

Report of the European Ombudsman conference - Access to EU documents: what next?

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HIGH LEVEL PANEL: CONSIDERING FUTURE RULES ON ACCESS TO DOCUMENTS

The conference started with a high-level panel comprising the European Ombudsman, **Emily O'Reilly** and representatives from the EU's legislative institutions **Věra Jourová**, European Commission Vice-President for Values and Transparency, **Heidi Hautala**, European Parliament Vice-President and **Reijo Kemppinen**, Director-General for Communication and Information in the General Secretariat of the Council.

The discussion focused on the need to review the EU regulation on public access to documents ([Regulation 1049/2001](#)), [\[Link\]](#) as it is more than 20 years old and in order to take account of developments in modern technology and the significant amount of relevant EU case-law.

The moderator introduced the topic, noting that approximately 25% of cases that the European Ombudsman handles are related to transparency and access to documents. That suggests that EU institutions cannot or will not supply the requested documents within reasonable periods, if at all. He also noted that previous attempts to review Regulation 1049/2001 have ended in EU legislative deadlock.

Emily O'Reilly explained that a stakeholder [survey](#) [\[Link\]](#) conducted by her office showed that the most frequent issues are delays, vague arguments put forward by the institutions or agencies, not taking the current case-law into account, and the divergent uses of document management systems to record and register documents.

Věra Jourová stated that the Commission hopes to address some of the issues surrounding access to documents requests within the current mandate. She suggested two options to do this:

- The co-legislators should find a solution to the current legislative impasse to amend or replace Regulation 1049/2001. She said that the Commission could withdraw the current proposal and bring forward a new one, taking into account recent EU case-law and including a clearer and modernised definition of the term "document", allowing for greater public access to information. Commissioner Jourová indicated that the Commission would like to propose such a revision as soon as possible, hopefully in 2022, so it could still be adopted during the current legislative term.



- As a “plan b”, the Commission intends to adopt new internal guidelines, which will address many issues, including the increasing use of instant messages as a means of communication. These new internal guidelines could serve as a benchmark for other institutions and as a starting point for inter-institutional negotiations on an updated regulation.

Heidi Hautala advocated for a common solution, which would be acceptable for all institutions. She argued that work on reviewing Regulation 1049/2001, should begin now, as the Parliament is in a position to engage and make suggestions. She stressed that a new legislative proposal should be preceded by a wide public consultation. Furthermore, she emphasised that it would be important to take existing case-law into account in any new proposal, and to ensure that any revision would in any case, not lead to less transparency. She recognised the importance of the roles of the European Court of Justice and the European Ombudsman in improving transparency in the EU. Finally, she also called for further consideration of the Parliament’s proposal to put in place minimum harmonised administrative standards for all institutions, which would include record keeping and document management. To date, this has not been given due consideration by the other institutions.

Reijo Kemppinen stated that the Council agrees that updating Regulation 1049/2001 is necessary to take into account technological change, but that this should not compromise aspects of the decision-making process, such as efficiency and the space to negotiate, which the EU institutions would like to protect. He argued that, while technological developments cannot be ignored, defining every piece of content as a document would not be an adequate solution either. In the Council’s opinion, such complex issues should be discussed informally between the institutions first, before a proposal to revise Regulation 1049/2001 can be made.

Emily O’Reilly concluded the panel discussion, by stating that she was optimistic that the institutions will have the ambition to make the necessary changes, and that the conference will hopefully help to this end. She noted that the EU institutions should also see transparency as a friend, which can reassure citizens who may harbour suspicions when information is not made public.

EXPERT PANEL: CURRENT SYSTEM FOR ACCESS TO DOCUMENTS

The participants on the second panel were experts on transparency, with experience in the field of access to documents. The panel comprised **Helen Darbshire**, executive director of Access Info Europe, **Päivi Leino**, Professor of Transnational European Law at the University of Helsinki, **Peter Teffer**, an investigative journalist for Follow the Money, **Rosita Hickey**, Director of Inquiries at the European Ombudsman office and **Tanya Verrier**, Director of Transparency, Efficiency and Resources at the Secretariat-General of the Commission. The moderator divided the discussion into various talking points, focusing on the outcome of the previous panel discussions. These included: the influence of new technologies, such as instant messages, on the notion of document; the need to apply Regulation 1049/2001 more consistently across the EU administration; the role of transparency in making institutions more accountable; the need to improve capacities to deal with access to documents requests; and on the European Ombudsman’s powers.



Helen Darbishire mentioned that transparency was not about technical access to documents, but about information, and is essential for the legitimacy of the EU. She referred to the results of the European Ombudsman's survey, which showed that two-thirds of those surveyed were dissatisfied with how the right of public access to documents is currently applied by the institutions. This means that it is unlikely that the wider public can access the information they need to understand the EU. She argued that the EU should have harmonised transparency standards for all EU institutions, bodies, offices and agencies. Rather than being distracted by the issue of instant messages, we should focus on the fact there is no regulation on record keeping and the management or archiving of documents. She argued that a fully-fledged transparency system needs to be much broader than the current provisions of Regulation 1049/2001. In devising this system, it would be beneficial to analyse the approaches taken by the Member States and to carry out a broad public consultation with interest groups, practitioners and the Member States.

Päivi Leino argued that the Commission does not seem to be sufficiently committed to reforming EU transparency rules. The main issues she mentioned include the fact that, while Regulation 1049/2001 does technically already cover text and instant messages, it still needs to be determined in practice whether these messages have a policy relevance and therefore whether they would have to be recorded. Furthermore, she argued that the public registers of EU institutions are not user-friendly. This forces applicants to make broad access to documents requests, which also makes it harder for the institutions to deal with requests within the time limits provided. She called for the creation of an inter-institutional document register that should at least cover all legislative documents of the institutions.

Peter Teffer criticised the EU's reflex of seeking to always solve problems through legislation. He argued that the different interpretations of Regulation 1049/2001 used by and within the institutions causes many problems. He also noted that text and messages should be already covered by the broad definition of documents in Regulation 1049/2001. He argued that negative experiences of how the EU institutions deal with access to documents requests may make people less trusting of the EU. With regard to the delays in dealing with access to document requests, he argued that the time limits were determined by the institutions themselves in adopting Regulation 1049/2001; if they have difficulty complying with these time limits, the institutions should be able to adapt their internal processes to comply with them.

Rosita Hickey stressed the importance of staff in all institutions having a transparency reflex to give effect to right of public access to EU documents. The advantage of reviewing Regulation 1049/2001 now could be to embed the principle of transparency by design. She agreed the institutions' registers do not work very well and need to be updated, so as to make it easier both for those requesting access to document but also for the institutions to deal with such requests. She stated that the Ombudsman is aware of the systemic issue of delays in dealing with access to documents requests, and is reflecting on how to work on this. She stated that ensuring swift access to information is often vital for the applicants.

Tanya Verrier explained that the Commission is committed to broader transparency overall.



She stated that the Commission has already set up a quite advanced internal system for dealing with access to document requests, which includes transparency training for staff and cooperation between the different units. In response to a question posed in the earlier panel, she estimated that over 100 people are involved in handling access to documents requests. She added that text messages are already covered by the Commission's internal guidelines on access to documents. However, she conceded that the Commission does not yet have a good technological solution for registering such messages. She confirmed that the Commission is currently investing in upgrading its IT system and registers, to make them more user-friendly. Finally, she said that the Commission is considering how to proactively publish documents that have been disclosed following access to document requests.

In response to a question by the moderator on whether the Ombudsman should have binding powers, the participants concurred that it would be preferable that the institutions respect the Ombudsman's recommendations, without the need to make them binding. They pointed out that the current soft powers of the Ombudsman allow for flexibility than the courts.

Emily O'Reilly concluded the conference by addressing the question of binding powers. She said that, where the rule of law is strong, an Ombudsman does not require binding powers. However, the creation of an 'Information Commissioner' with the power to make binding decisions, which themselves could be challenged before the EU Courts, would help to guarantee the public right to freedom of information.

This report is not a definitive account of the conference. See the video of the full conference .