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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

TRANSPARENCY AND ACCESS TO INFORMATION

NOTE

Abstract :

A critical appraisal of current policies in the EU and selected national systems

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Preface

Most Western societies have seen a strong trend over the past 10 to 20 years towards more transparency of public authorities, including parliaments, in their relations with citizens. In some Nordic countries, openness of political institutions and administrations has a long tradition, in other EU Member States the new trend ran against longstanding practices, at least in the beginning. Nowadays, it has become a broad and inevitable development in the European Union and in most other democracies, despite the fact that, in certain situations, a case can also be made for at least temporary protection of decision-making processes (e.g., to make compromises between the negotiating parties easier). A fine balance of openness versus confidentiality will sometimes be necessary to achieve progress in political settlements.

Two reasons are often given by transparency advocates for the necessity to create open administrations and public authorities:

- transparency is one of the most effective means to combat all forms of self-interested behaviour of decision-makers. Non-governmental organisations (NGOs) have demonstrated consistently that governments which rate high on transparency measures also have low corruption scores;
- more generally, transparency is becoming a requirement for legitimate government. If citizens are able to scrutinise the preparation of democratic decisions over all stages of the political process they will develop the confidence and trust necessary for the proper functioning of representative democratic government.

At the European level, the latter question is even more acute than in a nation state framework because citizens' emotional and intellectual allegiances still lie primarily with their country. In the wake of the debate about its "democratic deficit", now transformed into a debate on "European governance", the European Union has, not without reason, become very active in the field of access to documents, consultation of civil society and transparent legislation. Commission, Parliament and Council (when acting as legislator) have become more open to the public. The accession of Member States with a tradition of openness has accelerated this process since 1995.

The purpose of this paper is to provide an assessment of how the EU compares with some selected national systems, to take stock of the present situation of EU transparency rules, looking particularly at the regulations governing access to documents, and, finally, to present some ideas and observations which may give rise to proposals for reform.

The study was requested by the chair of the Committee on Constitutional Affairs, in October 2003. Preceding versions of the text were at the disposal of the rapporteur responsible for this dossier.

The text was completed in February 2004.

1. Information Acts and Access to Documents in selected national systems

1.1. Introduction

Since 1766, when Sweden passed the first law on freedom of information[1], the fight for disclosure of and access to official documents has been an uphill battle against the secretive culture of most public administrations. It seems, however, that integration in the European Union has induced most Member States to follow the examples of leading Nordic countries and, to a certain extent, the United States. Since the 1970s, laws on access to documents or freedom of information have been introduced in practically all of these countries. Recent evolutions within the EU institutions have pushed them further to improve and extend their legislation. Moreover, in 2002, the Council of Europe EU has issued a recommendation to Member States regarding access to public documents[2].

The advance of electronic information technology has been a second reason which has both obliged and helped many countries to open up their legislative and administrative activities. Computerised registers and archives have made access to documents much easier and user-friendly. Most governments and parliaments have created web sites providing online access to legislation and documents. In the United States, as in other major countries, a multiplicity of sites helps to apply for records and provides disclosed files. In Sweden, access to electronic information can even be requested on the spot, consulting official files directly on authorities' computers.

Nevertheless, a wide variety of methods and rules emerges when comparing laws and regulations of some selected countries. One important distinction opposes nations coming from a rather secretive tradition to those which have long been accustomed to a certain degree of openness. The first group comprises Spain and France (in many respects Germany, too), where transparency seems to take longer to become rooted in everyday reality. These countries are still ambiguous in their approach to transparency: exemptions are broader than in the most open countries and citizens are less aware of their rights. On the other hand, Sweden and the United States, as well as some German *Länder*, are good examples of transparency where confidentiality is the exception and citizens have the right, not only the possibility, to have access to many categories of documents.

In this section of the study, the analysis will be presented in two parts:

- firstly, a horizontal overview of the main issues underlying freedom of information (FOI) laws or similar provisions is given, based on the systems of the five countries mentioned above;
- the second part briefly describes the constitutional and legal instruments used in these five countries.

[1] Freedom of the Press Act

[2] Recommendation Rec(2002)2 of the Council of Ministers to the Member States on access to public documents.

1.2. Main issues

Overall, most FOI laws around the world are broadly similar. In part, this is because only a few countries' laws have been used as models. The United States Freedom of Information Act (FOIA) has probably been the most influential example. Canada's and Australia's laws have been copied and adjusted by countries based on the common law tradition. The most basic feature of FOI laws is the ability for individuals to ask for materials held by public authorities and other government bodies. This is variously defined as records, documents or information. The right to request information is generally open to citizens, permanent residents and corporations in the country without a need to show a legal interest.

Generally the acts apply to nearly all major government bodies in the countries, except for the Parliament and the Courts. In some countries, the security and intelligence services are also exempt from coverage. In many parliamentary systems, documents that are submitted to the Cabinet for decisions and records of Cabinet meetings are also excluded.

As international governmental organisations play an increasingly important role, the right of access to information must be codified in these new agreements. A key problem with access to information is that these organisations are based on a diplomatic system. Thus decisions that were once made on a local or national level where the citizen had access and entry into the process are now being made outside the country in a more secretive setting. Hence, activists have constantly pressured organisations such as the WTO, the World Bank and the IMF to release more information.

1.2.1. Legal sources

The legal base of FOI rights is either provided by the constitution itself (as, for instance, in **Sweden**, **Spain**, the Netherlands, Austria, Portugal, Belgium and Finland) or through specific provisions.[3] Many countries have administrative laws to define the rules for access to information, with the exception of **Sweden** and **Spain**, which have incorporated them in their constitutional system. Even if such a constitutional clause can contribute to a better protection of the general right to disclosure, it does not automatically design a better system to access information. **Sweden** has introduced its Freedom of Press Act into its constitutional legislation because it is believed to be one of the crucial bases for an open and participative democracy. Instead, **Spain** has introduced the principle during its transition from the Franco regime to democracy because, as is the case in most modern democracies, its new constitution[4] includes fundamental human and political rights. Nevertheless, the extent of the right of access to documents in **Spain** is not comparable to that guaranteed by Swedish constitutional law.

Nearly all countries have now passed administrative laws protecting and specifying FOI rights. Most have a number of laws which cover a broad variety of subjects and thus create some confusion with citizens. In general, legislation covers three issues:

[3] The website of Christoph Sobotta provides links to all FOI provisions of EU Member States (http://www.rz.uni-frankfurt.de/~sobotta/FOI_MS.htm). Further world-wide FOI laws can be retrieved on http://home.online.no/~wkeim/informationsfreiheitsgesetze.htm

[4] 1978 Constitution. Section 105 (b) for right to access to administrative archives and registers.

- right to access administrative documents of a general political nature,
- right to access personal data, and
- access to classified documents.

Yet, these laws tend to overlap and create mutual exceptions. Some countries, mainly **Sweden**[5], have therefore reduced legislation to only a small number of laws. However, the majority of countries examined here has a range of laws and regulations trying to cover gaps in the original legislation. The best examples here are **France** and **Spain**, which have introduced specific laws to fill deficits created through social or technical evolutions, as is demonstrated by the recent Law on access to origins in **France**[6] or the telematic registers and documents decree in **Spain**[7].

Two special cases seem to stand out: firstly, **Germany** has created a system that works on a variable geometry within its federal structure, which leads to a heterogeneous implementation of the right to access documents. This right is not yet provided in all regions of the country, as it mainly depends on *Länder* legislation. A draft federal law (*Informationsfreiheitsgesetz*) has been proposed in December 2000[8] but is still not adopted. Incidentally, the draft was criticised by action groups and NGOs for its insufficient openness. At present, four *Länder* have a law on freedom of information (either general or partial[9]). Other specific laws (e.g. in the environmental field) have provisions referring to general freedom of information rights. Consequently, German legislation acts differently depending on the administrative level and on political areas. This is partly due to its federal system but also to the absence of a general legal framework, either in the Constitution (Basic Law) or in a federal act.

As a second special case, the **United States** provide a general right of access to information for everyone. However, its legislation is sometimes extremely dependent on Government bills and agencies' regulations. For instance, President George W. Bush's executive order of Nov.1[10] reveals the facility with which Government can change or adapt precedent orders and laws. Likewise, every federal agency has its own Freedom of information act, producing a multiplicity of rules and procedures. Moreover, rights vary from one State to another, having a similar effect as in **Germany**. The main difference to **Germany** is that federal law provides a general framework, at least for federal activities.

1.2.2. What is a "document" ?

Most jurisdictions analysed here consider that a document can be kept in any format (written, audio or visual). Laws are being updated or completed by acts including electronic supports, which can usually be transmitted to interested applicants under the same format. Documents are

[5] Freedom of the Press Act, Secrecy Act (complemented by the Secrecy ordinance) and Personal Data Act.
[6] Act N° 2002-93 of 22 January 2002 on access to origins of adopted persons and wards of the state.
[7] Royal Decree 209/2003 of 21 February on the regulation of the telematic registers and notifications and the use of telematic means to substitute the transmission of certificates by citizens.
[8] Project of law on access to information, 20 December 2000, (IFG-E).
[9] Brandenburg, Berlin, Schleswig-Holstein and Nordrhein-Westfalen (even if in this latter State, the right is reduced to a personal access to individual data).
[10] Executive order changing the way presidential papers under Presidential Records Act will be released. It mainly affects documents established under the Reagan Presidency and George Bush (*père*) Vice-presidency.

defined in a multiple way in Freedom of Information acts. Some of them use the adjective "official" (Spanish law and German draft law) and, in general, they refer to documents as "information", "records", "files" or "material". However, the description of documents is rather similar in all laws. In **France**[11] and the US[12], they contain an extensive description of document categories, in some cases listing them. In almost all countries documents must be finalised (i.e. drafts and preparatory texts are not subject to the right of access). In **Sweden**, two aspects are required for a document to be considered as official: it has to be drawn up or received by the authority and it has to be dispatched. Documents that have either been finalised or checked and approved by the authority are considered as "official documents", i.e. as having a final form.

In some countries, documents are subject to further conditions that reduce the extent of access to records. For instance, some regulations point out that documents must refer to specific administrative or legal proceedings in order to create a right of disclosure (**Germany**) or that they have to be part of a file (**Spain**). Conversely, some countries just require them to be in the sphere of activity of a public authority (**France**). Usually, countries which show a narrow notion of "document" are at the same time restrictive in providing access to administrative information.

With the exception of **Sweden**, where access is possible if the document has been filed or registered or if it introduces new facts in a dossier, all countries refuse access to drafts and informal notes, i.e. to internal documents.

In all FOI laws access to documents containing personal data is usually restricted to the individuals concerned, pursuant to applicable personal data protection legislation.

1.2.3. Documents from third parties

The majority of the laws and regulations examined in this paper consider that a document is any information created or received by an administration. Therefore, citizens can also access documents coming from third parties. In **France**, it is even stipulated that if an authority knows where a citizen can find a particular information not included in their public register, it has to indicate where it can be found and facilitate the citizen's access to it. In **Sweden**, a document coming from a third party is considered to have been received either if an authority obtains it or if a civil servant is in possession of the record (even if he or she has received it under his/her personal address). This includes access to documents coming from abroad (if they are not classified as secret by the Secrecy Act). In practice, this legislation provides a wide-ranging right to citizens to obtain documents coming from international organisations, other countries

[11] Article 1 of Act 78-753 of 17 July 1978: Administrative documents shall mean all files, reports, studies, minutes, statistics, guidelines, instructions, circulars, memos and ministerial replies which provide an interpretation of current legislation or a description of administrative procedures, opinions, forecasts and decisions.

[12] The FOIA requires that government agencies publish material relating to their structure and functions, rules, decisions, procedures, policies, and manuals. Agencies must make available to the public:

- final opinions made in the adjudication of cases; statements of policy and interpretations adopted by an agency, but not published in the Federal Register;
- administrative staff manuals that affect the public;
- copies of records released in response to FOIA requests that an agency determines have been or will likely be the subject of additional requests;
- a general index of released records determined to have been or likely to be the subject of additional requests.

and the European Union. Documents that cannot be obtained directly from the European institutions can often be requested and received in **Sweden**[13].

On the other hand, **Spain**'s and **Germany**'s texts do not make reference to third parties' documents. Supposedly, they do (or will) not allow citizens to access documents coming from outside parties.

1.2.4. Who can apply for disclosure of documents ?

There are two main categories of legislation concerning access to documents: those countries which allow a general access to records for everyone, and those who restrict it to individuals directly affected by the documents or files. For reasons of privacy protection, access to personal data is generally limited to persons concerned by the information. Access to documents not including personal information varies between countries: for instance, **Germany** and **Spain** restrict it to individuals demonstrating personal concern or direct interest. Yet, both countries also provide exceptions to this rule. In **Germany**, some *Länder* have adopted laws granting general access to documents. In **Spain**, some persons have a special rights to access documents (e.g., researchers may access files directly if they can demonstrate a relevant historical, cultural or scientific interest and if personal privacy is properly protected).

Conversely, in **France**, **Sweden** and the **United States** citizens do not have to give evidence of any particular interest to obtain a record. In **France**, documents including private data can be partially transmitted after the confidential portions of the document have been deleted or blacked out (e.g., personal information, medical secrets or business and industrial secrets). Copyright rules also have to be respected. In **Sweden**, citizens requesting access to documents are not asked for reasons or for personal identification, except in some cases stipulated by the Secrecy Act.

Another aspect concerns citizenship: in **Germany** and **Spain**, foreigners are not allowed to access administrative records, while in **France**, **Sweden** and the **US** any citizen, having American citizenship or being a foreign resident, can request to access documents. Furthermore, **France** and the **US** extend the right of access to any legal entity (**France**) or organisation (US).

Most FOI laws provide that administrative institutions should maintain registers of all records which should help to avoid secrecy and facilitate access to files. Only **France** and **Germany** do not yet require administrations to create registers. In most countries access can be either on the spot or through provision of a copy of the requested document.

[13] The Swedish Union of Journalists decided in May 1995 to test access to documents in the EU by requesting twenty documents concerning Europol from the Swedish government and from the Council of Ministers. Eventually, they obtained 18 documents in Sweden and just two from the Council of Ministers.

1.2.5. Limits of application

FOI laws primarily grant access to administrative documents, i.e. to documents implementing government activities and acts of public authorities. In many cases, direct access to documents elaborated by legislative or political institutions is not automatically granted. Yet countries differ on the rigidity of this division. **France** and the **United States** list the institutions where FOI rights and regulations do not apply. In **France**, citizens cannot access information held or created by parliamentary chambers, the State Council (*Conseil d'État*[14]), the Court of Auditors, administrative courts, the Ombudsman and public health services because it is not considered as belonging to the administrative documents category[15]. In a similar way, the US Freedom of Information Act states that the law does not cover Congress, the courts, White House staff close to the President or the National Security Council. However, most official Congress records are now available; presidential papers and documents created after 20 January 1981[16] are also being disclosed under FOIA provisions.

On the other hand, some national regulations are not as explicit about the scope of FOI legislation as the above examples. This lack of precision can have two different consequences: a generic description of exempted institutions can result in a *de facto* restriction or an extension of the right of access to information. For instance, in **Spain**, the law only applies to the "general administration of the State", the autonomous Communities' administrations and to local administrations. Accordingly, citizens have to refer to second-level administrative regulations to find out that the highest level where access to information is granted are ministries. Political institutions such as the Congress are not included. However, legislation includes all entities having legal personality and which are related to public administrations when implementing their decisions.

But general descriptions can also lead to an extension of freedom of information. This has happened in **Sweden**, where a rather vague term like "public authorities" has permitted to subject political institutions to application of the right to access documents. As the meaning of "public authority" was never precisely defined in Swedish constitutional law, it is generally accepted that it includes state, municipal and judicial administrations (courts can also be included under the latter). Moreover, practical implementation of the Freedom of Press Act has led to inclusion of other institutions with a decision-making role. Hence, the *Riksdag* (parliament), the municipal assemblies and all legal entities owned or controlled by the State are now assimilated to public authorities.

1.2.6. Exemptions and limitations

Access to certain documents is subject to a number of limitations (see box below for a list of customary reasons to refuse inspection of such records). Provisions on exemptions can be divided in three main categories, according to the strictness of the criteria and the procedures to be applied before any decision is taken:

[14] However, most reports from the Conseil d'État are accessible through its annual report.
[15] Art.1 §3 of Loi 78-753 on improving relations between the administration and the public.
[16] Subject to certain restrictions and delays.

- Firstly, some provisions exclude some documents or make them subject to review before disclosure (for example, with respect to protection of the efficiency of public administration). That is, documents which are at a preparatory stage are exempted because they would jeopardise the authorities' capacity to act; similarly, requests which could do damage to the implementation of administrative objectives can be refused. In countries where such requests can be made according to FOI law (e.g., **Spain**), any refusal of disclosure has to be justified in writing. In **France**, these exemptions include documents related to service contracts involving third parties (persons or legal entities).
- A second category comprises the refusal of disclosure after case-by-case examination. There is a clear division here between open and restrictive national systems. In some countries, case-by-case examination is done only in special cases, while it is the general rule elsewhere. For instance, in **Sweden** and the **United States**, all requests have to be examined and assessed individually, and it is not permitted to refuse information simply because it is somehow related to a protected public or private interest. In order to justify a negative reply, disclosure must pose a real risk of serious harm to that interest. As a consequence, all negative replies must be substantiated and may be appealed. Yet in **Spain** this rule really applies only in two cases, i.e. public interests (security etc.) and protection of third parties' interests. In **France**, disclosure may be refused, for practical reasons, if a document has already been published or if applications are obviously vexatious because of their number or their systematic and repetitive character. Consequently, exemptions falling under this category are more numerous in **Sweden** and the **US** than in **Spain** and **France**. But **Sweden** has a detailed list of exemptions included in the Freedom of Press Act[17], referring to the Secrecy Act to prevent any discretionary right for authorities to define exemptions. Therefore, Swedish authorities are generally rather open; moreover, this openness is connected to a right for compensation if disclosure is unduly refused. In the US, a similar standard governs access to information and requires agencies to grant the fullest possible disclosure of information. Like in **Sweden**, the FOIA includes a rather precise list of exemptions (see 1.3.2).
- Finally, a third category of provisions denies any access to certain documents, which are considered secret. This means that no reasons have to be given to deny access and requests do not even have to be examined. **France** and **Spain** have some types of documents covered by this provision. They mainly concern political institutions, defence, criminal investigations, currency matters, economic information and personal or business data. However, as mentioned above, in **France** information can be transmitted partially after having blacked confidential data. In **Germany**, the provisions made by the current *Länder* laws and the draft federal law on freedom of information stipulate mandatory exemptions which are similar to the French and Spanish rules.

Possible limitations of the access to official documents, as listed in Recommendation R(2002)2 of the	Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting: i. national security, defence and international relations; ii. public safety;

[17] Article 2 of the chapter 2.

Council of Europe	iii. the prevention, investigation and prosecution of criminal activities; iv. privacy and other legitimate private interests; v. commercial and other economic interests, be they private or public; vi. the equality of parties concerning court proceedings; vii. nature; viii inspection, control and supervision by public authorities; ix. the economic, monetary and exchange rate policies of the state; x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

1.2.7. Benefit/harm of disclosure tests

There is a natural tension between the right to disclosure or transmission of documents and the fundamental right of personal privacy and data protection. In most of the countries examined here there exists a "harm test" to check if disclosure could affect such individual rights. Such an examination includes an evaluation of the content of the file at the moment of the request and, possibly, elimination of secret elements. **Sweden** has divided this procedure in two steps: first, a "double harm test" is applied which consists (1) of a positive test to ascertain whether any general rule for or against disclosure applies and, if disclosure is possible, whether it could violate any individual rights; (2) a further (negative) test assesses whether a provision exists which makes the document fall under any classified category. The *Riksdag* and, in some cases, the Government have the possibility to balance the different interests, e.g. in cases where the need to inform the public seems more important than personal data protection. In the **United States**, an executive order on security classification has established a special procedure which allows citizens to apply for the declassification of documents. Any agency can review a file to assess whether it still requires protection from disclosure. In **France**, the CADA[18] only has an advisory role concerning the release of classified files.

1.2.8. Classified documents and their disclosure to MPs

Most countries' legislation provides that MPs can request documents from public administration and government. For instance, Spanish MPs, after informing their political group, can ask for documents from the administration. Requests have to be transmitted through the President of the Congress; the reply has to be given at the latest within 30 days. If the request is denied, a justification must be given to the President of the Congress.

In **Sweden**, the competence to transmit such requests is with the Constitutional Affairs Committee of the Parliament. In **France**, the parliamentary inquiry commission can request any document from a public authority, exceptions made for secret files concerning national defence,

[18] Commission sur l'accès aux documents administratifs

international affairs and internal and external State security[19]. In the US, legislation provides that exemptions listed in the Freedom of Information Act cannot be used to withhold information from Congress.

While MPs have of course the same FOI rights as any citizen (see above), they have some supplementary privileges concerning sensitive documents in matters such as defence or foreign policy. In all administrations, certain documents are classified at several levels of confidentiality (usually between two and four). **Germany** has the most elaborate classification with four levels: top secret, secret, confidential and restricted. These levels are defined by the German *Bundestag* and applied by the authorities (ministries etc.). The **United States** and **France** have a classification of three levels: Top secret, secret and confidential (**France** adds the term "defence" after each denomination). In **France**, responsibility to classify documents lies with the French Prime Minister for top secret-defence documents, and with the other ministers for the two lower levels. In the **United States**, it is for the President, the agency heads, officials designated by the President in the Federal Register or United States Government officials who have been delegated this authority to assign the classification level. Decisions to withdraw classification are made by the Interagency Security Classification Appeals Panel (ISCAP). **Spain** has two levels, secret and confidential, which can be fixed either by the Ministers' Council or by the Joint Chiefs of Staff (*Junta de Jefes de Estado Mayor*), depending on the subject. Again, the most open country is **Sweden** with just one classification level (secret), which is defined by the Secrecy Act. Hence, the *Riksdag*, being the only body authorised to decide which documents must be kept confidential, is bound by the provisions of the Secrecy Act.

In most systems, parliaments have the right to request confidential information kept by the government or other authorities, but mostly this right is not automatic.[20] Requests can be declined when this is justified by a number of important reasons (public and external security, defence etc.). In most countries, individual members of parliament are not authorised to ask for confidential information individually. They have to apply for it either through a specific committee (**Sweden** and **France**) or via the Speaker of the Chamber (**Spain**). The nature of these committees varies from country to country. In **France**, the government has a discretionary right to transmit classified documents to parliamentarians. Senators and members of the *Assemblée* have established a practice by which a "review team" is authorised to examine confidential information. This team usually consists of members of the Defence Committee and proceeds *in camera*. In **Sweden**, the Constitutional Affairs committee is responsible for requests for disclosure of confidential documents. In **Spain**, the procedure is slightly more complex, since applications can be made by parliament committees or by one or more political groups of the Congress which represent at least 25% of its Members. In any case, the requests have to be made via the President of the Congress. The government can then ask for an *in camera* meeting of the committee which requested the document or of the committee competent for the subject

[19] Ordinance 1100 of 17 November 1958 on the organisation of parliamentarian assemblies. Since the entry into force of Act 96-517 of 14 June 1996, permanent and special committees can ask for the same access rights given to special inquiry committees during a maximum period of six months.

[20] A briefing drawn up by the former Directorate General for Research of the European Parliament in March 2003, on the treatment of confidential information in the parliaments of the Member States, contains a table comprising detailed information on the mechanisms and restrictions of parliamentary access to confidential material in all 15 Member States (doc. PE 328.669).

matter, if the request was made by a group. If MPs are allowed to consult the file, they must examine it on the spot, in the presence of a government official, and can only take notes (no copies).

Each system has some rules on the duration of the classification, mostly twenty to thirty years. Particularly sensitive documents are kept secret even longer. **Sweden** has the "shortest" time span: documents can be kept closed for between two and seventy years. In **France**, this is possible for a minimum of thirty and a maximum of 150 years. In **Spain**, there are different provisions for general information and personal data. The first category can be kept classified for thirty years while the second type of document requires the individual consent of the person concerned or remains classified for a period of twenty-five years after his or her death or fifty years after the creation of the document, whichever is shorter. In the **United States**, rules were changed recently[21]. They provide that, apart from the general rule of disclosure after ten years, files which are older than 25 years and have historical value should be disclosed five years after the entry into force of this regulation (that is, in 2000).

1.2.9. Appeal procedures

There are basically two ways to appeal negative FOI decisions in the national systems chosen for this comparison: in the first category, we find appeals addressed to authorities having oversight or advisory functions. In most countries this is embodied in the office of the ombudsman. In **Spain** (*defensor del pueblo*) and **Sweden**, the ombudsman can review cases and issue non-binding decisions. In **France**, this function is executed by the CADA, which can mediate disputes and issue non-binding recommendations. This is only the first step for individual appeals, i.e. a complaint must first be addressed to and decided by the CADA before an appeal can be filed to an administrative court. In **Germany**, the Parliamentary Oversight Board[22] surveys intelligence activities. The Board, which consists of members of the Bundestag, was originally created to prevent the intelligence services from breaching civil rights. Consequently, these services are obliged to supply all the information necessary to control their activities. Requests made to the Board by citizens can only be refused if disclosure of the documents risks to breach intelligence secrets or infringe on individuals rights. The Board can insist on disclosure of confidential files by a majority vote of two-thirds of its members. However, the role of the Oversight Board does not touch upon the general right of control exerted by the *Bundestag* itself.

The second type of procedure is court proceedings. Usually, a first appeal has to be filed with the responsible administration, e.g. to the head of the service where the original decision was made. If this superior level of authority confirms the negative decision, appeals can be brought before administrative courts (or federal courts in the US[23]). In **Sweden**, appeals can be presented to the Supreme Administrative Court. However, if a Swedish state authority (as opposed to a local or regional administration) rejects an application, the complaint has to be made to the government.

[21] Executive Order 12958 on Classification of National Security Information (1995).
[22] The former Parliamentary Oversight Committee, created in 1979.
[23] U.S. District Court in the district where the claimant lives or in the district where the documents are located or in the District of Columbia.

1.3. Specific legislation:

1.3.1. Historically secretive administrations

1.3.1.1. France

France is a good example of an administration that is evolving towards a more open approach. Following the Napoleonic tradition of powerful command of the central government, it has long had a tendency to withhold information from citizens. However, the last decade has brought a rapid evolution of legislation, which is also due to technological innovations such as the Internet.

An early origin of FOI legislation can be found in Article 14 of the Declaration on Human Rights which provides that access to information on the budget should be made freely available[24]. Yet, the most important laws have been adopted in the 1970s, e.g. the Loi n° 78-753 of 17 July 1978, on improving relations between the administration and the public[25], the Loi n°78-17 of 6 January 1978, on data processing, files and freedoms[26] (concerning access to computerised files) and the Loi n°79-18 of 3 January 1979 on the consultation of archives[27]. The most recent step has been the adoption of several laws concerning personal data protection and the right of access to origins[28] and legislation concerning defence classified information[29].

In order to implement these provisions, France has created a number of specialised authorities:

- the CNIL (National Commission on Computing and Freedoms[30]),
- the CNAOP (National Council for the Access to Personal origins[31]) and
- the CCSDN (Consultative Commission on Secrets and National Defence[32]).

Two further committees work on access to documents, the SID (Information and documentation service[33]) and the CIRA (Inter-ministerial directory of administrative inquiries[34]). However, the

[24] "Les citoyens ont le droit de constater, par eux-mêmes ou par leurs représentants, la nécessité de la contribution publique, de la consentir librement, d'en suivre l'emploi, et d'en déterminer la quotité, l'assiette, le recouvrement et la durée."
[25] Amended by act N° 79-583 of 11 July 1979 on justifying administrative acts and improving relations between the administration and the public; the decree 88-465 of 28 April 1988 on the procedure to access administrative documents; art. 7 of act N° 2000-321 of 12 April 2000 on the rights of citizens in their relations with the administrations; act 2002-303 of 4 March 2002 on patients' rights and quality of the health system; and act 2002-1487 of 20 December 2002 on Social Security funding for 2003.
[26] Amended by art. 5 of act 2000-321 of 12 April 2000 on the rights of citizens in their relations with the administrations.
[27] Amended by act 2000-321 of 12 April 2000 on the rights of citizens in their relations with the administrations.
[28] Act 2002-93 of 22 January 2002 on access to origins of adopted persons and wards of the state.
[29] Decree 98-608 of 17 July 1998 on protection of national defence secrets.
[30] Commission nationale de l'informatique et des libertés.
[31] Conseil national pour l'accès aux origines personnelles.
[32] Commission consultative du secret et de la défense nationale. Created by act 98-567 of 8 July 1998.
[33] Service d'information et de documentation.
[34] Centre interministeriel de renseignements administratifs.

most important committee is the CADA, already mentioned above (Commission on access to administrative documents[35]). Created in 1979 and independent of the Parliament, it is responsible for oversight and the mediation between citizens and administrations. As outlined above, it also has a pre-judicial role, as it is necessary to file an appeal to CADA before proceeding to an administrative court.

1.3.1.2. Spain

The transition period after the end of the Franco regime gave Spain the opportunity to draft a new constitution which was influenced by the state of developments in human rights and civil liberties during that time. However, the subsequent adoption of implementing laws has not completely left behind the country's rather secretive past. Although the principle established by section 105 (b) of the 1978 Constitution[36] gave rise to an implementing provision in the form of the Law on rules for public administration and administrative procedures[37], openness and transparency have not yet been fully embraced by Spanish administrations. Contrary to most other countries, Spain still has no citizens' guide or web site to indicate citizens' rights to access documents and the available procedures. The underlying legislation is not clearly spelled out.

Some discrepancies in the law mentioned above have led to a multitude of implementing acts, creating considerable confusion among citizens. There are, for instance, special provisions on official secrets[38], administrative procedures involving register offices[39] or environmental information, to quote a few examples. As Spanish law provided less transparency than the European environmental directive 90/313/EEC, adopted at the beginning of the 1990s, a new law entered into force in 1995 to increase specifically access to environmental information[40]. In 1999, the Personal Data Protection Act was adopted[41], giving birth to the Data Protection Agency[42]. Still other acts cover access to archives[43], administrative decisions[44] and new telecommunication technologies[45].

This variety of sectoral provisions complicates access to documents, which, in addition, is characterised by long delays (administrations have to reply after three months at the latest) and

[35] Commission d'accès aux documents administratifs.
[36] "The law shall regulate... b) access by the citizens to the administrative archives and registers except if it affects the security and defense of the State, the investigation of crimes, and the privacy of persons."
[37] Article 37 in Act 30/1992 of 26 November.
[38] Act 48/1978 of 7 October on the treatment of official secrets and the decision of 2 June 1992 on security classification by the Bureau of the Chamber of Representatives. It is now the legal basis for the government's obligation to supply the Chamber with information on official secrets.
[39] Royal Decree 772/1999 of 7 May on communications to the State General Administration, on the expedition of documents copies and the restitution of originals and on the regime of register offices.
[40] Act 38/1995 of 12 December on freedom of access to environmental information and Act 4/1999 of 13 January, amending Act 38/1995.
[41] Organic Law 15/1999 of 13 December on the Protection of Personal Data, allowing citizens to access and correct personal records held by public and private institutions.
[42] Agencia de protección de datos.
[43] Act 10/2001 of 13 July on Archives and Documents.
[44] Act 24/2001 of 27 December on fiscal, administrative and social order measures.
[45] Royal Decree 209/2003 of 21 February on the regulation of the telematic registers and notifications and the use of telematic means to substitute the transmission of certificates by citizens.

an extensive right of discretion of the competent administrations. Parliamentary control is also a rather complicated affair (see above).

However, it is important to stress that the transparency principle is enshrined in the Constitution. This should help to enable further evolutions in the future towards a more effective implementation of the general right of access to documents.

1.3.2. Traditionally open administrations

1.3.2.1. Sweden

Sweden is widely considered as a model for FOI legislation. As the first country having adopted, in 1766, a law on the public's right to access administrative information, this right is now seen by Swedish citizens, and officials, as a fundamental condition for democratic government. Hence, the Freedom of Press Act[46] has later been introduced into the Swedish Constitution. Openness and transparency are guiding principles for public administration and allow citizens to have unrestricted access to all sorts of documents, without any need to justify their request.

Some sectors of the administration may not accept this principle in its entirety. Still, secrecy has lost its importance and is now the exception. Rules defining these exceptions are specified in the Secrecy Act[47]. Other provisions protect privacy, such as the Personal Data Act[48], which is enforced by the Data Inspection Board. This Act gives individuals the right to access and correct personal information held by public and private institutions.

According to the Swedish tradition, there are three important reasons to move on with this openness. Firstly, transparency allows citizens (as taxpayers and members of a community) to control public services and to verify their correct implementation. Secondly, it ensures protection of civil rights when citizens deal with public administration errors or wrong-doing. Finally, openness helps to reduce corruption and excessive bureaucracy, thus contributing to a better management of public expenses, despite the delays and obstacles which may be caused from time to time.

Against this background, Swedish authorities have put into practice an almost instantaneous right for citizens to access documents. All civil servants, particularly those responsible for registers, are obliged, in the case of a FOI request, to interrupt their work and help applicants to find the requested information. If this is not possible, documents have to be transmitted in less than 24 hours. Secret documents are listed in public registers.[49] Officials have to examine each classified document to assess whether it can at least be partially disclosed, in the light of the reasons given by the applicant. Only in the case of classified records are officials supposed to

[46] The Freedom of the Press Act of 1766, chapter 2 on the public nature of official documents, amended in 1949 and 1976.
[47] The Secrecy Act (1980:100) of 20 March 1980. The Secrecy Ordinance (1980:657) of 19 June 1980 provides for additional regulations on some provision of the Secrecy Act.
[48] Personal Data Act (1998:204) of 29 April 1998.
[49] All documents have to be registered except for documents of little importance to the administrative activities.

ask the applicant for identification and for his or her motives. Again, all negative decisions must be justified and appeal procedures explained.

This unusual expression of freedom of information caused a problem at the moment of accession to the EU: a special declaration was included in Sweden's accession treaty, guaranteeing its constitutional right of access to documents. However, since Sweden is also obliged to respect European directives and regulations, this declaration could become a source of conflict with the Union, despite recent progress made at the European level (see chapter 2).

1.3.2.2. United States

The United States started to open its administrations through the Freedom of Information Act (FOIA), in 1966[50]. This law brought about a fundamental change from a possibility to know to a right to know. According to the FOIA, citizens do not need to provide a substantial reason for wanting to access documents[51]. The FOIA has been amended several times, most recently in 1996 by the Electronic Freedom of Information Act.

Some other acts are applied in conjunction with the FOIA: the Federal Advisory Committee Act of 1972[52] introduced more transparency of committees advising federal agencies and the President; the Privacy Act of 1974[53] allows individuals to access their personal records held by federal agencies; the Sunshine Act of 1976[54] requires the government to open the deliberations of multi-agency institutions; the Presidential Records Act of 1978[55] partially applies the FOIA to documents collected by former Presidents. The US being a federal state, there are also FOI laws in all fifty states providing access to their government records.

Federal provisions grant wide access to documents. The FOIA provides, for instance, for the immediate publication of several categories of administrative records such as final opinions made in the adjudication of court cases, statements of policy and interpretations adopted by an agency (but not published in the Federal Register), administrative staff manuals that could affect the public, a general index of released records determined to have been or likely to be the subject of additional requests for disclosure or copies of records released in response to FOIA requests which, according to the responsible agency, have been or will likely be the subject of additional requests. Since 1996, "electronic reading rooms" are made available and information is published and transmitted electronically; documents that have been requested three times must be made available electronically. Consequently, US agencies have moved from a culture of relative secrecy to an opener system where records have to be kept in public registers. Moreover, exemptions, although still quite extensive, are clearly specified and limit the possibility of withholding information[56].

[50] FOIA 5 U.S.C. 552 1966.
[51] Except for records concerning individuals or industrial privacy.
[52] 5 U.S.C. App II
[53] 5 U.S.C. 552a
[54] 5 U.S.C. 552b.
[55] 44 U.S.C. Sec. Sec. 2201-2207 (1982)
[56] Internal agency rules, information protected by other statutes (142 different statutes), national security, business information, inter and intra agency memos, personal privacy, law enforcement records, financial institutions, oil

However, FOI rights seem to be cut back, of late, through several initiatives undertaken by the Bush administration (see box below). For instance, Attorney General John Ashcroft revived, on October 18 2001, a 1981 policy[57] to help agencies to withhold a maximum of information while assuring support from the Justice Department. This new instruction contradicted the former pro-disclosure directive issued by then-Attorney General Janet Reno in 1993. Ashcroft's directive claims that the restrictive handling of information and internal procedures is necessary as a protection against terrorist activities. Some members of the House of Representatives have protested against this new tendency, affirming that the history of the FOIA demonstrates that it was always seen as an act promoting disclosure.

A second initiative was Executive order 13,233 of November 1 2001, modifying the way presidential papers are released (globally defined by the Presidential Records Act mentioned above). The most critical provision is an extension of the time span for keeping information confidential. Former presidents and their descendants can now examine the files after the 12 year period following which they are supposed to be published and select files to remain secret forever. Government attempts to retain information has led to a re-examination of many classified and sensitive documents, removing them from the Internet and making access through the ways and means provided by the FOIA more difficult. Several states are taking the same route, creating, for instance, offices similar to the Office of Homeland Security[58] or adopting provisions similar to those just outlined for the federal level.

Confidentiality under the Bush Administration

The Bush administration appears inclined to reverse many of the trends initiated by the Clinton administration. The genesis for these policies can be found long before Sept. 11. In April 2001, President Bush told the American Society of Newspaper Editors that things were going to be different during his watch. It should be noted that historically, Republican administrations have generally been more conservative toward openness than their Democratic counterparts. Still, this administration has taken so many steps against openness in such a short period of time that, at this pace, it's likely to break records for closed-government initiatives.

wells data, provision prohibiting the disclosure of voluntarily provided business information relating to "critical infrastructure"(Home and Security Act, 2003).

[57] Created by then-Attorney General William French Smith, a Reagan appointee.

[58] Created by the Patriot Act on September 2001.

Some examples:

- Attorney General John Ashcroft issued an agencywide memorandum on Oct. 12, 2001, essentially advising federal agencies to lean toward withholding information whenever possible, reversing Attorney General Janet Reno's openness policy issued in 1993.
- The president awarded the Secretary of the Department of Health and Human Services classification authority for the first time in the agency's history. Prior efforts sought to reduce the number of officials with classification authority.
- The White House refused to disclose records relating to Vice President Cheney's energy task force, including discussions involving meetings with Enron officials. Public interest organisations as well as Congress were denied access. Two federal courts have ordered records to be released, and the General Accounting Office, Congress' investigative arm, has taken the unprecedented step of suing the White House.

Sept. 11 did have a justifiable impact on some disclosure-policy decisions. Certain potentially sensitive documents, particularly dealing with infrastructure vulnerability assessments, have been removed, at least temporarily, from government Web sites. Some steps, regrettably, appear as no more than efforts to keep the public in the dark concerning certain governmental decisions.

Moreover, President Bush has announced a proposal for a new executive order governing classification. The existing Executive Order 12,958 was issued in April 1995 by President Clinton and resulted in the declassification of more than 800 million pages of documents. Two specific provisions that are in danger of repeal are the prohibition against reclassifying previously declassified information and the automatic declassification of records 25 years or older.

Source: Mark S. Zaid, Too Many Secrets, *The National Law Journal*, March 27, 2002

1.3.3. Germany

Looking at the large number of FOI laws adopted world-wide over the past twenty years[59], Germany has become a rather exceptional case in not having such a provision. A federal Freedom of Information Act was first announced by the newly elected coalition government of the Social Democratic Party and the Greens, in 1998[60]. A draft text was presented in 2000[61], which is being discussed ever since among ministries (*Ressortabstimmung*) and action groups,

[59] See Toby Mendel, *Freedom of Information: a Comparative Legal Survey*, UNESCO 2003, for an excellent overview.
[60] Coalition agreement of 20 October 1998, paragraph 13.
[61] Project of law on access to information, 20 December 2000.

but was not yet transmitted as a bill to the *Bundestag*. According to FOI activists, this is mainly due to lobbying from industry and hesitations at some ministries such as defence and economy.[62]

Due to its federal structure, Germany has a special status. At present, it can neither be classified as an open country nor as a country that still keeps most administrative records confidential. Although the historic *Amtsgeheimnis* (official secret) was widely and restrictively applied for centuries, mainly to ensure strict loyalty of the regional rulers' officials, the degree of openness depends nowadays on the level of administration (federal or *Land*) and on regional particularities. Therefore, the German system is at a position which is somewhere between the most open and most closed-up systems. However, an often-quoted judgement by the Berlin Upper Administrative Court states clearly that there is no general principle of access to information for "everybody" in German administrative law.[63]

At both the federal and the *Land* level the question of access to information is not the object of a specific provision but is dealt with by general laws on administrative procedures (for the *Bund*, Act of 25 May 1976 on administrative procedures (*Verwaltungsverfahrensgesetz*, VwVfG), the federal and *Länder* laws being practically identical. Art. 29 VwVfG is the most important provision. It grants access only to documents which are part of a specific administrative file, and only to persons having a clearly specified and documented interest in this same procedure (e.g., persons affected by an authority's decision). Art. 29 further limits the scope of access to documents by listing a number of clauses under which administrations can refuse to grant disclosure even to persons or legal entities having a legitimate interest (e.g., protection of public order and state secrets, safeguard of good administrative functioning). Preparatory documents are generally exempt from any disclosure.

Four *Länder* have adopted FOI acts between 1998 and 2002: Brandenburg (Law on inspection of files and access to information of 10 March 1998[64]), Berlin (Law on the promotion of freedom of information of 15 October 1999[65]), Schleswig-Holstein (Law on freedom to access information of 9 February 2000[66]) and Nordrhein-Westfalen (Law on freedom to access information of 27 November 2001[67]). These acts are largely comparable in their provisions.[68] According to some recent evaluations, they can be considered to reflect the state of the art of FOI legislation.[69] In most of the remaining *Länder* parliaments, the Greens have introduced draft FOI bills.

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[62] Cf. Reinold E. Thiel, *Bürgerrechte stärken?*, Rundbrief Nr. 27, Transparency International, March 2003, p. 3.

[63] "Ein Prinzip der Aktenöffentlichkeit, das grundsätzlich jedermann Anspruch auf Einsicht in und Auskunft aus allen Akten der öffentlichen Verwaltung gewährt, ist dem geltenden Verwaltungsrecht fremd. Auskunftsansprüche bestehen nur nach Maßgabe gesetzlicher Regelungen." OVG Berlin, judgment of 16 December 1986 - 8 B 3/85.

[64] Akteneinsichts- und Informationszugangsgesetz (AIG) (GVBl. Brandenburg I, S.46)

[65] Gesetz zur Förderung der Informationsfreiheit im Land Berlin (Berliner Informationsfreiheitsgesetz - IFG) (GVBl. 1999, Nr. 45, S.561), latest revision of 30 July 2001 (GVBl. 2001, Nr. 32, S. 305)

[66] Gesetz über die Freiheit des Zugangs zu Informationen für das Land Schleswig-Holstein (Informationsfreiheitsgesetz - IFG-SH)

[67] Gesetz über die Freiheit des Zugangs zu Informationen für das Land Nordrhein-Westfalen (Informationsfreiheitsgesetz - IFG NRW)

[68] Sabine Frenzel provides a comparative table analysing the differences between three of these *Länder* laws (see references).

[69] E.g., Sabine Frenzel, previous note.

Some other laws contain provisions applying to particular subject matters, e.g. the federal law on data protection, the transposition of EU directive 90/313/EEC on environmental information (*Umweltinformationsgesetz* (UIG) of 8 July 1994) and the law on documents of the State security service of the former German Democratic Republic (GDR).

In summary, the German definition of what constitutes a document, of the number of individuals authorised to request consultation of documents and of the rules for the classification of files is somewhat reminiscent of the French model. A high number of exemptions and a certain amount of secretiveness are the guiding principles of most federal institutions. Their discretionary powers are extensive and provide considerable room for manoeuvre for civil servants. Rather general definitions of citizens' information rights allow administrations to keep documents confidential in many cases. A federal FIOA would be useful to extend the rights provided by the *Länder* governments enumerated above to all German citizens. Still, the progress made by these regional states can be employed as a road map for future legislation at the federal level.

1.4. Conclusion

Freedom of information legislation has evolved rapidly over the past few decades. Most Western countries and a considerable number of other states have now adopted laws and institutions to grant a general right to access information and to administer it as correctly as possible. In Europe, the Committee of Ministers of the Council of Europe has recently adopted a Recommendation to Member States to adopt legislation providing for a general guarantee of the right to access official documents.[70]

However, a tangible lack of transparency still exists in the majority of administrative systems. For instance, many regulations are still not known to citizens because they contain highly technical and legal vocabulary that prevents them from making use of their rights. Some countries and regions have made a pedagogical effort by drafting citizens' guides on access to information provisions[71]. Still, procedures and the definition of exceptions are far from being well understood, particularly in countries where access to information is not yet felt to be a fundamental principle of democratic government.

Freedom of access to administrative information cannot be called yet a solidly entrenched principle everywhere. Even in Sweden, the implementation of this right encounters obstacles

[70] Recommendation R(2002)2, Art. III: "Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin."

[71] E.g., *United States:* Union Calendar No. 214; 107th Congress, 2d Session House Report 107-371: "A citizen's guide on using the freedom of information act and the privacy act of 1974 to request government records". http://www.epic.org/open_gov/citizens_guide_02.html
Sweden: "The right of access to official documents in Sweden". Ministry of Justice. http://justitie.regeringen.se/inenglish/pressinfo/pdf/access.pdf ; and "Public access to information and secrecy with Swedish Authorities". Ministry of Justice. http://justitie.regeringen.se/inenglish/pressinfo/pdf/publicaccess.pdf;
France: Guide produced by the Commission on access to administrative documents (CADA). http://www.cada.fr/fr/guide/frame.htm.
Germany: Online information provided by Berlin on http://www.informationsfreiheit.de/

and sometimes lacks efficiency. It is thus not surprising to find a general scepticism among citizens of most countries with regard to freedom of information. The recent reversal in the United States of seemingly well established FIO norms is worrying because the fight against terrorism can possibly last for many years. Even the media are beginning to encounter a wall of administrative silence in many cases. This backward trend to a less open administrative structure could again widen the gap between citizens and their governments.

Yet it seems that the institutions of the European Union and most of its Member States are determined to continue on their way to improve disclosure of public records. Led by the Scandinavian countries, particularly Sweden, they seem to be willing to proceed towards a stronger culture of transparency and openness. An interesting development is the growing trend towards extending FOI laws to include non-governmental bodies such as companies and NGOs that receive public money. For instance, this extension frequently covers hospitals but could have broader effects as more and more essential government functions are outsourced to private entities.

2. Access to documents at the European Level

2.1. Introduction

The legal principle of access to information is a recent development in European law. Following the negative outcome of the Danish referendum on the Maastricht Treaty the political willingness to bring the European Union closer to its citizens increased considerably and was expressed in the Birmingham Declaration of October 1992[72]. The Edinburgh Council of November 1992 therefore introduced a provision to implement the FOI principle into Union law. The Council conclusions also mandated better access to Council working documents and fuller information about its activities.[73] A first non-binding legal basis was included in the form of Declaration n°17 annexed to the Treaty of Maastricht (1992):

> "The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions".

The European Council in Copenhagen proceeded further in this direction, mandating the Council and the Commission to improve the right of European citizens to access documents, with a deadline set for the end of 1993. [74]

This trend found its conclusion through Article 255 TEC of the Treaty of Amsterdam (1997), providing for a primary right of access to documents. The article, which was adopted at the 1996 IGC not least as a result of political pressure from the European Parliament and the Dutch delegation, states that

> "any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3 ".[75]

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[72] "*Make the community more open, to ensure a better informed public debate on its activities*". Para 2 (2) of the Birmingham Declaration, Birmingham European Council, 16 October 1992.

[73] "*Transparency: Implementation of the Birmingham Declaration: Access to the work of the Council; information on the role of the Council and its decisions; simplification and easier access to Community legislation*". Conclusions of the Presidency, Annexe, para 3, Edinburgh European Council, 11 and 12 December 1992.

[74] "*In the area of public access to information, it invited the Council and the Commission to continue their work based on the principle of the citizens having the fullest possible access to information. The aim should be to have all necessary measures in place by the end of 1993.*" Conclusions of the Presidency para 15, Copenhagen European Council, 21 and 23 June 1993.

[75] Art. 255: [...] 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 189b within two years of the entry into force of the Treaty of Amsterdam. 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

The right to access information is also protected by Article 6 TEU, which calls for the respect of human rights as guaranteed by the European Convention of Human Rights. The same principles are proclaimed in the EU's Charter of Fundamental Rights, to be included in a future European Constitution. Its Article 42 provides that

> "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 documents of the institutions and agencies of the Union, in whatever form they are produced".

The creation of the right to information in the Treaty of Amsterdam marked a turning point. Since then, parties claiming a further extension of this principle have had a legal basis at their disposal to sustain their demands. However, implementation was slower than many would have wished too see it: the implementing act was not adopted before 2001 (regulation of the Parliament and the Council on access to documents). Since the entry into force of this regulation EC 1049/2001 the number of applications and disclosures of documents has risen considerably.

In this part of the paper, the presentation will follow a chronological order. Its two sections, one on the acts preceding present legislation, the other on the present state of affairs in the inter-institutional exchange of information, aim at identifying the crucial moments and decisions which have enabled the three institutions to arrive at the necessary agreements. Some observations as to possible further improvements conclude the chapter.

2.2. Closer to the Citizen: the origins of European Access to Documents Legislation

2.2.1. Precursor regulations separately adopted by the institutions

Citizens' access

As was previously mentioned, the Copenhagen Summit had set a deadline which led to a certain multiplication of regulations, not only in the three main institutions but in most of the other agencies and institutions. In 1993[76] and 1994[77], the Council and the Commission, separately, adopted two decisions concerning public access to their documents. The European Parliament enacted a similar decision in 1997[78]. At the same time, the Council and the Commission agreed on two different inter-institutional documents that would govern their co-operation in this field. Furthermore, an inter-institutional agreement on democracy, transparency and subsidiarity was signed[79]. A common code of conduct concerning public access to Council and Commission documents was also agreed.[80]

[76] 93/731/EC: Council decision on public access to Council documents of 20 December 1993 (no longer in force)
[77] 94/90/ECSC, EC, Euratom: Commission decision on public access to Commission documents of 8 February 1994 (no longer in force)
[78] 97/632/EC, ECSC: European Parliament decision on public access to European Parliament documents of 10 July 1997 (no longer in force)
[79] Inter-institutional agreement of 25 October 1993 on democracy, transparency and subsidiarity
[80] 93/730/EC: Code of conduct concerning public access to Council and Commission documents, OJ L340 of 31 December 1993, p. 1.

These regulations prepared the ground for forthcoming provisions on access to documents,[81] such as the right to apply for third-party documents or to file an appeal if a document is denied. However, the limits of this piece-meal approach were clear: there was no general definition of the right of the public to access documents; the number of exemptions was high, transforming the principle to a mere possibility rather than a full right. Moreover, the codes of conduct were extremely sketchy, leaving a broad discretionary space to the institutions.

In the wake of these decisions, each institution started to publish periodical reports on public access. These surveys also were a starting point for the work of the European Ombudsman, particularly in his relationship with the European Parliament. Following an own-initiative inquiry carried out according to his statute, Ombudsman Jacob Söderman sent his first special report to the Parliament in 1997, on the subject of public access to documents held by certain community institutions[82]. The report makes several recommendations to the Parliament, not only referring to its inner conduct but also on the possibility to put pressure on other institutions, mainly on the Court of Justice, to pursue their transformation towards more openness. The Ombudsman also examined the contents of the above decisions, criticising their lack of co-ordination and the non-existence of registers. The Parliament reacted by adopting a resolution based on a report of the Committee on Petitions[83], in which it welcomed the initiative taken by the Ombudsman. The resolution became a point of departure for several further reports dealing with the subject of openness and transparency, not only within the Parliament but also with respect to the other institutions.[84]

Since then, Parliament has played a leading role to strengthen citizens' right to access Community and Union documents. Generally speaking, Parliament criticised that the prevailing rule at the Commission and the Council was still secrecy and confidentiality. More particularly, Parliament refused the idea that the Council, through discretionary decisions, could determine which documents were part of the legislative procedure, and which were not, while at the same time the extension of the co-decision procedure increased its powers in the European legislative process. That is why Parliament put special emphasis on a better definition of what constitutes a "document" (internal and external) and on a better organisation of registers and confidential documents[85]. In many ways, the points raised in these resolutions prepared the drafting of regulation 1049/2001, in that they insisted on the rights of third country nationals residing outside the EU, on the necessity to accelerate decisions on disclosure applications and on the importance to make use of the latest technological instruments to provide access to electronic documents.

[81] See annex for a detailed list of these texts.
[82] Special Report by the European Ombudsman of 15 December 1997.
[83] Report on the Special Report by the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents, on behalf of the Committee on Petitions (rapporteur: Mrs. Astrid Thors) of 2 July 1998. Resolution adopted in OJ C292 of 21 September 1998, pp. 113 and 170.
[84] These resolutions are listed in the annex.
[85] Report on openness within the European Union, on behalf of the Committee on Institutional Affairs (rapporteur: Ms. Maj-Lis Lööw) of 8 December 1998. Resolution adopted in OJ C104 of 14 April 1999, pp. 14 and 20.

Access for the European Parliament

At the same time, Parliament also started to claim wider access to sensitive documents for parliamentarians, calling for privileged access to confidential records, not only for MEPs but also for their assistants[86]. Provisions of this type were already included in the annex of the European Parliament's Rules of Procedure dealing with the treatment of confidential information[87], but their implementation in the relations with the other two institutions has only been completed in 2002.[88] Similarly, Parliament asked for an extended right of access to documents for rapporteurs when drawing up their report, especially the right to consult all the documents informing the Commission when preparing a legislative proposal. It also raised the necessity to improve access of the European Parliament to comitology documents. Due to the secluded nature of the comitology process, parliamentarians are often not sure whether their requests for information are being fully answered on the basis of the most recent documentation. Therefore, MEPs called for a right of access for the parliamentary committee dealing with the subject matter (e.g., agriculture) of particular working groups of the comitology system. Likewise, Parliament pleaded for broader access to Council working groups, at least for rapporteurs when drafting their report.

Between 1998 and 2001, inter-institutional relations did not change very much. Most steps forward were made by the Council, which decided, in 1999, to create a register for publicly available documents[89]. This register excluded, however, all files concerning security and defence policy. Council decided as well to adopt a rather controversial decision concerning the classification and transmission of sensitive information (Solana decision)[90], which was strongly criticised by the European Parliament and gave rise to a ECJ case (see below).

On 27 October 2000, the European Parliament adopted a resolution on a proposal made by the Commission for a common regulation concerning public access to documents of the European Parliament, the Council and the Commission[91]. One of the essentials called for by the Parliament was access to documents of the defence and security policy. Parliament insisted on an exceptional status for some of its organs, for instance the Committee on Foreign Affairs, the extended Bureau of this committee, the ad hoc permanent delegation concerning the relations with the NATO Parliamentary Assembly or, finally, an inquiry Committee to be formed by five

[86] This possibility has been accepted in 2002 (see 2.3.2).
[87] Annex VII: Confidential and sensitive documents and information.
[88] For an overview of the agreements made with the Commission and the Council, see the Briefing drafted by the former Directorate General for Research, Division for International and Constitutional Affairs, "The treatment of confidential information in the Parliaments of the Member States", for the attention of the Committee on Budgetary Control, March 2003.
[89] Council Decision 2000/23/EC of 6 December 1999 on the improvement of information on the Council's legislative activities and the public register of Council documents (subsequently modified by Council decision 2000/527 of 14 August 2000 amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC, OJ L212 of 23 August 2000, p. 9).
[90] Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 27 July 2000, on measures for the protection of classified information applicable to the General Secretariat of the Council.
[91] Report of the European Parliament of 27 October 2000, on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (rapporteur: Mr. Michael Cashman), on behalf of the Committee for Citizens' Freedoms and Rights, Justice and Home Affairs,. Resolution adopted in OJ C27 E of 31 January 2002, pp. 19 and 39.

to seven Members of the directly concerned committees or by the leaders of the political groups (see 2.3.2 below).

The Commission's proposal was finally adopted, on 30 May 2001, as regulation EC 1049/2001 under the co-decision procedure[92]. However, this would not have been possible without some recent case law of the ECJ and, probably, the increasing claims coming from civil society and the new Nordic Member States.

2.2.2. Court cases and civil society: their influence on the extension of FOI rights

One of the most active MEPs with respect to access to documents was former Finnish MEP Heidi Hautala. In 1996, she addressed a written question to the Council, on arms exports[93], and received a summary answer, stating that the information requested by her were to be found in the report of the Council Working Group on Conventional Arms Exports.[94] Ms Hautala thus asked the Council for the documents established by the working group[95]. Seeing her request denied because of a possible harm to public interest and security she appealed the Council's decision. Her appeal was rejected because the disclosure could harm the EU's relations with third countries. Consequently, in 1998, Ms Hautala decided to turn to the Court of First Instance[96].

The judgement of the Court on this case was the first element of a series of case law, in which the Court defined four main principles for access to information[97]:

- Access to documents has to be the rule, not the exception, particularly in view of the adoption of the Common Code of Conduct of 1993[98] and the several decisions outlined above. In *Carvel*[99], the Court of First Instance stated that "the objective pursued by the Decision ... [was] ... to allow the public wide access to Council documents". Therefore, as it reaffirmed in *Hautala*, the right to access documents also had to apply to Title V of the Treaty on the European Union, i.e. to the common foreign and security policy.
- Exemptions should be narrowly interpreted. For example, in *WWF UK* the CFI introduced the idea of reducing exceptions: "where a general principle is established ... exceptions ... should be construed and applied strictly, in a manner which does not defeat the application of the general rule"[100].

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[92] Cf. European Parliament resolution of 3 May 2001 (position of the European Parliament adopted with a view to the adoption of European Parliament and Council Regulation (EC) No ..../2001 regarding public access to European Parliament, Council and Commission documents; previous footnote); approved after the first reading.
[93] Written Question P-3219/96, OJ 1997 C 186 of 14 November 1996, p. 48.
[94] This working group had developed criteria for authorised arms exports, including respect of human rights, and adopted a Code of Conduct on Arms Exports under the British presidency.
[95] Letter to the Secretary-General of the Council of 17 June 1997.
[96] T-14/98 *Hautala v. Council of the European Union*. 18 July 1998. The applicant was supported by Finland and Sweden, the Council by France.
[97] *Essays for an Open Europe*. Tony Bunyan, Deirdre Curtin, Aidan White. European Federation of Journalists. November 2000; p. 18
[98] Even if it had no direct legal effect (Decision 93/730/EC; see footnote above).
[99] T-194/94 Carvel and *Guardian Newspapers v. Council* of 19 October 1995.
[100] T-105/95 *WWF UK v. Commission,* 5 March 1995, paragraph 56.

- The disclosure of documents should be examined case by case[101] and an individual analysis should be made for every application; a reasoned justification is to be given when refusing disclosure. In *Interporc Im- und Export GmbH*[102] the Court annulled the refusal of the Commission to grant access, given the fact that it had not clearly specified on which category of exceptions the refusal was based.
- Finally, the examination of possible harm to the public or international interests should be made with due respect for a proportional assessment, not in the form of an unspecific general statement. Therefore, the institutions should also carefully contemplate whether partial disclosure is possible[103]. In *Carvel*, the Court had established that the Council had to favour disclosure to withholding when weighing the different interests.

Both Courts thus created a juridical basis which has helped to pave the way for transparency and openness, two principles essentially created and developed at the EU level during the nineties. A recent decision of the ECJ confirms that the Court moves more and more towards prioritising disclosure of documents (see box).

Judgement of the Court of Justice in Case C-353/01 P of 22 January 2004, Olli Mattila v Council of the European Union and European Commission

The failure by the Community institutions to fulfil their obligation to examine the possibility of granting the public partial access to documents in their possession leads to the annulment of their decisions refusing to communicate those documents.

In March 1999, Mr Mattila, a Finnish citizen, asked the Commission and the Council for access to 11 documents concerning principally the relations of the European Union with Russia and Ukraine. Public access to documents in the possession of those two institutions was, at the time, governed by a code of conduct. The Commission and the Council refused to grant access to 10 documents on the ground that they were covered by the exception based on protection of the public interest in the field of international relations.

In its judgement of 12 July 2001, the Court of First Instance dismissed Mr Mattila's action seeking the annulment of those negative decisions. Mr Mattila brought an appeal against that judgement before the Court of Justice.

First, the Court observes that the Court of First Instance found that the Council and the Commission did not consider the possibility of granting partial access to the information which was not covered by the exception. The Court recalls that the examination of the possibility of partial access constitutes an obligation, under Community legislation and in accordance with the principle of proportionality, failure to comply with this obligation leads to the annulment of the decisions refusing to communicate the documents.

[101] "...a decision to reject a confirmatory application for access […] must be based on a genuine examination of the particular circumstances of the case...", T-14/98, paragraph 2.
[102] T-124/96 *Interporc Im- und Export GmbH v. Commission*, 6 February 1998
[103] "... before refusing access to a document unconditionally, the council is obliged to examine whether partial access should be granted..."; T-14/98 *Hautala*, paragraph 4.

The Court considers that the Court of First Instance wrongly held that the fact that the institutions could not have allowed partial access, even if they had carried out such an examination, does not lead to the annulment of those negative decisions. The Court holds that communicating the reasons for the refusal to the person concerned for the first time before the Community courts is not compatible with the procedural guarantees provided by Community law, and with the right of the person concerned to know the immediate reasons for any decision adversely affecting him adopted by the Community institutions.

The Court sets aside the judgement of the Court of First Instance and annuls the negative decisions of the Council and the Commission

Source: *ECJ Press release*

This development was also accelerated by the pressure of non-governmental groups and some recent Member States. In fact, the transparency principle has been much promoted since the accession of Finland and Sweden to the European Union. An important role was played by these countries in court cases and Ombudsman complaints. In the Parliament, the majority of reports and public hearings have been organised or promoted by MEPs from Scandinavian countries, the United Kingdom and the Netherlands. In fact, despite the dismissal of the application, the ECJ's *Netherlands* case[104] was an important step towards a better definition of the circumstances under which more freedom of access to documents must be granted. The Dutch delegation to the 1991 IGC had insisted, to no avail, on the inclusion of the FOI principle in the Maastricht Treaty. Thus, the Dutch government later appealed the Council's decision on its Rules of Procedure[105] because it held, supported by the European Parliament, that these rules were insufficient as a legal basis for what should be a fundamental right for European citizens and went beyond the Council's powers of internal organisation. The Court held that "[s]o long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" and that "the measures in question are among those which, as Community law stands at present, an institution is empowered to take pursuant to its power of internal organisation" (paragraphs 37 and 43). The decision clearly was an invitation to the Community legislator to adopt "general rules" on access to documents.

In addition, press associations and NGOs continued to criticise secretive practices. For instance, the European Federation of Journalists reacted to the decisions of the Secretary General of the Council, of July 2000, not to disclose foreign and security policy documents[106] by publishing several articles on transparency and openness in Europe[107]. They attacked the Council's

[104] C-58/94. *Netherlands v. Council*, 30 April 1996, ECR 1996, p. I-2169.
[105] 93/731/EC: Council decision on public access to Council documents of 20 December 1993
[106] Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council (Solana Decision).
[107] *Essays for an Open Europe*, op.cit.

behaviour at a time when a new regulation on access to documents was already discussed. Likewise, Statewatch, a European NGO, created a web site dedicated exclusively to freedom of information in Europe[108]. It assembled all legal documents concerning access to records and many articles on the current FOI situation in the EU. Without the work of these pressure groups, which were often supported by the European Parliament, the adoption of European regulations providing better transparency would certainly have been slower.

2.3. The Current Situation: Increasing Inter-Institutional Co-operation

2.3.1. Regulation 1049/2001: a new framework for access to documents

This regulation[109], applicable from 3 December 2001, replaces previous decisions and constitutes a major change in how European administrations deal with requests to access documents. It has obliged them to acquire a new *modus operandi* in order to meet the expectations of citizens and civil society. Among other things, the three institutions have created public registers[110], adopted new internal rules of procedure[111] and drawn up guides to help civil servants to react adequately to applications and to classify documents correctly[112].

The ***Council*** has adopted a new publication policy[113], providing access to all documents referring to a legislative act that has already been approved, even if these documents were not accessible before. It has also started to examine requests on a case by case basis to check if there is any possibility to disclose records partially. Moreover, and probably more important, the Council has accepted to transmit preparatory documents even if they are still under discussion, only withholding information which could allow to identify statements made by a particular Member State delegation. Likewise, the new policy has enabled the automatic disclosure of all documents (legislative or not) that have already been transmitted to citizens. The Council has found that by including more documents in the public register, the number of requests has dropped, but many applications concern sensitive documents.

The ***Commission*** has also created a web site on access to documents which includes links to other institutions and to Member State laws[114]. Its registers are an attempt to incorporate sensitive documents in order to allow applicants to know which records are classified, and at what level of confidentiality. The Commission has also made an effort to reform its internal

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[108] http://www.statewatch.org/foi.htm

[109] Regulation (EC)No 1049/2001 of the European Parliament and of the Council of 30 May 2001, regarding public access to European Parliament, Council and Commission documents; OJ L145 of 31 May 2001, p. 43.

[110] European Parliament: http://www4.europarl.eu.int/registre/recherche/RechercheSimplifiee.cfm; Council: http://register.consilium.eu.int/utfregister/frames/introfsEn.htm;

[111] *Council:* 2001/840/EC: Council Decision of 29 November 2001 amending the Council's Rules of Procedure. *Commission:* 2001/937/EC, ECSC, Euratom: Commission Decision of 5 December 2001 amending its rules of procedure. *European Parliament:* Amendment to the Rules of Procedure: Access to European Parliament documents. (Rules 172 and Annex VII) 13 November 2001.

[112] E.g., Staff Note CP n° 134/02 of the Deputy Secretary-General, of 24 September 2002.

[113] First annual report on the implementation of Regulation (EC) n° 1049/2001 of 8 April 2003. Doc. 7957/03.

[114] http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm#. It includes the link to all the Commission registers. A similar page can be found on the European Parliament's web site: http://www.europarl.eu.int/opengov/default_en.htm.

structure in order to create higher awareness among its officials of the importance of FOI requests. The number of applications and the number of refusals to disclose have increased since the entry into force of regulation 1049/2001.

Still, both internal reviews and outside observations have highlighted some gaps in the new regulation, which should be amended either through a reform of its provisions or, possibly, by enshrining a better description of FOI rights in the draft Constitution for the European Union. The main points causing problems in the current system were outlined at a recent hearing organised by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament. Chairing the hearing, MEP Charlotte Cederschiöld expressed her concern on three main issues[115]:

- Many registers, even if electronically available, are still difficult to use. Citizens need specific skills to access them and to make requests. That is why most applicants and users are professionals (lawyers, lobbyists, academics etc. [116]).
- The use of the "space to think" principle, i.e. the possibility for officials to deny access to preliminary documents preparing a decision or implementing policies is dangerously vague[117]. Where should be the limits of this "space"? This principle should only be used as a case by case exemption and should always be justified in detail.
- Finally, the usefulness of Council press releases was questioned because they were too technical to be fully understood by citizens and often conveyed the principal political "message" only between the lines.

At the same occasion, Statewatch presented an analysis on secrecy and openness in the EU[118]. In chapter 8, the authors study the effects of the new regulation and possible trends for the future. Their conclusions also insist on the points raised by the EP hearing, adding two further aspects:

- The problem of third-party documents: in practice, the power of refusal is left to the original authors of a document. This is obviously problematic, given that Member States are treated as third parties. They can thus block the disclosure of documents with sensitive information concerning their own acts. The Council has given the assurance that it will draw a line between documents coming from a Member State acting as a Council member and documents drafted in their capacity as national governments, but this distinction can obviously be difficult. The Council has also vouched that it will interpret the obligation to ask third parties for their permission to disclose as narrowly as possible.
- Classification of sensitive documents: the regulation has extended the Solana Decision mentioned above to all areas of decision making, not just security and foreign policy. This extension is controversial and could undermine the main purpose of the regulation.

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[115] Public hearing on *EU transparency - Access to documents: does it work?* Chaired by Charlotte Cederschiöld, MEP, and Michael Cashman, MEP. 12 June 2003.

[116] For a more detailed overview of profiles and other statistics on public access to documents, see the annexes of the two annual reports of the Commission and the Council (see footnotes above).

[117] This principle had already been harshly criticised in *Essays for an Open Europe*, op.cit.

[118] Tony Bunyan, Secrecy and Openness in the European Union - the Ongoing Struggle for Freedom of Information, *Statewatch*, September 2002 (cf. http://www.statewatch.org/secret/freeinfo/index.html).

According to Steven Peers, "the new regulation ultimately contains several steps forward, counterbalanced by several steps backwards and a number of disappointments"[119]. Regulation 1049/2001 has certainly created a new FOI environment which provides for a general commitment to the transparency principle at the European level and for better control of access to documents provisions by the European Parliament.

2.3.2. The current flow of information between institutions.

As far as the European Parliament's information rights are concerned, an important improvement of institutional importance has been achieved by two agreements between the Parliament and the Commission and the Council, respectively. The Framework Agreement with the Commission of 2000[120], amending the 1990 code of conduct (updated in 1995[121]), established procedures allowing to improve inter-institutional relations and to create a flow of information between both institutions:

- The Commission commits itself to transmit as soon as possible proposals and initiatives concerning the legislative and budgetary fields, documents concerning the Common Foreign and Security Policy and Justice and Home Affairs. This obligation to inform the Parliament, predominantly in its capacity as legislator, will also bind the Council.
- Annex 3 of the agreement includes provisions on access to confidential information[122]. However, infringement procedures and procedures relating to competition are excluded from disclosure, except for the President of the Parliament, the chairperson of the committee concerned or the Bureau of the Conference of Presidents. In case of disagreements between the two institutions, their Presidents are called upon to find a solution.

A more restrictive agreement has been signed with the Council in 2002[123], on the problem of access to classified information concerning CFSP and JHA[124]. Such files can now be transmitted to the President of the European Parliament or to the Chairperson of the Committee on Foreign Affairs, Human Rights and Common Security and Defence Policy. A special procedure, involving a committee consisting of the President, the Committee chair and four Committee members appointed by the Conference of Presidents, is to be established in the event of an

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[119] Steven Peers, *The new regulation on access to documents - a critical analysis*. Quoted by Tony Bunyan in "Chapter 8 (The new Regulation, its operation and new challenges to secrecy) of *Secrecy and openness in the European Union - the ongoing struggle for freedom of information*, op.cit.
http://www.statewatch.org/secret/freeinfo/ch8.htm

[120] Framework Agreement on relations between the European Parliament and the Commission; included in Annex XIII of the Rules of Procedure of the European Parliament (approved by the Conference of Presidents on 29 June 2000 and by Parliament on 5 July 2000).

[121] OJ C89 of 10 April 1995, p. 1.

[122] Access to confidential documents is granted mainly in the legislative domain and in the framework of the budgetary procedures (discharge and powers of scrutiny).

[123] Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy; OJ C 298, of 30 November 2002, p. 1-3.

[124] As specified in regulation 1049/2001, any document coming from an international organisation or a Member State cannot be disclosed without the express permission of the author.

international crisis. However, the range of possibilities to transmit documents is smaller for records classified as top secret[125]. Nevertheless, the agreement constitutes an improvement compared to the Solana Decision.

The present state of inter-institutional communication with the Council is usefully demonstrated by a recent court procedure initiated by a Member of the European Parliament, which establishes a link between the problems encountered by the Parliament and regulation 1049/2001. MEP Maurizio Turco presented his case to the Court of First Instance[126] because he received a partially blacked-out answer to his request for disclosure of five documents appearing on the agenda of the 2455th Justice and Home Affairs Council, of 14 and 15 October 2002. In its reply, the Council had eliminated information allowing to identify national delegations from four documents and almost completely denied access to the fifth one, arguing that it could not deliver legal opinions from its Legal Service.

Mr Turco brought the case to the Court of First Instance on 28 February 2003, arguing that it was not justified to delete the names of national delegations for the following reasons:

- The Council had violated regulation 1049/2001 on access to documents and had not respected the principle of proportionality.
- The Council had breached Article 6 of the Treaty on the European Union, guaranteeing the respect of civil and political rights.
- The Council had not given any justification for deleting the delegations' identities, which is contrary to Article 255 of the EC Treaty and to Article 7 of regulation 1049/2001.

Mr Turco also wanted to demonstrate the futility of the Council decision, because most national delegations' positions were widely known anyway or had even been the object of public debate in their countries. According to the plaintiff, the Council insisted on its secretive conduct even without plausible justification. He also criticised the fact that refusal to disclose this information was used to cover up differences between the political positions taken by Council members and those of large action groups in their home country. He finally criticised the fact that the Council was not willing to transmit legal opinions,[127] considering that the Council had not established a sensible balance of interests, particularly as the issue at stake was a legislative procedure. The court has not yet taken a decision.

Another important step forward is the creation of an inter-institutional Committee, pursuant to Article 15(2) of Regulation 1049/2001[128]. Up to now, the Committee had three meetings. The first one took place on 13 March 2002, with President Cox, Mr Josep Piqué, President-in-Office of the Council, and Ms Loyola de Palacio, Vice-President of the Commission. The second

[125] Classified as TOP SECRET, SECRET or CONFIDENTIAL, according to the NATO system.
[126] T-84/03 - *Maurizio Turco v. Council of the European Union*.
[127] In the Parliament, most opinions given by the Legal Service are also considered confidential.
[128] Art. 15: "The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents".

meeting of 10 April 2002[129] dealt with some issues concerning the implementation of the regulation:

- It was decided to draft a guide to explain access to documents procedures to European citizens. This guide is now accessible on the three institutions' web sites[130].
- It was agreed to extend disclosure to proposals of legislative acts, pursuant to Article 12 of the regulation[131].
- A more intensive inter-institutional co-operation on the problems concerning third-party documents and the establishment of good administrative practices was envisaged[132]. The Committee insisted on the necessity to apply the regulation to institutions or agencies to be created in the future.
- The Committee encouraged the Commission to review existing rules on access to documents in order to avoid conflicts with the new regulation or overlapping provisions.

A third meeting took place on 9 July 2002[133], which dealt with the creation and further evolution of public registers in the three institutions[134] and with the inter-institutional guide on public access to documents. In addition, a memorandum of understanding was signed to improve administrative co-operation. This memorandum has led to increased communication within and between the institutions on handling disclosure requests made to one institution but also concerning documents held or drawn up by another. To respect the 15-days deadline, several "contact points" assure, within five working days, any necessary co-ordination between different services of the institutions having received disclosure requests in order. The three institutions also agreed on an amendment of the Regulation concerning historical archives[135] and on agencies' statutes, incorporating the provisions of regulation 1049/2001.

Some commentators have called for a wider composition of the Committee, including, for instance, representatives of other European institutions, and of the European Ombudsman[136]. Other critics have drawn attention to the fact that the practical implementation of the framework agreement of July 2000, between the Commission and the Parliament, in some respects falls behind what regulation 1049/2001 now provides for citizens.

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[129] Participants: Ms Cederschiöld, Vice-President of the European Parliament, Mr de Miguel, State Secretary for European Affairs representing the Council and Mr Barnier, Commissioner for Regional Policy and institutional affairs.

[130] *Access to European Parliament, Council and Commission documents: A user's guide*; European Union, 2002. EP access: http://www4.europarl.eu.int/registre/recherche/Aide/Guide_EN.pdf

[131] Art. 12(2): "In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."

[132] Article 15(1) of regulation 1049/2001: "The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation."

[133] Participants: Ms Cederschiöld, Mr Haarder, on behalf of the Danish Council Presidency, and Ms Loyola de Palacio for the Commission.

[134] The European Parliament and the Commission registers have been created on 3 June 2002.

[135] COM/2002/462 final: Proposal for a Council Regulation amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community.

[136] Cf. *Public hearing on EU transparency - Access to documents: does it work?* Contribution by Elizabeth Crossick. 12 June 2003

Other related issues addressed by EP resolutions

Several resolutions have been adopted by the Parliament calling for disclosure of all documents necessary to follow the ***budgetary discharge*** procedure and the activities of the European Anti-Fraud Office (OLAF). In December 2000, the European Parliament voted a resolution on the reform of budgetary control which called for an improvement of the flow of information between the Parliament and the Court of Auditors[137]. E.g., it demanded prompter communication of special reports and more outspoken comments on specific incidents, criticising particularly the general allusions brought forward by the Court of Auditors (for instance, "Member States" instead of mentioning the delegation or national administration responsible for a particular problem). The Court of Auditors was requested to attach a list of documents received from the Commission and a list of files requested, but not transmitted, to its annual report. Moreover, it was reiterated that, according to previous agreements[138], the Commission should transmit to the chairperson of the CoCoBu committee all information needed to carry out Parliament's oversight and implementation of the budget as well as information necessary for an effective control of the budgetary discharge procedure. Parliament committed itself to provide a list of documents requested for transmission (including classified documents) and of the subsequent decisions, positive or negative, of the other institutions. It also announced that the discharge would be postponed if the Commission continued to refuse transmission of such documents.

Another resolution refers to the ***fight against fraud***[139]. It carries particular importance since, to exert its powers of scrutiny, the European Parliament is given a right to access information acquired by OLAF when investigating external and Community institutions. Parliament requests OLAF to provide a timely and complete list of cases dealing with fraud, corruption or other illegal activities related to budgetary activities. The resolution also includes a section referring to access to information: Parliament wishes to be informed promptly of OLAF's activities and requires access to documents, assuring that it will not intervene in ongoing investigations. This access should not be denied with reference to third parties' or national public prosecutors' objections. Furthermore, all members of the CoCoBu Committee should have access to confidential OLAF reports, not only its chair or the President of the Parliament.

Finally, a recent resolution, based on a report by the Committee on Citizen's Freedoms and Rights, Justice and Home Affairs, examines European ***policies against corruption***[140]. The text notes the importance of freedom of information and pluralism for an effective fight against corruption. The Commission and the other institutions are urged to assure transparency during

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[137] Report of 6 December 2000 on Reform of budgetary control procedures and institutions (rapporteur: Mair Eluned Morgan), on behalf of the Committee on Budgetary Control, doc. A5-0383/2000; resolution adopted on 13 December 2000 (OJ C232 of 17 August 2001, pp. 82 and 194).

[138] Paragraph 17 of the Framework Agreement of 5 July 2000, pursuant to Article 276 of the EC Treaty.

[139] Report of 28 February 2001 on the Commission's 1999 Annual Report 'Protecting the Communities' financial interests - the fight against fraud' (rapporteur: Herbert Bösch), on behalf of the Committee on Budgetary Control, doc. A5-0078/2001; resolution adopted on 14 March 2001 (OJ C343 of 5 December 2001, pp. 106 and 187).

[140] Resolution PE T5-0542/2003, of 4 December 2003, on the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - On a Comprehensive EU Policy Against Corruption, based on a report on behalf of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, doc. A5-0367/2003 (rapporteur: Francesco Rutelli); not yet published in the OJ.

the whole decision-making process and to build an efficient and economically reliable administration.

2.4. Conclusion

The *Turco* case is the first presented by an MEP to the Court of First Instance after the entry into force of regulation 1049/2001 and illuminates the current situation of FOI and transparency at the European level. Some EU institutions continue to be secretive and to apply exemptions extensively. A profound change of mentality will certainly take more time.

Evaluating present European FOI policies, the following issues may need further consideration:

- There is still a strong tendency to withhold certain types of information (for instance, third party documents or opinions drafted by legal services).
- The opacity of the comitology process makes the contents of committees' debates and their decisions and composition almost inaccessible for ordinary citizens.[141]
- In the field of competition policy, documents concerning state aid are not disclosed because the information contained in them could affect the interests of third parties.

As was confirmed by the recommendation of the Council of Europe's Committee of ministers, there are certainly justified exceptions to the right of access to documents. Therefore, a common inter-institutional code of conduct or closer involvement of the European Ombudsman could be explored as possible avenues. This might be especially useful with respect to procedures where Parliament is not directly associated or where legislation is delegated to the Commission. It could also clarify some problems encountered by the Commission and the Parliament in implementing their 2000 Framework Agreement.

There should also be a more serious commitment to use new communication technologies. The advances made through increased userfriendliness of the Internet and modern database technologies could permit much wider access to documents to a larger number of citizens and a better organisation of records. Citizens could have a clearer idea of which are the latest documents and easier access to related records, even if they are kept by different institutions.

However, access to documents is not the only valid strategy to improve openness and transparency and to fill the gap between the citizens and the European Union, as was intended by declaration 17 annexed to the Maastricht Treaty. Although the rising number of requests for disclosure clearly demonstrates the citizens' interest to get the EU's activities to know better and to have a more transparent Union, this policy cannot suffice to reach all strata of society if it is not accompanied by an effort of didactics to explain the role of each institution and the working of the legislative process.

FOI rights and, more specifically, rights to access documents are not a principle acquired forever. It is even likely that certain recent developments may undermine them again. To

[141] Cf. Torbjörn Larsson, *Pre-cooking in the European Union – the World of Expert Groups*, Stockholm 2003.

combat this tendency, Parliament has to scrutinise further evolutions, especially in the security and defence policies. The EU should avoid a backlash on FOI rights as they have been criticised by action groups in the US, where the fight against terrorism and the defence of public security are invoked as reasons to refuse disclosure of ever more public information to citizens. It will be important to present the EU as a positive example. This will only be possible if the European institutions establish a climate of mutual trust and co-operation and allow access to a wide range of documents, including, at least to some extent, classified and sensitive records.

Annex: Features of an up-to-date Freedom of Information Regime

Principle 1: **Maximum Disclosure**	Freedom of information legislation should be guided by the principle of maximum disclosure
Principle 2: **Obligation to Publish**	Public bodies should be under an obligation to publish key information
Principle 3: **Promotion of Open Government**	Public bodies must actively promote open government
Principle 4: **Limited Scope of Exceptions**	Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests
Principle 5: **Processes to Facilitate Access**	Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available
Principle 6: **Costs**	Individuals should not be deterred from making requests for information by excessive costs
Principle 7: **Open Meetings**	Meetings of public bodies should be open to the public
Principle 8: **Disclosure Takes Precedence**	Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed
Principle 9: **Protection for Whistleblowers**	Individuals who release information on wrong-doing - whistleblowers - must be protected

Source: Toby Mendel, Freedom of information: a comparative legal survey; UNESCO 2003.

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