, October 2003, p. 78-84.

See for a comparison between the old and the new text McDonagh, ibid., and M. McDonagh, Freedom of Information in Ireland: Five Years On, posted on 22 September 2003 on freedominfo.org, to be found at http://www.freedominfo.org/reports/ireland/ireland.pdf.

Section 2 § 1 FOIA.


Section 6, subsections 4 and 5 FOIA.

See also McDonagh (September 2003), p. 8.

This possibility was introduced by amendment 2003, see on this McDonagh (September 2003), p. 12.

See McDonagh (September 2003), p. 6.

The website of the Office of Information Commissioner can be found at http://www.oic.gov.ie/.

The reports can be found at the website of the Office of Information Commissioner.


The annual reports can be found at http://www.foi.gov.ie.

An English translation can be found at http://www.governo.it/Presidenza/DICA/documentazione_accesso/normativa/legge241_1990_eng.html.

An English translation can be found at http://www.governo.it/Presidenza/DICA/documentazione_accesso/normativa/dpr352_1992_eng.html.

An English translation can be found at http://www.fas.org/irp/world/italy/intellaw.html.

An Italian text of this act can be found via http://www.governo.it/Presidenza/DICA/documentazione_accesso/normativa.html.

A Latvian text of this law can be found at http://www3.lrs.lt/cgi-bin/preps2?Condition1=128107&Condition2=.

An English translation of this law can be found at http://www3.lrs.lt/eng/legislation/pdp/.

A Lithuanian text of this regulation can be found at http://www.izm.gov.lv/default.aspx?tabID=3&id=759.

An English translation of the Constitution can be found at http://www.vescc.com/constitution/lithuania-constitution-eng.html.

An English translation of this law can be found at http://www.rtk.lt/downloads/PIP_20040501.doc.

A Latvian text of this law can be found at http://www3.lrs.lt/cgi-bin/preps2?Condition1=102722&Condition2=.

A Lithuanian text of this law can be found at http://www3.lrs.lt/cgi-bin/preps2?Condition1=128107&Condition2=.

The Commission’s website can be found at http://www.vagk.lt/eng/index.php.

See Aquilina (2003).


See in general the introduction on p. 3.


An English translation of the Dutch Constitution can be found at http://www.oefre.unibe.ch/law/icl/nl00000_.html.

An English translation of the Act can be found at http://www.aip-bg.org/documents/wob.htm.


An English translation of this Act can be found at http://home.online.no/~wkeim/files/poland-foia.htm.

An English translation of this Act can be found at http://faculty.maxwell.syr.edu/asroberts/foi/library/poland_secrecy.pdf.

Disclosure of public information will take place by publishing it in the Public Information Bulletin (Biuletyn Informacji Publicznej). This Bulletin can be found at http://www.bip.gov.pl/. For an extensive analysis of the Polish Freedom of Information Act in relation to European legislation and some national legislation see the legal opinion prepared by J. Tallineau, *European Standards on access to Public Information*, 3 May 2003, to be found at http://www2.ukie.gov.pl/HLP/files.nsf/0/5C246E0FB841CE45C1256E8400369D5A/$file/039_Access_to_public_information_ENG.pdf.

Article 6 § 3 Information Act.

Both Annexes can be found at http://faculty.maxwell.syr.edu/asroberts/foi/library/poland_secrecy.pdf.

An English translation of the Act can be found via http://www.cada.pt.

This information is taken from the general information on access to administrative documents in Portugal provided for by the Committee of Access to Administrative Documents. This information can be found at http://www.cada.pt/paginas/acessoing.html.

CADA's website can be found at http://www.cada.pt/.

An English translation of the Slovak Constitution can be found at http://www.oefre.unibe.ch/law/icl/lo00000_.html.

An English translation of this Act can be found at http://www.info211.sk/zakon_en.php.

An English translation of this Act can be found at http://www.nbusr.sk/htm/act_241_draft.rtf.

183 Article 11 § 1 Act 211/00.
184 See the website of Aliancia Fair-Play in Slovakian at http://www.fair-play.sk/index.php.
185 An English translation of the Constitution can be found at http://www.oefre.unibe.ch/law/ic/l/sioooooo_.html.
187 An English translation of the Act can be found at http://nato.gov.si/en/documents/classified-ifo-
aet/.
188 The Commissioner’s website can be found at http://www.dostopdoinformacij.si/index.php?id=149.
189 The Ministry of Information Society website can still be found at http://www.uvi.si/eng/slovenia/publications/facts/information/.
190 To be found in Slovenian at http://193.2.236.12/mid/mid.nsf/V/XB8C7C4223B9B6B7CC1256E69023C139D/$file/Skupno_letno_por-
191 An English translation of the Constitution can be found at http://www.spainemb.org/information/constitucionin.htm.
192 The Spanish text of this Act can be found at http://noticias.juridicas.com/base_datos/Admin/l30-
193 An English translation of this Act can be found at http://www.riksdagen.se/english/work/fundamental/press.asp.
194 The Swedish text of this Act can be found at http://www.notisum.se/rnp/SLS/LAG/19800100.HTM.
196 Information about the Secrecy Acts is extracted from ‘Public Access to Information and Secrecy with
Swedish Authorities’, which is published by the Ministry of Justice of Sweden, 2000, to be found at:
197 Absolute secrecy applies, for example, to documents held by the Swedish tax authorities. See Österdahl
200 The Ombudsman’s homepage can be found at http://www.jo.se/default.asp?SetLanguage=en.
203 To be found at http://www.scotland-
204 To be found at http://www.cfoi.org.uk/copertext.html.
205 Exceptions requiring a harm test are indicated by ‘(h)’.
206 The Information Tribunal’s website can be found at http://www.dca.gov.uk/foi/inftrib.htm.
207 The Commissioner’s website can be found at http://www.informationcommissioner.gov.uk/.
208 The CFI’s very informative website can be found at http://www.cfoi.org.uk/.
210 The Scottish Information Commissioner’s very informative website can be found at http://www.itspublicknowledge.info.
List of Participants

België (Belgium)

Federal Public Service, Home Affairs
Frankie Schram
T. 0032 32041059
M. Frankie.schram@rrn.fgov.be;
M. Frankie.schram@law.kuleuven.ac.be
M. Frankie.schram@ua.ac.be

D-G European Affairs and Co-ordination
Jacqueline De Hanscutter
T. 0032 2/501.85.01
E. jacqueline.dehanscutter@diplobel.fed.be

Cyprus (Cyprus)

Permanent Representative to the EU
Stavros Papaggianneas
T. 0032 26500625
M. chypre.pio.bxl@skynet.be

Denemarken (Denmark)

Department of European Politics
Mikkel Hagen Hess Head of Section
T. 0045 25267590
M. mikhes@um.dk

Estland (Estonia)

e-Governance Academy Tallin
Ivar Tallo Director
T. 00372 6313792
M. ivar.tallo@ega.ee
Anneli Külaots
T. 00372 6280181
M. anneli.kulaots@just.ee

Permanent Representative to the EU
Marki Tihhonova
T. 0032 22274321
M. marki.tihhonova@eu.estemb.be

Finland (Finland)

Ministry of Justice
Kirsi Salo
T. 00358 916067751
M. kirsi.salo@om.fi

Permanent Representation to the EU
Marko Ruonala
T. 0032 47572072
M. marko.ruonala@formin.fi

Frankrijk (France)

J.P. Lerendu
T. 0033 142758338
M. jpl.lerendu@cada.pm.gouv.fr

Permanent Representation to the EU
Aurélie Royet-Gounin Conseillère de presse adjointe
T. 0032 22298284
M. aurelie.royet-gounin@diplomatie.fr

Griekenland (Greece)

Permanent Representation to the EU
Angelos Avgoustidis
T. 0032 222350374
M. avgoustidis@gpo.be
Ioannis Panagiotopoulos
T. 0030 2103696351
M. ioannis.panagiotopoulos@minpress.gr

Hongarije (Hungary)

Ministry of Justice
Csaba Gáli
T. 0036 304085757
M. galics@i-m.hu

Prime Minister’s Office Department of EU Communication
Györgyné Irina Pintér
T. 0036 14413323
M. Judit.Regoci@MEH.HU

Ierland (Ireland)

FOI Central Policy Unit, Department of Finance
Caitriona O’Brien
T. 00353 16045454
M. caitriona.obrien@finance.gov.ie

Italië (Italy)

Ministero Affori Esteri
Valentina Savastano
T. 0039 0636915152
M. valentina.savastano@esteri.it
Letland (Latvia)

Alda Vanaga
T. 00371 7016393
M. alda.vanaga@mfa.gov.lv

Luxemburg (Luxemburg)

Permanent Representation to the EU
Danièle Bisdorff
T. 0032 27375619
M. daniele.bisdorff@mae.etat.lu

Ministry of Foreign Affairs
Marcelle Mangen

Malta (Malta)

Cabinet Office
Cecilia Attard Director
T. 00358 21224903
M. cecilia.attard@gov.mt

Nederland (The Netherlands)

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Harke Heida Directeur Constitutionele Zaken en Wetgeving
T. 070 4266057
M. harke.heida@minbzk.nl

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Peter Stolk Juridisch Adviseur
T. 070 4266823
M. peter.stolk@minbzk.nl

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Aida Tunovic_ Rijkstraineer
T. 070 426 8564
M. aida.tunovic@minbzk.nl
Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Marga Groothuis Juridisch medewerker
T. 070 4268376
M. marga.groothuis@minbuza.nl

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Jon Schilder Senior Juridisch medewerker
T. 070 4268717
M. jon.schilder@minbzk.nl

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Jan-Willem Severijnen Senior Juridisch medewerker
T. 070 4266792
M. jan-willem.severijnen@minbzk.nl

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties
Jan van Schagen Senior Juridisch medewerker
T. 070 4266797
M. jan.schagen@minbzk.nl

Ministerie van Buitenlandse Zaken
Eveline Molier
Esther Loeffen
M. eveline.molier@minbuza.nl

Ministerie van Buitenlandse Zaken
Edo Gillissen Expert over Openbaarheid van Documenten

Ministerie van Buitenlandse Zaken
Peter van Velzen Expert Openbaarheid van Documenten

Ministerie van Sociale Zaken en Werkgelegenheid
Marcel van de Wetering Expert Openbaarheid van Documenten

Raad van State
Jan Kees Wiebenga
Universiteit van Tilburg
Sophie van Bijsterveld Senior Lecturer
T. 013 4662183
M. s.c.vbijsterveld@uvt.nl

Universiteit van Leiden / Staatsrecht
Prof. Wim Voermans
M. w.j.m.voermans@law.leidenuniv.nl

Universiteit van Leiden / Staatsrecht
Herke Kranenburg

Oostenrijk (Austria)

Federal Ministry for Foreign Affairs, European Law Department
Tünde Fülöp-Grabner
M. sonja.rosenberger@bmaa.gv.at

Georg Schnetzer
M. sonja.rosenberger@bmaa.gv.at

Polen (Poland)

Permanent Representation to the EU
Zbigniew Gniatkowski
T. 0048 27777268
M. zbigniew.gniatkowski@pol-mission-eu.be

Portugal (Portugal)

Permanent Representation to the EU
Ana Oliveira e Silva
T. 0032 22864231
M. aos@reper-portugal@be
Slovenië (Slovenia)

Commissioner for Access to Public Information
Natasa Pirc Musar
T. 00386 14788365
M. natasa.pirc@gov.si

Slowakije (Slovak Republic)

Permanent Representation to the EU
Marta Domokova
T. 0032 27436807
M. domokova@pmsreu.be

Igor Pokojny
T. 00421 259783625
Igor_Pokojny@foreign.gov.sk

Tsjechië (Czech Republic)

Ministry of Foreign Affairs, Internal Market
and Related Policies Department
Olga Bircakova Head of Unit
T. 00420 2224182482
M. olga_bircakova@mzv.cz

Ministry of Foreign Affairs
Alice Soukupova
M. alice_soukupova@mzv.cz

Verenigd Koninkrijk (United Kingdom)

Permanent Representation to the EU
Hazel Cameron
T. 0032 22828932
M. hazel.cameron@fco.gov.uk
Foreign and Commonwealth Office
Catherine Duncan Legal Advisor
T. 0044 2070083054
M. catherine.duncan@fco.gov.uk

Zweden (Sweden)

Permanent Representation to the EU
Anders Ericson
M. anders.j.ericson@foreign-ministry.se

Johan Wilhelmsson
T. 0032 22895674
M. johan.wilhelmsson@foreign.ministry.se

Raad van de Europese Unie (Council of the European Union)

Hans Brunmayr
T. 0032 22859197
M. hans.brunmayr@consilium.eu.int

Council Legal Service
Bart Driessen
T. 0032 477455073
M. bart.driessen@consilium.eu.int

Vincenzo Le Voci
T. 0032 27325684
M. vincenzo.levoci@consilium.eu.int

CS – DG F: Press, Communication and Transparency
Jakob Thomsen
T. 0032 22859417
M. jakob.thomsen@consilium.eu.int

CS - DG Justice and Home Affairs
Wouter van de Rijt
M. wouter.vanderijt@consilium.eu.int
Europese Commissie

Secretariat-General of the Commission
Marc Maes
T. 0032 22990652
M. marc.maes@cec.eu.int

Europees Parlement (European Parliament)

Michael Cashman Member of European Parliament
T. 0032 4544209 / 0032 0269524
M. mcashmanmep@yahoo.com

Maria Caus Galves
T. 0032 22844548
M. mcaus@europarl.eu.int

Brigitte Nouaille-Degorce
M. bnouaille@europarl.eu.int