European Ombudsman

European Ombudsman guide on the right of public access to EU documents

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1. The right of public access to EU documents

1.1. Does EU law provide for a right of public access to documents?

The Charter of Fundamental Rights of the EU [Link] and the Treaty on the Functioning of the EU [Link] (TFEU) state that EU citizens and residents have a right to access documents in the possession of EU institutions, bodies, offices and agencies.

Article 42 of the Charter states 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, bodies, offices and agencies of the Union, whatever their medium.”

Article 15(3) TFEU states that:

“Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European

Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph."

Regulation 1049/2001 [Link] on public access to EU documents gives effect to this right for most EU institutions, bodies, offices or agencies.

When a document contains environmental information, the specific rules set out in the Aarhus Regulation [Link] also apply (more information in question 9.1).

See general Q&A on the right of public access
- Does EU law provide for a right of public access to documents? [Link]

2. Obligations on the different EU institutions, bodies, offices and agencies

2.1. What are the rules applying to the EU institutions?

There are seven EU institutions: the European Parliament, the Council of the EU, the European Commission, the European Council, the Court of Justice, the European Central Bank and the Court of Auditors.

Regulation 1049/2001 [Link] on public access to documents applies directly to the Parliament, the Council of the EU and the Commission (these institutions are explicitly mentioned in Regulation 1049/2001). The rules of procedure of the Parliament [Link], the Council [Link] and the Commission [Link] include specific provisions setting out how they apply Regulation 1049/2001.

In a Joint Declaration on Regulation 1049/2001 [Link], the European Parliament, the Council and the Commission called on the other EU institutions, bodies, offices and agencies to adopt internal rules on public access to documents which take account of the principles and limits set out in that regulation.

The **European Council** applies Regulation 1049/2001 and the relevant rules of procedure of the Council of the EU regarding how to deal with requests for access to document (see Article 10 of the European Council's rules of procedure [Link]). According the European Council's rules of procedure [Link], the European Council's deliberations are covered by secrecy provisions, unless the European Council decides otherwise. However, Regulation 1049/2001 nonetheless applies to documents held by the European Council. The European Council's rules of procedure [Link] add that the European Council may authorise the production of a copy of or an extract

from European Council documents for use in legal proceedings even when those documents have not already been released to the public in accordance with Regulation 1049/2001.

The three other EU institutions - the Court of Justice of the EU, the European Central Bank and the European Court of Auditors - apply separate rules that differ to varying degrees from Regulation 1049/2001.

The **Court of Justice** adopted a decision [Link] setting out how it deals with access to documents requests relating to its administrative work only. There is no right of public access to documents it holds relating to its 'judicial work', which includes pleadings, evidence and its internal deliberations on cases. The legal basis for this exception to the general rule of public access to documents is found in paragraph 4 of Article 15(3) of the Treaty on the Functioning of the EU [Link] (TFEU), which states that the right of public access to documents does not apply to the Court of Justice, except when it is exercising its 'administrative tasks'. The Court of Justice's rules that apply to documents relating to its administrative tasks are broadly similar to the rules set out in Regulation 1049/2001.

If another EU institution, body, office or agency were also to hold a copy of a document that relates to the judicial work of the Court of Justice, a request for access to that document can be put to that institution, body, office or agency. For example, if an EU institution is a party in court proceedings, it will have copies of the pleadings in that case, as demonstrated by EU case-law [Link]. It must deal with any request for access to that document in accordance with the access to documents rules that apply to it.

The decision [Link] of the **European Central Bank** (ECB) on public access to ECB documents sets more restrictive rules than Regulation 1049/2001, in particular to protect the ECB's decision making. The rules regarding decision making exist to give effect to Article 15(3) of TFEU, which states that the right of public access to documents does not apply to the European Central Bank, except when it is exercising its administrative tasks. In addition, in accordance with article 10(4) of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank [Link], the proceedings of the meetings of the Governing Council of the European Central Bank are confidential unless the Governing Council decides to make the outcome of its deliberations public. EU case-law [Link] has established the concept of the 'confidentiality of the deliberations of the ECB's Governing Council', however this covers only the conduct of the deliberations and not their outcome.

According to EU case-law [Link], as regards its supervisory work, the ECB cannot rely on a 'general presumption' to refuse access. This means that it must justify any refusal to grant access on the basis of the content of the documents at issue.

The **Court of Auditors** has adopted rules [Link] that are very similar to Regulation 1049/2001. They contain one additional exception aimed at protecting the Court of Auditor's *"audit observations"* and documents used in the preparation of those observations. This does not differ in substance from the rules set out in Regulation 1049/2001. The Court of Auditors' rules also contain an option to release any document it holds if there is an overriding public interest in

disclosure.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

2.2. What are the rules applying to EU bodies?

There are seven EU bodies: the European External Action Service (EEAS), the European Economic and Social Committee, the European Committee of the Regions, the European Data Protection Supervisor (EDPS), the European Data Protection Board (EDPB), the European Ombudsman and the European Investment Bank (EIB).

Regulation 1049/2001 [Link] on public access to documents applies to the **EEAS** pursuant to article 11(1) of Council Decision [Link] 2010/427 of 26 July 2010 establishing the organisation and functioning of the EEAS. The EEAS has also adopted implementing rules [Link].

The EEAS also assists EU 'civilian missions' in dealing with access to documents requests.

The **European Economic and Social Committee** decided [Link] to apply the *principles* of Regulation 1049/2001. In practice, this means that it applies Regulation 1049/2001.

The **Committee of the Regions** decided [Link] to apply the *principles* of Regulation 1049/2001. In practice, this means that it applies Regulation 1049/2001.

Article 51 of the Regulation [Link] governing the **EDPS** states that Regulation 1049/2001 applies to documents it holds.

Article 76 of the Regulation [Link] governing the **EDPB** states that it applies Regulation 1049/2001. However, that article contains the proviso that the discussions of the EDPB shall be confidential where it deems necessary, as provided for in its rules of procedure.

The European Ombudsman deals with [Link] applications for public access to documents in accordance with Regulation 1049/2001, while respecting the Statute of the European Ombudsman [Link], which contains provisions on confidentiality.

The EIB has a policy [Link] that is more restrictive than Regulation 1049/2001, notably regarding protecting the purpose of investigations, audits and inspections.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

2.3. What are the rules applying to EU agencies?

The founding regulations of the EU agencies that existed in 2001, when Regulation 1049/2001 [Link] on public access to documents was adopted, have been adapted to specify that Regulation 1049/2001 applies to these agencies. The founding regulations of all new agencies, established since 2001, contain a provision applying Regulation 1049/2001 to those agencies.

Most agencies have adopted decisions setting out how they *apply Regulation 1049/2001* , for example the Single Resolution Board [Link] and the European Medicines Agency [Link]. It is important to note that these decisions cannot derogate from or limit the right of access provided for in Regulation 1049/2001.

The 'EU executive agencies' depend on the European Commission for administrative support when dealing with access to documents requests. They apply the same rules as the European Commission when dealing with access to documents requests, namely Regulation 1049/2001 and the rules of procedure of the Commission.

See a detailed list [Link] of the EU's decentralised and executive agencies.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

2.4. The rules applying to EU offices

The four EU inter-institutional offices – the European Personnel Selection Office, the European School of Administration, the Publications Office of the EU and CERT-EU (the EU's Computer Emergency Response Team) – deal with requests for access to documents in accordance with Regulation 1049/2001 [Link] on public access to documents.

Regulation 1049/2001 applies to the European Public Prosecutor's Office through Council Regulation 2017/1939 (the EPPO Regulation [Link]). However, in accordance with article 109 (1) of Regulation 2017/1939, the right of access to documents does not apply to documents that are part of the investigation files of the EPPO. The EPPO has adopted implementing rules [Link] governing access to EPPO documents.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

2.5. Does the right of public access to documents apply to the Eurogroup?

The Eurogroup is an informal body through which the ministers of the euro area Member States meet. As the Eurogroup is not a formal EU body, the right of public access to EU documents does not apply to it. Nevertheless, the Eurogroup has informed the Ombudsman [Link] that it aims to adhere to the spirit of the rules and principles set out in the Treaties. One such principle

is transparency. The Eurogroup has stated that it has a proactive transparency policy and draws on article 4 of Regulation 1049/2001 [Link] on public access to documents to help it evaluate whether or not documents can be disclosed proactively. It also stated that EU citizens can address requests for public access to documents to the Eurogroup.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

2.6. Are there other rules governing the right of public access to documents?

The rules on access to documents must be understood and applied in accordance with the case-law of the Court of Justice.

EU institutions, bodies, offices and agencies must take account of the rules set out in the Aarhus Regulation [Link] on environmental information (Regulation 1367/2006 [Link]) when they apply Regulation 1049/2001 (more information in question 9.1).

The right of public access to EU documents is qualified by the EU Data Protection Regulation (Regulation 2018/1725 [Link]). The Regulation lays down the data protection obligations for the EU institutions and bodies when they process personal data, which must be taken account of by EU institutions when they apply Regulation 1049/2001 [Link] on public access to documents.

According to EU case-law [Link], rules on confidentiality set out in certain sector specific regulations must be taken into account when applying Regulation 1049/2001, for example article 28 of Regulation 1/2003 [Link] on competition law proceedings.

See general Q&A on the right of public access
- How does the right of public access apply to the EU administration? [Link]

3. To whom does the right of public access apply?

3.1. Who can ask an EU institution, body, office or agency for access to a document?

Any EU citizen, any other person residing in an EU Member State or any ‘legal person’ resident or with their registered office in a Member State (such as a company, a non-governmental organisation, a school or an association) has a right to access documents held by an EU institution, body, office or agency. Certain EU institutions, bodies, offices or agencies have chosen to extend this right to non-residents.

See general Q&A on the right of public access

- Who can make a request for public access to documents? [Link]

3.2. Must a person identify who they are when making a request for access to a document?

The Ombudsman has found [Link] that an institution, body, office or agency is entitled to ask for contact details for the purpose of processing a request for access, including to verify if the person requesting access to documents is an EU resident or citizen.

Many institutions, bodies, offices or agencies do not, however, make use of this option and accept requests from all persons.

See general Q&A on the right of public access
- Who can make a request for public access to documents? [Link]

4. To what does the right apply? What is a document?

4.1. What is implied by ‘document’ in the context of the right to public access?

The concept of a ‘document’ is broad. It covers any content (words, numbers, symbols, computer code, pictures and, according to EU case-law [Link], sounds) and, according to EU case-law [Link], in any format (paper or electronic documents or sound, visual or audio-visual recordings). The Ombudsman has taken the view [Link] that ‘document’ also refers to text or instant messages concerning professional activities (see question 4.2 on the subject matter of the document).

The Ombudsman has found [Link] that the right of public access to documents also covers the content of a database, provided the content can be retrieved from the database using existing software solutions available to those persons using the database (that is, to end-users). However, if the content can be retrieved from the database only with substantial help from specialised IT staff or by specialised IT tools that are not normally available to end-users of the database, that content is not covered by the right of public access to documents, according to EU case-law [Link].

However, the Ombudsman has encouraged [Link] EU institutions to investigate and evaluate possible technical solutions, so as to be able to provide the public with downloadable versions of a database in the future.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.2. Does the subject matter of the document matter?

The right of public access to documents applies to documents relating to the policies, activities and decisions falling within the institution's 'sphere of responsibility'. Normally, if an institution holds a document, it will fall within the institution's sphere of responsibility. That said, the right of public access does not apply to certain very limited categories of documents, for example:

· Documents held by the Court of Justice that relate to its judicial work. The right of access applies only to 'administrative documents' held by the Court. According to EU case-law [Link], if a Court document relating to its judicial work is held by another institution, body, office or agency, the right of public access applies in principle to that document.

· Documents containing the deliberations of the *Governing Council* of the European Central Bank.

· Documents held by the European Public Prosecutor's Office that relate to the prosecutorial work of the European Public Prosecutor (individuals only have the right to access 'administrative documents' held by the European Public Prosecutor's Office).

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.3. Does the right of public access apply to documents on the work email account of an EU staff member?

Provided an email is work-related (see question 4.2 on the subject matter of documents), the right of public access applies in principle.

If the email is related to the private life of a staff member (personal emails), or otherwise falls outside the institution's sphere of responsibility, it is not covered by the right of public access.

The Ombudsman has found [Link] that an EU institution, body, office or agency may, in accordance with principles of good administration, ask a staff member to give it copies of substantive work-related emails sent to or from the staff member's private email account. Once the emails come into the possession of the EU institution, body, office or agency, they are covered by the right of public access to documents.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.4. Does the right of public access apply to text or instant messages sent by mobile phone?

The Ombudsman has taken the view [Link] that work-related text (or other instant) messages sent to or from a phone provided to staff by an institution are covered by the right of public access to documents.

The Ombudsman has taken the view [Link] that, an EU institution may, in accordance with principles of good administration, ask a staff member to give it copies of substantive work-related text messages sent to or from the staff member's private phone. The right of public access would then apply to such documents.

The Ombudsman has issued a set of best practices [Link] for the EU administration concerning the record keeping of text and instant messages sent by EU public servants, when acting in a professional capacity.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.5. How to find out if an institution has a document?

All institutions, bodies, offices and agencies that apply Regulation 1049/2001 [Link] (or equivalent rules) on public access to documents are supposed to have a register of documents. Such registers must be made available to the public in electronic form. The Ombudsman has issued guidance [Link] on the principles that should apply to such registers. They normally contain lists of documents. In certain cases, registers will contain a direct link to the documents in an online register. The register should give a brief description of each document, and its reference number. If the document is not available directly, the reference can be used to request access to the document.

Certain categories of document should, as far as is possible, be made directly accessible (preferably electronically) to the public. For example, documents that concern the process by which legislation is created should, as far as possible, be directly accessible.

According to EU case-law [Link], the institutions should ensure that their policies on registering documents are not arbitrary.

In practice, registers do not contain all of the documents in the possession of an institution, body, office or agency.

Those seeking documents not listed in the register of an institution may find references to such documents on the websites of the institutions, or they may be cross-referenced in other documents. This information can be used to make requests for access to documents.

Individuals may also request access to documents that they assume exist, for example, where a particular procedure *normally* involves the creation of a certain type of document.

However, in the context of an access request, individuals may also ask an institution if it has any documents concerning a particular issue. According to article 6(2) of Regulation 1049/2001, the institution is obliged to help process such requests by providing a list of the documents that it holds concerning that issue. Individuals may then use this list to make a request for public access to documents.

However, if it is not possible to clarify a request, the institution is entitled not to deal with the request further. It is therefore in the interest of requesters to attempt to identify as clearly as possible the document(s) that they want.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.6. What if an institution insists that a requested document does not exist or is no longer in its possession?

The right of access to documents applies only to documents that exist and are in the possession of an institution.

According to EU case-law [Link] if an institution states that a document does not exist, this statement is presumed to be true. However, the requester can seek to rebut this presumption, for example, by pointing out that a particular procedure *normally* involves the creation of that type of document.

An EU institution, body, office or agency is not obliged to retain copies of documents indefinitely. It may be the case that a document was once in the possession of an institution and was, as part of a normal document retention policy, deleted. However, it is good administrative practice to keep copies of important documents, at least for a reasonable period. The Ombudsman has found [Link] that an institution should not destroy documents while a request for access to those documents is being processed.

It is good administrative practice for an EU institution, body, office or agency to make public its document retention policy, as the Ombudsman has suggested [Link].

The right of public access to documents does not imply any duty to create a new document. That said, separate from the right of public access to documents, all citizens have the right to ask every EU institution, body, office or agency for information and have a right to a response. The right of access to 'information', which is set out in the EU Treaties, can be used to obtain a punctual answer to a question.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.7. Is there a limit to the number of documents that can be requested?

According to EU case-law [Link], an EU institution, body, office or agency can refuse to deal with a request for public access to very large numbers of documents or to very large documents if the work needed to reply to the request would lead to a disproportionate administrative burden. However, the EU institution in question should first consult the requester to try to find a *"fair solution"* . This could involve helping to narrow down the request.

It is usually in the interest of requesters to assist with such efforts since, according to EU case-law [Link], if no solution can be found, the EU institution, body, office or agency may refuse to deal with the request.

A requester cannot circumvent this rule by making multiple separate requests in the same time period.

The Ombudsman has found [Link] that an EU institution, body, office or agency should help a requester narrow down its request by providing the requester with a list of the documents in its possession.

Some agencies may, instead of refusing multiple requests, use a queuing system. In such cases, they will deal with the requests in sequence.

See general Q&A on the right of public access
- To what can the public request access? [Link]

4.8. What rules apply to classified documents?

Article 9 of Regulation 1049/2001 [Link] on public access to documents explains how the rules on public access apply to classified documents. These are sensitive documents that have been classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned.

The aim of these rules is to protect the essential interests of the European Union or of one or more of its Member States in the areas covered by article 4(1)(a) of Regulation 1049/2001, notably public security, defence and military matters.

While article 9 of Regulation 1049/2001 makes specific reference to public security, defence and military matters, it does not exclude consideration of the need to protect the other interests set out in article 4(1)(a) of Regulation 1049/2001, which include international relations and the financial, monetary or economic policy of the EU or a Member State.

Applications for access to sensitive documents must be handled only by those persons who

have ‘clearance’ to consult such documents.

Sensitive documents can be recorded on a public register or released only with the consent of the person or entity with whom the documents originated.

See general Q&A on the right of public access
- To what can the public request access? [Link]

5. Access to documents and EU languages

5.1. If an institution has granted access to a document in one language, does the requester have the right to a translation?

If the EU institution has a copy of a document in the requested language, it should give access to this. This applies even if the language is not an EU official language.

However, if the institution does not already have a copy in the language requested, it is under no obligation to provide a translation.

See general Q&A on the right of public access
- In what languages can a request be made and documents received? [Link]

5.2. If a request is made in one official EU language, can the EU institution, body, office or agency respond in another language?

EU institutions, bodies, offices or agencies must reply to requests for public access in the same official EU language in which the request was made.

See general Q&A on the right of public access
- In what languages can a request be made and documents received? [Link]

6. How to request access in practice

6.1. Can a request be made by email?

A requester can make a request, and ask the institution to respond, in their preferred written format. Some institutions may provide online request forms or portals with user accounts. Such online forms or portals make it easier to deal with requests, and may therefore improve the

experience for those requesting access, as requests can be dealt with more efficiently.

See general Q&A on the right of public access
- What is the procedure and timeline for requesting access to documents? [Link]

6.2. How long will it take to obtain a decision?

Institutions are required to take a decision within 15 working days of registering a request. Requests may only be registered once they reach the correct operating unit of the institution, so identifying and sending a request to the correct operating unit will ensure that it is registered more quickly. Some EU institutions, bodies, offices or agencies have a web page indicating where access requests should be made. If it is not possible to identify the correct operating entity, requests should be sent to either the general contact address or the operating entity that the requester believes is responsible for the document(s). The message should clearly state that it concerns a request for public access to documents. The recipient should then forward the request to the persons dealing with access to documents.

Once a request is registered, the requester should normally receive an acknowledgement of receipt.

If a request is unclear, the institutions might request clarifications and this may impact [Link] when the request is registered. It is therefore important to make sure that requests are as clear as possible. The Ombudsman has found [Link] that an institution should not suspend the statutory time-limits when it realises, after having registered a request, that the request is not sufficiently precise. Where an institution has registered a request that is not sufficiently precise to enable it to identify the documents and which therefore should not initially have been registered, it should rapidly ask the requester to provide the necessary clarifications, and activate the 15 working day time-limit once such clarifications have been received. The time for contacting the requester to seek such clarifications should not exceed 2-3 working days from the date of receipt of the request. Moreover, an institution should avoid making multiple requests for clarifications.

If a request is complicated, concerns a very large document or a large number of documents, the EU institution, body, office or agency can, exceptionally, extend the deadline by 15 working days. It should inform the requester of this extension before the deadline expires and explain why it is necessary.

Public holidays are not counted when calculating when the deadline expires. Thus, if a request is made before a public holiday period, when the institution is closed for a number of days, it may take more time to get a decision.

See general Q&A on the right of public access
- What is the procedure and timeline for requesting access to documents? [Link]

6.3. What information should a requester provide in a request?

Requesters should identify themselves and the documents they seek access to.

Normally, requesters do not need to explain why a document is sought. However, the right of public access is not absolute and certain exceptions to this right apply. (More information on these exceptions can be found under question 7.1.) In some cases, the exception does not apply if there is an overriding public interest in granting the request. In such an instance, an explanation by the requester as to why the document is being sought may be helpful in deciding whether there is an overriding public interest in disclosing the document. Consequently, if requesters believe that a public interest will be served by granting public access to a document, they should explain what this public interest is and why they believe disclosing the document serves that public interest.

For example, if the request includes access to the personal data of a third party, the requester has to demonstrate that there is a necessity, in the public interest, which would justify making public that personal data. If such a necessity exists, the EU institution, body, office or agency will then balance that necessity against the 'legitimate interests' of the persons identified in the documents. The Ombudsman has taken the view [Link] that, if the legitimate interests of those persons outweighs the reasons put forward by the requester, access to the personal data must be denied.

According to EU case-law [Link] and the Ombudsman [Link], an EU institution, body, office or agency should always seek to identify if there is an overriding public interest in granting access. This is particularly important since they are the only ones who can see the documents – except for the Ombudsman who may decide to inspect the documents in the course of dealing with a complaint.

See general Q&A on the right of public access
- What is the procedure and timeline for requesting access to documents? [Link]

7. Restrictions on the right to public access

7.1. What reasons can be put forward for refusing access?

The reasons for refusing access to a document are set out in article 4(1) to 4(3) of Regulation 1049/2001 [Link] on public access to documents.

Article 4(1)(a) states that access should be denied if disclosure would undermine the protection of the public interest as regards: public security; defence and military matters; international relations; and/or the financial, monetary or economic policy of the EU or a Member State.

Article 4(1)(b) states that access should be denied if disclosure would undermine privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

Article 4(2) states that access should be denied if disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; and/or the purpose of inspections, investigations and audits.

However, unlike the exceptions set out in article 4(1) (a) and (b), for the exceptions set out in article 4(2), access can still be granted to these documents if there is an overriding public interest in disclosure. A person's private interests in disclosure are not relevant unless they coincide with a public interest. A good example would be where a person wishes to have access to a clinical study report to check if a medicine approved by the European Medicines Agency is safe. The person may have a private interest in knowing this information. However, there is also a public interest in making known information about the safety of medicines.

Article 4(3) states that access should be denied if disclosing the document would *seriously* undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. Wider access may be possible where the decision-making process has already ended. In such circumstances, this exception continues to apply to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.2. How detailed must an institution's arguments be when justifying a refusal to grant access to a document?

The EU courts have consistently found that, in justifying their decision to invoke an exception under Regulation 1049/2001 [Link] and refuse access, an institution must show that it is "reasonably foreseeable" that access would undermine the interests they cite. The institution is therefore not required to prove that granting access would undermine these interests.

However, it is not sufficient for an institution to state that the documents simply *concern* a particular interest. For example, it is not sufficient to state that a document concerns the financial, monetary or economic policy of the EU or a Member State (article 4(1)(a) fourth indent of Regulation 1049/2001). Rather, the institution must show that it is reasonably foreseeable that disclosing the document(s) would undermine one or more of these interests.

The institution is not required to give any information on the content of the documents.

According to EU case-law [Link], an institution is required to adopt a broad interpretation of the right of access and a narrow interpretation of the exceptions to that right of access.

In certain cases, however, an institution can rely on a 'general presumption' to deny access. This means that an exception justifying a refusal to grant access is presumed to apply to all documents of a certain type. This normally occurs when there is legislation that expressly provides for the confidentiality of a document. For example, EU legislation [Link] on the conduct of state aid investigations states that information gathered in such investigations is confidential. Thus, according to EU case-law [Link], all the documents in a state aid file can be *presumed* to be confidential.

General presumptions have, however, been recognised even where there is no specific legislation requiring that access be denied. For example, according to EU case-law, [Link] documents relating to an ongoing infringement proceeding can be presumed to be confidential while the investigation is ongoing.

Where an institution invokes a general presumption to refuse access, the requester can seek to rebut this by showing that the basis for the general presumption does not exist. For example, if the presumption is based on the fact that an investigation is ongoing, it will be rebutted if it is demonstrated that the investigation has ended. If the general presumption is based on the fact that information can be presumed to be commercially confidential, that presumption can be rebutted by pointing out that the information is now obsolete. According to EU case-law [Link], if documents relate to matters that occurred more than five years ago, it cannot be presumed that the information is commercially confidential.

However, even if a general presumption is rebutted, the EU institution, body, office or agency may refuse access based on the specific content of the document or the specific circumstances that relate to how the document is currently being used.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.3. How can requests verify that the reasons given for refusing access are justified if it is not possible to see the documents?

In certain cases, the content of a document will not be in dispute. For example, if a requester expressly asks for the personal data of a third party, it will not be in dispute that the documents falling within the scope of the request contain personal data.

In other cases, a requester may not expect that the document they requested contains sensitive data. In such cases, where access is refused after the requester has asked for the initial decision to be reviewed (by making a 'confirmatory application'), the requester may submit a

complaint to the Ombudsman. The Ombudsman has the power to inspect documents held by an institution and can therefore confirm if they contain sensitive data. The General Court of the EU can do likewise.

In certain cases, the reasons why a document cannot be disclosed will not be based on information contained in the document itself. For example, if a person requests documents relating to infringement proceedings by the European Commission (such as a 'letter of formal notice'), access can be refused if the infringement proceedings are ongoing at the time the request for access is refused. According to EU case-law [Link], institutions are justified in refusing access in such circumstances, in order to protect the purpose of the ongoing investigations. According to EU case-law [Link], this applies even if the documents concern environmental information.

The content of the letter of formal notice will not show if the infringement proceedings are still ongoing: while the proceedings were certainly ongoing *when* the letter was sent, that does not mean that they were ongoing when the Commission refused to grant access to the letter. The Ombudsman must therefore check if the proceedings are ongoing, by asking the Commission to provide information on the status of the investigation.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.4. What is a 'public interest' in disclosure, when can it be invoked and when can it lead to access being granted?

A public interest in disclosure exists when disclosing the document would serve to protect an interest to the benefit or advantage of the public. This does not mean that every member of the public must derive a benefit from a document being made public. For example, public access to information on the safety of a certain medicine would serve a public interest even if the medicine is prescribed to a limited group of patients.

According to EU case-law [Link], the transparency of a legislative procedure is a public interest that is relevant as regards assessing whether public access can be granted, as is the protection of the environment. The Aarhus Regulation [Link] recognises that public access to environmental information (more information in question 9.1), and in particular information relating to emissions into the environment, constitute a public interest (except where the information is being used in an investigation). The Clinical Trials Regulation (Regulation 536/2014 [Link]) implies that public health may be an overriding public interest justifying access to documents relating to clinical trials. The Ombudsman has supported this view [Link].

The public interest must be considered when examining if the exceptions set out in article 4(2) and 4(3) of Regulation 1049/2001 [Link] apply. In both cases, the exception will apply unless there is an overriding public interest in disclosure. Article 4(2) of Regulation 1049/2001 applies

when disclosure would undermine the protection of: the commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; and/or the purpose of inspections, investigations and audits.

Article 4(3) of Regulation 1049/2001 states that access must be denied if disclosure of the document would *seriously* undermine the institution's decision-making process.

However, the public interest does not need to be taken into consideration when disclosure would undermine an interest protected by article 4(1)(a) of Regulation 1049/2001, namely the protection of: public security; defence and military matters; international relations; and/or the financial, monetary or economic policy of the EU or a Member State.

In other words, these are *absolute* exceptions (whereas the exceptions set out in article 4(1)(b), 4(2) and 4(3) of Regulation 1049/2001 are *relative* exceptions).

According to EU case-law [Link], purely private interests, such as an interest in using the documents in court proceedings, are not considered public interests. The *general need* for an institution to be transparent is also, according to the Court, not a public interest that can override an exception invoked to protect one of these interests. According to EU case-law [Link] , an overriding public interest must normally be something specific.

The fact that a public interest in disclosure is identified does not mean that this interest overrides the interest in non-disclosure. Rather, it is always necessary to weigh up the relative importance of these interests.

This is particularly important where the interests that are protected by an exception are themselves public interests, such as the need to protect court proceedings or the purpose of investigations, audits and inspections.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.5. Does the passage of time play a role in dealing with requests for access to documents?

An EU institution, body, office or agency can only refuse access if, at the time it refuses access, one of the exceptions set out in Regulation 1049/2001 [Link] applies. According to EU case-law [Link], in certain cases, it is reasonable to judge that disclosing a document would cause harm at a given point in time, whereas disclosing the same document at a later point in time may cause no harm.

This is particularly the case for documents that are related to investigations, audits and inspections. Such documents are very sensitive while an investigation is ongoing. However,

they may cease to be sensitive once the investigation ends.

A document may contain commercially sensitive information. However, the passage of time may render this information obsolete, in which case it will cease to be commercially sensitive. According to EU case-law, [Link] a document cannot be presumed to be commercially sensitive if it relates to facts that are more than five years old.

Requesters who have been refused access to documents, because there is an on-going investigation or because the document contains commercially-sensitive information, can make a new request for access to the documents once an investigation ends or sufficient time has elapsed, meaning the information is no longer commercially sensitive.

If circumstances have changed, the institution must take these into consideration when considering a new request.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.6. May an EU institution, body, office or agency refuse access to a document containing information that is already in the public domain?

According to EU case-law [Link], the fact that a document may have been leaked or is the subject of press reports does not imply that the EU institution, body, office or agency is required to officially disclose the document.

It may be the case, however, that certain information contained in a document was not leaked, but rather was intentionally made public by the EU institution, body, office or agency in another context, or by another authorised body in a Member State. This may mean that the information is not sensitive and that the EU institution, body, office or agency should disclose the document containing that same information.

However, there are cases where access can still be refused, for example, where public access to the specific document would confirm *how* the information is being used by the institution. For example, the various technical means used to protect IT systems from hacking may be well known. However, it may not be well known *which* of those technical means are being used by an EU institution, body, office or agency to protect *its* IT systems. The Ombudsman has found [Link] that the EU institution, body, office or agency can refuse to grant access to documents explaining how it protects its IT systems (even though the technical methods described in those documents may be found online).

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency?

[Link]

7.7. What is meant by the exception for protecting ‘public security’ and ‘defence and military’ matters?

Article 4(1)(a) of Regulation 1049/2001 [Link] states that access should be refused to protect: public security; and/or defence and military matters

These related concepts can have a very broad meaning. According to EU case-law [Link], the EU institution, body, office or agency also has a particularly broad ‘margin of appreciation’ when deciding whether the disclosure of certain information would undermine the protection of public security or defence and military matters. That is, the institution has considerable room for manoeuvre in evaluating whether the exception apples.

It is reasonable to consider that public security or defence and military matters could include the interests of the EU, of its Member States, or of third countries or organisations (such as NATO).

Public security could also cover the supply of essential products, such as petroleum or medicines.

Normally, it is not possible to argue that there may be an overriding public interest in disclosure. However, Article 6(1) of the Aarhus Regulation (Regulation 1367/2006 [Link]) implies that the public interest served by disclosure may be taken into account when the information in the document also relates to emissions into the environment (more information in question 9.1).

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.8. What does the exception for protecting international relations mean?

Article 4(1)(a) of Regulation 1049/2001 [Link] states that access should be refused to protect international relations.

This concept can also be given a very broad meaning. The EU institution, body, office or agency also has a broad margin of appreciation when deciding whether disclosing certain information would undermine international relations.

International relations does not encompass how the EU institutions interact with Member States on matters that fall within the scope of EU law.

However, a Member State may also engage with the EU institutions regarding a matter that falls

outside the competences of the EU. In those circumstances, the relations between the EU and the Member States may fall within the exception.

According to EU case-law, [Link] the concept of international relations would also encompass how the EU interacts with international bodies such as the UN, the WTO or NATO. In principle, the concept of international relations would also encompass how non-EU countries or international bodies interact with each other, or how a Member State interacts with an international body.

Normally, it is not possible to argue that there may be an overriding public interest in disclosure. However, article 6(1) of the Aarhus Regulation (Regulation 1367/2006 [Link]) implies that the public interest served by disclosure should be taken into account when the information in the document also relates to emissions into the environment.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.9. What is meant by the exception for protecting the financial, monetary or economic policy of the EU or a Member State?

Article 4(1)(a) of Regulation 1049/2001 [Link] on public access to documents states that access should be refused to protect the financial, monetary or economic policy of the EU or a Member State.

Unlike the other interests described in article 4(1)(a) of Regulation 1049/2001, this exception relates to the protection of interests *of the EU* or *a Member State.* It does not apply where disclosure might undermine the financial, monetary or economic policy of non-EU countries or international bodies. That said, if disclosing a document would undermine the financial, monetary or economic policy of a non-EU country, its disclosure would potentially fall under the exception relating to the protection of international relations. For example, if access were requested to documents on trade agreements with non-EU countries, this would not be covered by the exception for protecting financial, monetary or economic policy, but it might be covered by the exception for protecting international relations.

This concept can also be given a very broad meaning. The EU institution, body, office or agency also has a broad margin of appreciation when deciding whether the disclosure of certain information would undermine the financial, monetary or economic policy of the EU or a Member State.

This exception is often invoked by those institutions and bodies that are involved in formulating financial, monetary or economic policy, such as the European Central Bank.

Normally, it is not possible to argue that there may be an overriding public interest in disclosure. However, Article 6(1) of the Aarhus Regulation (Regulation 1367/2006 [Link]) implies that the public interest served by disclosure may be taken into account when the information in the document also relates to emissions into the environment (more information in question 9.1).

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.10. What is meant by the exception for protecting personal data? Can personal data contained in a document be accessed?

Article 4(1)(b) of Regulation 1049/2001 [Link] on public access to documents states that access should be denied if disclosure would undermine the privacy and the integrity of the individual, in particular in accordance with Regulation 2018/1725 [Link] on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies.

The concept of 'personal data' is very broad. It means *any information* relating to an identified or identifiable natural person (known as a 'data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

If a requested document contains personal data, it can be disclosed only if disclosure is in compliance with the rules set out in Regulation 2018/1725. The relevant rule is that the personal data shall only be transmitted if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. In addition, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, such data may transmitted only if the institution that holds the data ('the controller') establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

This implies that a request must set out what need will be served by having access to the personal data. That need must be in the public interest. Even then, access can be refused if there is *any reason to assume* that the data subject's legitimate interests *might* be prejudiced.

In practice, this makes it very difficult to obtain non-redacted access to documents containing personal data.

The key to obtaining access in such cases very often revolves around the question of whether information is or is not personal data. In certain cases, it will be clear: a person's name, their

signature, or details about them (age, marital status, health, and so on) will be personal data. In other cases, it may be less clear: for example, certain information relating to travel expenses, hotel bills or allowances may be personal data.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.11. What is meant by the exception for protecting commercial interests?

The concept of commercial interests is broad.

It covers, for example, information on contractual terms (prices, the nature and the quality of product or services), technical details in tenders, commercial relationships, 'know-how' and expertise, etc.

The original proposal of the Commission that led to Regulation 1049/2001 [Link] specified what these interests could include. It stated that they covered in particular: business and commercial secrets; intellectual and industrial property; industrial, financial, banking and commercials information including information relating to business relations and contracts; and/or information on costs and tenders in connection with award procedures.

While these specifications were not included in Regulation 1049/2001 when it was adopted, all of the specific points have been accepted as valid commercial interests under EU case-law (see judgements on business and commercial secrets [Link], intellectual and industrial property [Link], information on business relations and contracts [Link], and costs and tenders in award procedures [Link]).

That said, commercially confidential information does not cover all information relating to a company. It certainly does not cover information that the company has made public about itself.

According to EU case-law [Link], (concerning competition law proceedings), in order to be deemed as being covered by professional secrecy, information must be known only to a limited number of persons and its disclosure must be liable to cause harm. In addition, the interests liable to be harmed by disclosure must, objectively be worthy of protection.

Furthermore, the Ombudsman has found that the exception only covers the protection of *legitimate* commercial interests. The Ombudsman has taken the view [Link] that a wish to hide information about defective products would not normally be considered a legitimate commercial interest.

The fact that information is or is not commercially sensitive is independent of *how* the institutions use that information. The Commission may gather such information for many

purposes, such as competition law proceedings, trade law proceedings, tenders, grants etc. The nature of those proceedings, and whether they have ended or are ongoing, will not affect the question of whether the information is or is not commercially confidential.

As such, according to EU case-law [Link], information may remain commercially confidential after the procedures in which that information was used have ended. That said, time does play a role regarding whether information will remain commercially confidential. It can be presumed that commercial information that is relatively up-to-date remains sensitive. However, according to EU case-law [Link], that presumption is deemed not to exist if the information is more than five years old. However, the absence of a presumption of commercial confidentiality does not mean that the institutions cannot provide *specific reasons* why *specific information* remains confidential. Certain information may continue to constitute trade secrets for many years, even indefinitely. However, the burden of proof will be on the institutions to show that this is the case.

The exception covers the commercial interests of legal persons (for example, companies) and physical persons. The exception does not apply where there is an overriding public interest in disclosure.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.12. What is meant by the exception for protecting legal advice and court proceedings?

The exception relating to legal advice and court proceedings contains two reasons for refusing access, which must be understood separately from each other.

Legal advice may sometimes relate to court proceedings. At the same time, documents relating to court proceedings may sometimes disclose legal advice. The two categories may sometimes overlap but they are, essentially, separate categories.

Legal advice given in the context of court proceedings is covered by the exception for protecting court proceedings (see section on legal advice, below).

If the request for access is dealt with *while* the court proceedings are ongoing, there is a presumption that disclosure would undermine the court proceedings. Once the court proceedings end, the institution must explain how the interest would be undermined by disclosure.

The exception does not apply where there is an overriding public interest in disclosure.

Court proceedings

This exception covers only documents prepared *for* court proceedings. This clearly covers pleadings and evidence gathered *for the purposes* of court proceedings. It also covers internal documents concerning the investigation of a case, as well as internal correspondence within the institution or with a lawyer's office regarding the case.

According to EU case-law [Link], documents could be considered protected by this exception if a national court using the documents objected to their disclosure.

According to EU case-law [Link], when a request relates to *pleadings* submitted to a court while the court proceedings are pending, there is a general presumption that such documents cannot be disclosed. This is to prevent interference with ongoing court proceedings, to guarantee the presumption of innocence and to ensure all parties have an equal opportunity to present their case, which may be affected if the pleadings of one of the parties were released. Once the court proceedings end, the general presumption no longer applies.

Legal advice

As noted above, if legal advice relates to court proceedings, it can benefit from the high level of presumed protection afforded to documents that relate to ongoing court proceedings. However, if legal advice relates to other matters, the specific content of the legal advice is relevant.

Legal advice can be protected if disclosure would undermine the ability of an institution to obtain frank, objective and comprehensive legal advice. A judgment call on whether that is the case will depend on the content of the legal advice. According to EU case-law [Link], an institution must, on the basis of such an assessment provide concrete and detailed evidence to support this, rather than general and abstract considerations.

If the content relates to a matter to which a high degree of transparency applies, such as legislative matters, it may be possible that, in any event, there is an overriding public interest in disclosure. As indicated in recitals 2 and 6 of Regulation 1049/2001 [Link] on public access to documents:

"Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

…

Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent."

In addition, according to EU case-law [Link]:

"Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information, which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.13. What is meant by the exception for protecting the purpose of audits, inspections and investigations?

The fact that a document might relate to an audit, inspection or investigation does not in itself suffice as justification for applying this exception. Rather, the exceptions only applies if disclosure would undermine the *purpose* of the audit, inspection or investigation. In refusing access, an institution must explain how this is the case.

EU case-law [Link] has defined an investigation as a structured and formalised procedure that has the purpose of collecting and analysing information, to enable the institution to take a position in the framework of its functions established by the EU Treaties.

According to EU case-law [Link], the *purpose* of an audit, inspection or investigation is to discover, analyse and prove a set of facts. If disclosure would undermine the ability of an institution to do any of these, access may be denied.

The scope of the exception is not limited to audits, inspections and investigations carried out by EU institutions offices bodies or agencies. It also covers the need to protect national audits, inspections and investigations.

A number of 'general presumptions' exist as regards the application of this exception. These arise because the secondary law applying to audits, inspections and investigations normally contains rules requiring the investigatory authority to keep confidential information gathered in the context of audits, inspections and investigations. These include merger investigations, cartel investigations, abuse of dominance investigations, state aid investigations and investigations by the European Anti-Fraud Office (OLAF). Disclosure is generally presumed to undermine the purpose of audits, inspections and investigations if they are ongoing.

EU case-law [Link] has also recognised the application of a general presumption for infringement proceedings while the infringement proceedings are ongoing. The Court stated that

the exception relating to the protection of the purpose of audits, inspections and investigations would still apply even when a case is submitted to the Court. The reason for this is that the Court considers that the negotiations with the Member State, aimed at putting an end to the infringement, continue even when the court case is ongoing.

The exception does not apply where there is an overriding public interest in disclosure.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.14. What is meant by the exception for protecting internal decision making? How could this interest be undermined by disclosing documents?

Article 4(3) of Regulation 1049/2001 [Link] on public access to documents states that:

"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

and

"Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

These exceptions seek to protect the process by which decisions are taken within institutions.

The decision making in question need not give rise to a situation where a legally binding decision is adopted. *Any* deliberative process, aimed at allowing an institution to take a position on a given matter, constitutes decision making.

A decision-making process can also relate to legislative decision making, as we have seen in cases relating to access to legislative files.

The first sub-paragraph of article 4(3) can cover *any* document used in decision making. In contrast, the second sub-paragraph of article 4(3) only covers any document containing *opinions for internal use as part of deliberations and preliminary consultations within the institution.*

This implies that purely factual information, such as statistics, evidence or background

information, gathered for the purpose of decision making, can be protected under the first sub-paragraph of article 4(3), but cannot be protected under the second sub-paragraph of article 4(3).

It should be emphasised that, according to EU case-law [Link] if a decision-making process has ended but can nonetheless recommence, the first sub-paragraph of article 4 (3) can continue to apply.

The wording of Article 4(3) would seem to exclude its application to inter-institutional decision making, since it refers to a matter where the decision has not been taken *by the institution* holding the document. However, it could be argued that all inter-institutional decision making also involves, to some degree, decision making *within* each of the participating institutions.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.15. What are 'legislative documents' and what rules apply to such documents?

Recital 6 of Regulation 1049/2001 [Link] on public access to documents states that:

"Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent."

Article 12(2) of Regulation 1049/2001 sets out the requirement to make legislative documents directly accessible to the public. It states that:

"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."

It is clear that the concept of legislative documents applies to documents that are related to procedures for the adoption of regulations and directives, as well as the adoption of delegated and implementing acts connected to such legislation. For example, according to EU case-law [Link], documents drawn up or received by the Commission in the context of its preparation of a proposal for legislation, such as an impact assessment used by the Commission to assess legislative options, fall within this definition.

The fact that a document is a legislative document means that a high degree of transparency applies. However, it does not imply that transparency is an absolute rule. It may still be possible that certain documents may remain confidential for a period of time. Regulation 1049/2001

(recital 6) states that the effectiveness of an institution's decision-making process should be preserved, which implies that there may be cases where disclosure could be understood to undermine a decision-making process. This has been confirmed both in EU case-law [Link] and in Ombudsman decisions [Link]. That said, the scope for refusing access should be extremely limited.

It can be argued that procedures for the adoption of all acts that are generally applicable in the Member States, such as delegated acts and implementing acts, may fall within the definition of legislative documents (since they are “acts which are legally binding in or for the Member States”). Even if they are not considered to be legislative documents, the Ombudsman has taken the view [Link] that they should still benefit from a high degree of transparency, since they give rise to rules with which the public has to comply. According to EU case-law [Link], the Commission must justify why such documents cannot be released on the basis of an individual assessment of their content. It cannot base its assessment on a general presumption of non-disclosure.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.16. Can a third party that provided a document to the EU institution, body, office or agency veto the disclosure of the documents?

A third party that provides a document to an institution cannot veto disclosure of the document. However, the institution should consult that third party to obtain its views if it considers that the matter is not clear and that the views of the third party might be useful.

In principle, the third party can put forward any reason justifying why public access should be refused. However, it is often the case that the third party will put forward reasons relating to its own interests, such as the need to protect its commercial interests.

It is for the EU institution, body, office or agency to assess whether the reasons put forward by the third party in favour of non-disclosure trigger one of the exceptions set out in Regulation 1049/2001.

Where an institution identifies a need to consult with a third party, it may invoke this as a reason for extending the deadline for replying to a requester by 15 working days. However, an institution that contacts a third party to obtain its views must still respect this final deadline (of an additional 15 days) for replying to the request for public access.

If the EU institution does not agree to a request from a third party not to disclose a document, the third party has a right to bring the issue before the General Court. According to EU case-law [Link], if the Court grants ‘interim measures’, an institution must suspend its

processing of the request for access pending the outcome of the court proceedings.

One important exception to the rule that there is no veto is when documents are obtained from third countries on the basis of an international agreement with that third country. This often occurs in the context of international trade negotiations. The Ombudsman has found [Link] that, if the EU has entered into a binding agreement with a third country not to disclose documents *without the consent of the third country* , the EU institution cannot rely on Regulation 1049/2001 [Link] to avoid complying with that agreement.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

7.17. Can a Member State that provided a document to the EU institution, body, office or agency veto disclosure of the document?

If a request concerns a document that was provided by a Member State to an EU institution, the institution is obliged to consult the Member State before disclosing the document.

In principle, the Member State can put forward any reason justifying why public access should be refused. However, it is often the case that the Member State will put forward reasons relating to its interests, such as the need to protect international relations, the need to protect national investigations or national court proceedings, or the need to protect the commercial interests of companies in that Member State.

While the need to consult with a Member State can constitute a reason for extending the deadline for replying to a requester by 15 working days, an institution that contacts a Member State to obtain its views must still respect this final deadline (of 15 additional days) for replying to the request for public access.

It is for the EU institution, body, office or agency to assess whether the reasons put forward by the Member State in favour of non-disclosure trigger one of the exceptions set out in Regulation 1049/2001 [Link]. If it does not agree to a request not to disclose a document, the Member State has a right to bring the issue before the General Court. According to EU case-law [Link], if the Court grants ‘interim measures’, an institution must suspend its processing of the request for access pending the outcome of the court proceedings.

An EU institution must take into account the request of the Member State when refusing access. If the institution decides to grant access even where the Member State asked it to refuse access, it must explain why it has not abided by the request of the Member State.

If a Member State requests that a document originating from it not be disclosed, it must normally base its request on an exception set out in Regulation 1049/2001. Normally, it cannot simply

veto the disclosure of a document or base a request not to disclose a document on its own national law.

Member States do not have a generic right to veto the disclosure of documents emanating from them. However, according to EU case-law [Link], where secondary EU legislation specifically gives a Member State an express veto on disclosure of a document emanating from it, the Member State is entitled to veto disclosure of the document.

See general Q&A on the right of public access
- Under what circumstances can access be refused by an EU institution, body, office or agency? [Link]

8. Appeals and redress

8.1. What happens if the EU institution, body, office or agency refuses to grant access?

If an EU institution, body, office or agency refuses to grant access, it must explain why it has denied access. It must do so by referring to the 'exceptions' set out in article 4(1) to 4(3) of Regulation 1049/2001 [Link] on public access to documents. (Information concerning these exceptions can be found under question 7.1.)

It must also examine if access to parts of the requested document(s) ('partial access') can be granted. Partial access will be granted if there are parts of the documents that would, if released, not be subject to one of the exceptions invoked in refusing access.

It may be the case that the reasons provided by the EU institution, body, office or agency are convincing. However, if a requester disagrees with the arguments put forward by the EU institution, body, office or agency, and still wishes to obtain access to the document, they can request the institution to review its decision (by making what is known as a 'confirmatory application'). A confirmatory application must be made within 15 working days of receiving the institution's reply.

Making a 'confirmatory application' has a number of important consequences.

The first is that the EU institution, body, office or agency will re-examine whether access can be given. It must do so within the same period that applies to initial requests, that is within 15 working days, extendable by another 15 working days in exceptional circumstances.

Requesters may only complain to the Ombudsman or bring the issue to court, if they have made a confirmatory application and the institution has maintained its decision to refuse access to the document(s) or parts thereof. According to Regulation 1049/2001, failure to deal with the confirmatory application within the prescribed time period "shall be considered to be a negative

reply".

Requesters are not required to give reasons for making a confirmatory application. They can simply ask the EU institution, body, office or agency to re-examine whether access can be given. However, if they disagree with the reasons the institution already gave for refusing access, they should explain why they consider that these reasons are not convincing.

If the reasons given for refusing access include that the documents contain personal data, requesters should explain why there is a need, in the public interest, to have public access to that personal data.

If, more generally, requesters consider that access to a document serves an important public interest, they should explain why this is the case. This will force the EU institution, body, office or agency to take account of these arguments when dealing with the confirmatory application.

See general Q&A on the right of public access
- What to do when an access request is refused. How to appeal decisions refusing access to documents? [Link]

8.2. What happens if the initial decision is upheld following a request for review ('confirmatory application')?

If an institution refuses to change its decision following a request for review ('confirmatory application'), the requester should first consider whether the reasons given for refusing access are reasonable. (Information on the exceptions under which access may be refused can be found in question 7.1.) EU courts have consistently found that, when an EU institution, body, office or agency examines whether access can be given, it has a certain 'margin of appreciation'. That is, the institution has room for manoeuvre in determining whether access may be granted. It is also only required to show that it is *"reasonably foreseeable"* that public access would harm one of the interests set out in its 'confirmatory decision'. While an EU institution, body, office or agency may give various reasons for invoking an exception and refusing access, it is only necessary that one reason is valid.

If a requester considers that no convincing explanations have been given for the exceptions invoked, they may consider making a complaint to the European Ombudsman or bringing the issue to Court. Legal challenges must be brought within two months and require a lawyer. Complaints to the Ombudsman can be brought within two years, do not require a lawyer and are free to make.

See general Q&A on the right of public access
- What to do when an access request is refused. How to appeal decisions refusing access to documents? [Link]

8.3. What happens if an institution does not respond at all to a request?

If the EU institution, body, office or agency does not respond within the time periods for replying (15 working days, plus 15 more working days in exceptional circumstances), requesters may make a 'confirmatory application'. (See question 8.1)

If the EU institution, body, office or agency does not respond to a confirmatory application within the applicable timeframe (15 working days, plus 15 more working days in exceptional circumstances), requesters may complain to the Ombudsman or bring the issue to court.

It is often the case that the EU institution, body, office or agency will contact a requester to state that it is unable to meet the deadlines. If they do, they should state when they intend to reply. Requesters may then decide to wait for the reply, to complain to the Ombudsman or to go to Court.

See general Q&A on the right of public access
- What to do when an access request is refused. How to appeal decisions refusing access to documents? [Link]

9. Special rules for environmental information/documents

9.1. What are the rules that apply to access to environmental information?

Access to information and documents, public participation in decision making and access to justice in environmental matters are governed at international level by the Aarhus Convention (1998).

The Convention binds the EU institutions, bodies, organisations and agencies. It has been incorporated into EU law by means of the Aarhus Regulation (Regulation 1367/2006 [Link]). However, access to documents containing environmental information is granted based on the rules set out in Regulation 1049/2001 [Link] or the equivalent applicable rules, read in combination with the Aarhus Convention and the Aarhus Regulation.

One rule in the Aarhus Regulation is that environmental information should be accessible directly and should be organised in such a way as to make it easy to access directly. Examples of information directly accessible by members of the public are legislation, policy-related documents, plans and programmes relating to the environment, progress reports on the implementation of those items and, more generally, reports on the state of the environment that are available through databases, such as EUR-Lex [Link].

‘Environmental information’ covers any available information, in any form or format, on the environment itself, its elements (air, water, soil, land, landscape and natural sites, marine areas, etc.) and its various components. It also covers information concerning factors affecting or likely to affect the environment, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases. Environmental information also includes measures affecting or likely to affect the environment as well as measures or activities designed to protect it, such as policies, legislation, plans, programmes and activities.
Cost-benefit and other economic analyses used to prepare those measures and activities are also covered. Information on the state of human health and safety, conditions of human life, cultural sites and built structures, when influencing or influenced by the environment, and reports on the implementation of environmental legislation also constitute environmental information.

However, the fact that information constitutes environmental information does not mean that it must always be disclosed. Any of the exceptions set out in Regulation 1049/2001 can still apply. The grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure.

Where the information requested relates to ‘emissions into the environment’, the application of exceptions is further limited. According to article 6(1) of the Aarhus Regulation, where the information requested relates to emissions into the environment, the public interest in disclosure is deemed to override the interests in exceptions set out in the first and third sub-paragraphs of article 4(2) of Regulation 1049/2001 (the protection of commercially confidential information and the protection of the purpose of audits, inspections and investigations).

However, the public interest is not deemed to override other interests set out in Regulation 1049/2001, such as the need to protect an investigation, in particular those concerning possible infringements of EU law. For example, if the Commission is undertaking infringement proceedings concerning an alleged infringement of EU environmental rules, public access to the infringement file can be refused while the investigation is ongoing, even if the file contains environmental information, including information on emissions into the environment.

In addition to the exceptions provided for in article 4 of Regulation 1049/2001, article 6(2) of the Aarhus Regulation states that, access to environmental information may be refused where disclosure of such information would adversely affect the protection of the environment to which the information relates, such as disclosing the breeding sites of rare species, for example.

See general Q&A on the right of public access
- What rules apply to environmental information? [Link]

10. Publication of disclosed documents

10.1. How do the rules on public access to documents

interact with the rules on publishing documents?

The fact that an institution must disclose a document to a requester does not mean that the institution has a duty to publish the document proactively.

That said, according to the EU Treaty, Regulation 1049/2001 [Link] and EU case-law, institutions have a duty to make documents directly available to the greatest extent possible, for example by publishing them on their websites and/or through their public registers of documents.

This applies in particular as regards 'legislative documents', which covers all documents related to a procedure for the adoption of generally applicable acts.

As regards other documents, the Ombudsman considers that the institutions should, when deciding which documents to publish, assess which documents are of most interest and use to the public.

Legislative acts must be made available to the public in every official EU language, in accordance with Regulation 1/58 [Link].

See general Q&A on the right of public access
- Are documents that were disclosed following an access to documents request published? [Link]

10.2. Can a requester that has received a document following a request for access publish that document?

The fact that an individual obtains a copy of a document from an institution does not imply that the individual, or anyone else, has a right to republish or otherwise reuse the document.

If the document is covered by copyright or other intellectual property rights, certain restrictions on its reuse can be imposed by the institution.

If copyright does not impede the reuse of a document, it is still reasonable for an institution to ask complainants to indicate the origin of the documents if they republish it, and to desist from altering the document.

See general Q&A on the right of public access
- Are documents that were disclosed following an access to documents request published? [Link]

11. The right of access to your 'file'

11.1. What is the difference between the right of public access to documents and the right of access to the file?

The right of public access to documents applies to all EU citizens and persons residing in a Member State, and all legal entities (for example companies) residing in a Member State.

The right of access to a file applies whenever an EU institution intends to take a decision that may adversely affect specific persons or companies. Those persons and companies have a right to see all the evidence that is relevant to that decision. This right must be respected by giving the persons concerned access to the file before the decision that may adversely affect them is taken, thereby ensuring that they can make whatever comments they consider relevant. Those comments must then be taken into consideration by the EU institution when it adopts a decision that may adversely affect that person or company.

The right of access to a file can be broader than the right of public access to documents. For example, a party under investigation by the Commission has a right of access to the evidence that will be used against it. However, public access to such documents is unlikely to be granted to a third party requester while the investigation, or a follow up, is ongoing.

See general Q&A on the right of public access

- To what can the public request access? [Link]