# Making Access to EU Documents a Reality

## Recommendations on Implementing Regulation 1049/2001

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## About Access Info Europe

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe and globally. Access Info's mission is to advance democracy by making the right to information work in practice as a tool for defending civil liberties, for facilitating public participation in decision-making, and for holding governments accountable.

## Acknowledgement

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## Introduction

Access to EU Documents is a fundamental right[1] with its regulatory framework laid down in Regulation 1049/2001[2] (the Access to Documents Regulation), the purpose of which is to give the "fullest possible effect" to the right of public access to documents.[3]

The Lisbon Treaty followed, introducing significant provisions on transparency. Article 10 of the Treaty on European Union (TEU) affirms citizens' rights to participate in the Union's democratic life and mandates that decisions be made as openly as possible. This underscores the importance of access to documents, as citizens cannot fully exercise their democratic rights without timely and proper access. Similarly, Article 15 of the Treaty on the Functioning of the European Union (TFEU) requires the legislature to act publicly and grants citizens the right to access documents held by all EU institutions, bodies, and agencies.

Since the drafting of this Regulation, over 20 years ago, significant strides have been made in international standards concerning the right to official documents. There have also been various cases brought in front of the Court of Justice of the European Union (CJEU) and the European Ombudsman, often in response to institutional resistance to transparency, which have resulted in clear guidance on how the Access to Documents Regulation must be interpreted and implemented. Despite this, implementation of such judgement and guidance by the institutions can be lacking in practice.

The growing recognition of this right, along with technological advances, necessitates a reassessment of how access to documents is implemented. Although efforts to revise the Access to Documents Regulation have stalled,[4] the institutions must enhance the application of existing rules in accordance with the regulation's intent, CJEU jurisprudence, and the European Ombudsman's recommendations.

Access Info has developed a set of recommendations for the EU institutions, bodies, and agencies on the implementation of the Access to Documents Regulation. These recommendations are based on practical problems that civil society, journalists, lawyers, academics and citizens have identified in their attempts to use their fundamental right of access to EU documents. With these recommendations, Access Info hopes to highlight the practical issues that need to be addressed to ensure that the right of access to documents becomes a tangible reality.

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[1] Article 42 of the Charter of Fundamental Rights

[2] Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

[3] Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, preamble 4

[4] https://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-revision-of-the-access-to-documents-regulation

# Recommendations Summary

## 1. Existence of a document is independent of its format or registration

- It is not the format or registration that defines a document, but the information it contains. If the information concerns "policies, activities, and decisions" for which the institution is responsible, it qualifies as a "document" under the Access to Documents Regulation.
- Document management rules and practices should encompass modern forms of communication.

## 2. There must be real time transparency of institutions acting in a legislative capacity

- Institutions should employ a wide definition of "legislative documents" and proactively publish key documents—such as impact assessments, legal service opinions, Member State positions, and trilogue documents—throughout the ongoing legislative processes.
- A register containing all documents relating to possible or proposed EU legislation should be created and in case of an ongoing legislative process updated in real time.
- Access to documents requests for legislative documents should be answered promptly during an ongoing process, irrespective of whether a legislative proposal has been made.
- The Council should restrict the use of "LIMITE" status for legislative documents.
- The institutions should recognise the special role of civil society and protect their democratic rights to receive and provide information during legislative procedures, as well as during ongoing legislative negotiations.

## 3. Compliance with timeframes is essential to enjoying the right to documents

- Compliance with the timeframes for processing initial requests and confirmatory applications, as specified in the Access to Documents Regulation, is essential.
- Extensions should be applied only in exceptional cases where they are genuinely necessary.
- Standard holding messages without specifying a date for expected response should not be used.

## 4. The harm and overriding public interest test must be applied properly

- Exceptions to the right of access to documents should be interpreted and applied strictly. To justify the use of an exception to disclosure, the institutions must clearly demonstrate how disclosure would specifically and actually harm a protected interest. In the context of environmental information, the exceptions must be read in light of the Aarhus Convention and are often narrower in scope.

- Public interest arguments presented by the requester must be fully considered and balanced against the interest protected by non-disclosure. The institutions should give adequate weight to the public interest in disclosing environmental information, including information concerning environmental law enforcement.
- Even when a general presumption of non-disclosure is applied, public interest arguments should still be evaluated. The use of general presumptions must align with CJEU case law.
- When access is denied, the institutions should provide a tailored, clear, and robust explanation in their response.

## 5. Partial access should always be considered

- When an exception is evoked to prevent full disclosure, only the specific parts of the document falling under that exception should be redacted. The rest of the document should always be released.

## 6. The correct balance must be struck between data protection and access to documents

- There should not be an automatic denial of access to personal data within requested documents, a proper balancing test must be carried out between the right of access to documents and the right of protection of personal data.
- Proving the transfer of personal data is necessary for a specific purpose in the public interest should not be an unreachable benchmark. Requester arguments should be fully taken into consideration and judged on a case-by-case basis.

## 7. There must be compliance with CJEU rulings and Ombudsman decisions

- To fully respect the right of access to EU documents, and to ensure that individuals have a reliable and effective means of redress, institutions must adhere to the CJEU rulings and Ombudsman's decisions and recommendations.

## 8. More documents should be proactive publication and document registers must be complete

- Institutions should proactively publish all documents in the public interest. All documents in their registers should be referenced and published in a timely and user-friendly manner.
- There should be proactive and systematic gathering and publishing of information related to the state of the environment and enforcement of environmental law.
- Environmental information in existing registers, such as the Comitology Register, infringement procedures database and European Investment Bank public register, should be comprehensive, up-to-date and published systematically without unjustified delay.

## 9. Sufficiently staffed and adequately trained units are required

- Access to documents units should be well-resourced and adequately staffed.
- EU public officials handling requests must receive regular training on document access, including key decisions from the Ombudsman, relevant CJEU jurisprudence, and international and regional standards on the right to information.

## 10. Requester's language preferences must be taken into consideration

- EU officials should respond to access to documents requests in the requester's preferred official EU language.
- Documents not in the requester's language should be provided in open electronic formats wherever possible to facilitate online translation.

# Making the Right to EU Documents a Reality: Recommendations on Implementing Regulation 1049/2001

## 1. Existence of a document is independent of its format or registration

Despite being drafted over 20 years ago, the Access to Documents Regulation offers a comprehensive definition of a "document" that can encompass modern means of working. It states that a document includes any content, regardless of its medium—be it written on paper, stored electronically, or recorded as sound, visual, or audiovisual material—pertaining to policies, activities, and decisions falling within the institution's sphere of responsibility.

In the context of environmental information Regulation 1367/2006, which applies the provisions of the Aarhus Convention, also applies a wide definition of "environmental information", which can encompass any information in written, visual, aural, electronic or any other material form.[5]

Consequently, these definitions are adaptable today in our contemporary digital landscape where email, text, and phone conversations have become vital channels for rapid communication and decision making.

Yet, in practical application, challenges arise. Requests for text messages and emails have been denied, citing technicalities in registration policies. A clear example of this was when the Commission denied an access to documents request for text messages between President Ursula von der Leyen and the CEO of Pfizer regarding Covid-19 vaccine procurement. It was argued that text messages, due to their ephemeral nature and perceived lack of substantial information, do not meet the registration criteria under the Commission's policy. They are therefore not "held" by the institutions, thus making them ineligible for public request under access to documents rules.[6]

This practice is out of line with the letter and spirit of the Access to Documents Regulation for two reasons:

1. Firstly, the existence of a document does not depend on its format, what matters is whether its content concerns "policies, activities and decisions" for which the institution is responsible;
2. Secondly, a document's existence is not contingent on its registration, as the Access to Documents Regulation does not require a document to be registered for it to be requested.

[5] Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention, Article 2(d)
[6] https://www.asktheeu.org/en/request/9413/response/32712/attach/6/1%20EN%20ACT%20part1%20v2.pdf?cookie_passthrough=1

The Ombudsman has opined on this issue, stating that it is the content of the document that matters, not the medium, and therefore modern forms of communication including text messages can fall within the scope of the Access to Documents Regulation.[7]

The Ombudsman has also stated that whether a document was registered in an institution's document management system is irrelevant in the context of public access requests, stating that "registering a document is a consequence of the existence of a document and not a prerequisite for its existence".[8] This practice of only considering "registered" documents in response to an access to documents request is especially concerning considering that if an email is not registered, according to the Commission's automatic deletion policy, it will be deleted after 6 months.[9]

As the EU administration is increasingly using means of modern electronic communication in its daily work, the EU administration's document management rules and practices should be in line with the wording and spirit of the Access to Documents Regulation and the Aarhus Convention.

**Recommendation:**

- It is not the format or registration that defines a document, but the information it contains. If the information concerns "policies, activities, and decisions" for which the Institution is responsible, it qualifies as a "document" under the Access to Documents Regulation.
- Document management rules and practices should encompass modern forms of communication.

## 2. There should be real time transparency of institutions acting in a legislative capacity

Article 15 of the TFEU states that the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible, and that the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act. Article 10(3) of the TEU also states that every citizen shall have the right to participate in the democratic life of the Union.

[7] Recommendation on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID 19 vaccine (case 1316/2021/MIG)
[8] Recommendation on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID 19 vaccine (case 1316/2021/MIG)
[9] https://ec.europa.eu/transparency/documents-request/search/document-details/7253

This concept of transparency of the legislative process is enshrined in the Access to Documents Regulation where it is specifically stated that even wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, and the CJEU and the Ombudsman have both opined on this issue.

a. **There should be proactive publication of legislative documents.** Article 12 of the Access to Documents Regulation states that legislative documents, that is 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 be made directly accessible.

b. **Proactive publication should take place while legislative processes are ongoing.** The Court has ruled access to legislative documents should be granted while legislative initiatives are being debated as it "increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act(..)."[10]

**c. A wide definition should be given to what constitutes a "legislative document".** In a separate case, the Court found that legislative documents don't only constitute acts adopted by the EU legislature, but also, more generally, 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, which led to the disclosure of draft impact assessments during a legislative process.[11]

In 2018 the General Court in case T-540/15 De Capitani v Parliament considered that the principles of publicity and transparency should be applied to Trilogues, since they constitute a decisive stage in the legislative process. The Court ruled that these types of documents not only fall within the scope of the Access to Documents Regulation, but also constitute legislative documents, and therefore a heightened level of transparency is essential to ensure the legitimacy of this process: "If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information".

[10] C-39/05 and C-52/05, Kingdom of Sweden and Maurizio Turco v Council of the European Union, 1 July 2008, para. 67
[11] C-57/15 P, ClientEarth v European Commission, 4 September 2018, para. 92

The Ombudsman has also opined on this issue, stating that transparency of the Trilogue process is an essential element of EU law-making legitimacy: "Citizens must be in a position to scrutinise the performance of their representatives during this key part of the legislative process. Citizens also require information on the topics under discussion during Trilogues to be able to participate effectively in the legislative process."[12]

d. **Access to documents requests for legislative documents should be answered promptly.** If a certain legislative document is not proactively published and a requester submits an access to documents request, this request should be answered promptly to allow for effective participation. The Court upheld that a requester should be able to access Trilogue documents, including the "four column document" via an access to documents request.[13] It is irrelevant if the legislative process is still ongoing.

Despite a strong stance taken by the Court and the Ombudsman on legislative transparency, in practice there are many limitations. There is a lack of proactive publication of legislative documents during the ongoing legislative procedures. Trilogues remain famously opaque, additionally, the informal nature sometimes results in no official records being created at all.[14]

In 2016, there was an Interinstitutional Agreement to establish "a dedicated joint database on the state of play of legislative files".[15] The Ombudsman welcomed this initiative, stating that "it is not only important that information on the legislative process, including Trilogues, be made available, but also that this information is easily and readily accessible to citizens, preferably on one single platform and with 'open data' capabilities." [16] Despite this, such a comprehensive database has still not been created and made publicly available.

In addition, access to documents requests for legislative documents suffer significant, and potentially strategic, delays. Meaning that the requester often does not receive an answer to a request for legislative documents until the legislative process has concluded.[17] This means that the public only

[12] Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues
[13] Case T-540/15 De Capitani v Parliament
[14] Francesca Martines, "Transparency of Legislative Procedures and Access to Acts of Trilogues: Case T-540/15, De Capitani v. European Parliament" European Papers, Vol. 3, 2018, No 2, European Forum, Insight of 24 June 2018, pp. 947-959
[15] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, para 39
[16] Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, para 65
[17] Päivi Leino-Sandberg, "Transparency and Trilogues: Real Legislative Work for Grown-Ups?" European Journal of Risk Regulation (2023), 14, 271–291

has access to the initial negotiating positions followed by the outcome of the Trilogue negotiations, which will usually contain many new changes, without showing the positions taken by the different institutions.

Another issue regarding limitations on legislative transparency is the practice of the Council designating most preparatory documents in ongoing legislative procedures as "LIMITE", restricting access to the public. The Ombudsman stressed that restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary. The "LIMITE" status should not be applied in a general manner, rather only to documents which are exempt from disclosure on the basis of one of the exceptions provided for in the Access to Documents Regulation. Therefore, the general application of "LIMITE" status represents a disproportionate restriction on citizens' right to the widest possible access to legislative documents, constituting maladministration.[18]

The EU Treaties recognise the importance of involving representative associations and civil society in all areas of Union action (Art. 11 TFEU). In 2023 the Commission recommended that "the participation of citizens and civil society organisations should be ensured in public policy-making processes at the local, regional, national, European and international level."[19] This requires meaningful and timely access to key legislative documents. Proactive publication of documents relating to the legislative process would allow civil society to participate in the process and offer valuable views on the protection of diverse public interests. Fair and inclusive public disclosure would also prevent situations in practice where the lack of transparency in the legislative process, including trilogue negotiations makes it very difficult for civil society organisations to participate while a limited number of better-resourced and connected lobby groups often obtain privileged access. Thus, the institutions should recognise the special role of civil society representing diverse public interests and facilitate their participation in democratic processes.

**Recommendation**

- Institutions should employ a wide definition of "legislative documents" and proactively publish key documents—such as impact assessments, legal service opinions, Member State positions, and trilogue documents—throughout the ongoing legislative processes.

[18] Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process

[19] Commission Recommendation (EU) 2023/2836 of 12 December 2023 on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes, Preamble, recital 5

- A register containing all documents relating to possible or proposed EU legislation should be created and in case of an ongoing legislative process updated in real time.
- Access to documents requests for legislative documents should be answered promptly during an ongoing process, irrespective of whether a legislative proposal has been made.
- The Council should restrict the use of "LIMITE" status for legislative documents.
  The institutions should recognise the special role of civil society and protect their democratic rights to receive and provide information during legislative procedures, as well as during ongoing legislative negotiations.

## 3. Compliance with timeframes is essential to enjoying the right to documents

Under the Access to Documents Regulation, a request should be handled "promptly". Once a request has been registered, the institutions have 15 working days to respond. This concerns replying to both an initial request (Article 7) and a confirmatory application (Article 8).

In "exceptional circumstances", this time limit may be extended by 15 working days, for example in the event of an application relating to a very long document or to a very large number of documents. The requester must be notified and given detailed reasons for the extension.

In practice, there is a widespread lack of compliance with the timeframes laid down in the Access to Documents Regulation. While extensions should only be used in "exceptional circumstances" we see this commonly used time and time again. Once the extension has expired, it is common that we see requesters receiving a holding message, such as the one below:

> We regret to have to inform you that we will not be able to respond within the extended time-limit. However, we can assure you that we are doing our utmost to provide you with a final reply as soon as possible. We regret this additional delay and sincerely apologise for any inconvenience this may cause.

Therefore, not only do we see incompliance with the initial timeframes set out in the Access to Documents Regulation, but this practice of sending an indefinite holding message to requesters is completely out of line with the law.

The Court has made it clear that the timeframes of the Access to Documents Regulation are laid down in the public interest, cannot be varied by the parties:

> It must be recalled in that regard that Regulation No 1049/2001 does not allow for the possibility of derogating from the time-limits laid down in Articles 7 and 8 thereof and that

those time-limits are determinative as regards the conduct of the procedure for access to the documents held by the institutions concerned, which aims to achieve the swift and straightforward processing of applications for access to documents.[20]

The Ombudsman has previously found maladministration in the Commission's handling access to documents requests, as there were systemic and significant delays in responding to confirmatory applications. She stated that delays defeat one of the very purposes of the right of public access, "namely to allow citizens and organisations to participate in public debates and scrutinise the action that public authorities envisage or have taken. Granting access months or years after the matter has been in the public eye can be meaningless."[21] The Ombudsman also stated that failure to comply with the time limits laid down by the legislature cannot be good administration.[22]

**Recommendation**

- Compliance with the timeframes for processing initial requests and confirmatory applications, as specified in the Access to Documents Regulation, is essential.
- Extensions should be applied only in exceptional cases where they are genuinely necessary.
- Standard holding messages without specifying a date for expected response should not be used.

## 4. The harm and overriding public interest test must be applied properly

Access to EU Documents is a fundamental right which can be limited. Article 4 of the Access to Documents Regulation lays out interests that may justify the refusal of access to certain documents. According to EU case law, however, these exceptions should be "interpreted and applied strictly".[23] The interpretation of how EU institutions apply these tests determines how the exceptions operate and arguably shapes the degree to which the Regulation can achieve its democratic aims.[24]

[20] C-127/13 P Strack v Commission, para 25
[21] Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents (OI/2/2022/OAM)
[22] Special Report of the European Ombudsman in her strategic inquiry concerning the time the European Commission takes to deal with requests for public access to documents (OI/2/2022/OAM)
[23] E.g. *Sison* v *Council*, Case C-266/05 P, EU:C:2007:75, para 63; *Sweden* v *Commission*, Case C-64/05 P, para 66; *Sweden and Turco v Council*, para 36; *Sweden and Others* v *API and Commission*, para 73; *Sweden* v *Commission and MyTravel* Case C-506/08 P, EU:C:2011:496, , para 75; Case C-57/16 P, *ClientEarth v Commission* (2018), para 78.
[24] Joana Mendes, "The Principle of Transparency and Access to Documents in the EU: for what, for whom, and of what?" (2020)

- **Application of the Harm Test**

Article 4 of the Access to Documents Regulation states that access to requested documents shall be refused where it would undermine the protection of a protected interest - this is the harm test.

In applying the harm test, it must be demonstrated that disclosure would "specifically and actually undermine the interest protected by an exception", and that the risk of the interest being undermined is "reasonably foreseeable and must not be purely hypothetical."[25]

The CJEU has stated that the mere fact that an exception under Article 4 could be applicable to a requested document is not sufficient to justify the application of that exception, and therefore the denial of full disclosure.[26]

In practice, however, we often see access being denied with the institution justifying the application of an exception under Article 4 by simply stating that full disclosure could "negatively affect," said exception, or by repeatedly giving the same generic justifications to different requests. This is not sufficient in demonstrating the harm is of such a level that it would compensate for denying a citizen their fundamental right of access to documents.

In the context of environmental information, the exceptions listed in Article 4 of the Access to Documents Regulation must be read in light of the Aarhus Convention and are often narrower in scope. Interpreting the notion of "decision-making" under Article 4(3) of the Access to Documents Regulation in *Saint-Gobain* the CJEU stated:

> [Th]at [..] addresses the requirement of strict interpretation of the first sentence of Article 4(3) of Regulation No 1049/2001, which requirement is all the more compelling where the documents communication of which is requested contain environmental information.[27]

In *ClientEarth* the CJEU stated concerning the exception contained in Article 4(3) of the Access to Documents Regulation:

> [T]he ground for refusal set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 is to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information.[28]

[25] Judgment of 3 July 2014. Council of the European Union v Sophie in 't Veld.C-350/12P para. 64
[26] Case T 233/09 Access Info Europe v Council
[27] C-60/15 P, Saint-Gobain Glass Deutschland GmbH v. Commission, para. 78; See also Decision on the European Commission's refusal to give full public access to documents concerning a Horizon 2020 mineral exploration research project (cases 1132/2022/OAM and 1374/2022/OAM), 17 April 2023, para. 39
[28] C-57/16 P, ClientEarth v. Commission, para. 100

- **Application of the Overriding Public Interest Test**

Article 4 of Regulation 1049/2001 states that the protected interest under paragraph 2 and 3 can be disclosed where there is an "overriding public interest" to justify disclosure. In arguing the public interest, the requester is presented with a difficult task, that is to argue the existence of an overriding public interest for the purposes of justifying disclosure when the contents of the documents are not known to the requester.

In practice, it is often found that the institutions do not fully consider the public interest arguments presented by the requester, often stating that there are "no elements in this instance which could indicate the existence of such an overriding public interest". Where the existence of overriding public interest is denied in relation to environmental information the practice of the institutions often shows a lack of engagement with arguments on overriding public interest and a failure to carry out a proper weighing exercise through providing reasons.[29] Even where an overriding public interest is presumed under Aarhus Regulation, the Commission often refuses to disclose information related to emissions into environment.[30]

The institutions should properly take into consideration the public interest arguments presented by the applicant and provide detailed and case-specific reasons why the interests protected by the exceptions take precedence over the stated public interest. If not, the public interest test is rendered meaningless with no practical relevance.

- **General Presumptions of Non-Disclosure**

When responding to a request for access to documents, the EU institutions can rely on a general presumption of non-disclosure for certain categories of documents. According to the CJEU in ClientEarth v Commission, those presumptions "apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature".[31]

[29] ClientEarth's response to the European Ombudsman's public consultation on transparency and participation in EU decision-making related to the environment, pp.5-6
[30] European Ombudsman, Decision on the European Commission's refusal to give public access to documents concerning the energy consumption and greenhouse gas emissions of the ceramics industry reported under the EU's emissions trading system (case 2000/2022/PVV)
[31] C-57/16 P ClientEarth v Commission, para 51

Recently however the EU institutions have overapplied the concept of general presumption extensively, if not abusively,[32] and have advocated for the creation of additional general presumptions, other than those accepted by the CJEU.

In terms of non-mandatory exceptions, the application of general presumptions of non-disclosure is rebuttable. The requester still has a right to demonstrate that a certain document is not covered by a presumption, or that there is a higher public interest justifying disclosure.[33] In March 2024, an applicant was successful for the first time in proving an overriding public interest in disclosure against the application of a general presumption of non-disclosure before the courts.[34]

**Recommendation**

- Exceptions to the right of access to documents should be interpreted and applied strictly. To justify the use of an exception to disclosure, the institutions must clearly demonstrate how disclosure would specifically and actually harm a protected interest. In the context of environmental information, the exceptions must be read in light of the Aarhus Convention and are often narrower in scope.
- Public interest arguments presented by the requester must be fully considered and balanced against the interest protected by non-disclosure. The institutions should give adequate weight to the public interest in disclosing environmental information, including information concerning environmental law enforcement.
- Even when a general presumption of non-disclosure is applied, public interest arguments should still be evaluated. The use of general presumptions must align with CJEU case law.
- When access is denied, the institutions should provide a tailored, clear, and robust explanation in their response.

## 5. Partial access should always be considered

If an EU Institution decides that one of the exceptions listed under Article 4 of the Access to Documents Regulation applies to the requested document, and covers only parts of it, the remaining parts of the document should be released, as per Article 4(6):

[32] Curtin D and Rubio A, 'Regulation 1049/2001 on the right of access to documents, including the digital context' (2024), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament
[33] C-139/07 P Commission v Technische Glaswerke Ilmenau, para 62.
[34] C-588/21 P Public.Resource.Org and Right to Know v Commission.

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

At times we see that when an exception applies to a document, the EU institution, body or agency can decide to withhold the entire document, and will not give partial access as it states that no "meaningful" partial access is possible.

What is considered "meaningful partial access", however, may be different to the EU body than to the requester. Partial access should always be granted, even if large parts of the document are legitimately redacted under an exception.

**Recommendation**

- When an exception is evoked to prevent full disclosure, only the specific parts of the document falling under that exception should be redacted. The rest of the document should always be released.

## 6. The correct balance must be struck between data protection and access to documents

The Charter of Fundamental Rights of the European Union lays out the right of access to documents (Article 42) and the right to protection of personal data (Article 8). Both rights are classified as fundamental rights. They are equal and carry the same weight, and therefore neither can have automatic priority over the other. Regulation 2018/1725 (the Data Protection Regulation) specifically refers to the obligation for institutions to reconcile the right to the protection of personal data with the right of access to documents.

In terms of balancing access to documents with personal data protection, the exception under 4(1)(b) of the Access to Documents Regulation states that documents cannot be fully released if disclosure would "undermine the protection of privacy and the integrity of the individual" in accordance with EU law on the protection of personal data.

This is not an absolute exception. Just because a document or parts of a document contains personal data, it should not automatically be exempt from release. Access should only be denied if it is expressly prohibited by the Data Protection Regulation.

When an access to documents request relates to documents that contain personal data, the Data Protection Regulation applies in its entirety. Article 9(1)(b) of the Data Protection Regulation states

that in response to an access to documents request, personal data can only be released if the following three-part test is complied with:

1. The requester shows that it is necessary to have the data transmitted for a **specific purpose** in the **public interest**;
2. The institution decides that there is no reason to assume that the data subject's **legitimate interests** might be prejudiced;
3. And the institution establishes that it is **proportionate** to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

**Access to personal data should not be automatically denied.** Automatic redaction of personal data sometimes leads to unnecessary exclusions. For instance, a journalist requested documents about a 2022 meeting between Commissioner Thierry Breton and Elon Musk, which was publicly known from a video posted by Breton on Twitter. The Commission initially redacted Musk's name under Article 9(1)(b) of the Data Protection Regulation, but it was released after the journalist's appeal.[35]

The automatic denial of access to personal data in response to an access to documents request, however, causes an automatic favouring of the right of data protection of the data subject over the right of access to documents of the requester. If data protection was set to constantly take priority over access to documents, the utility and purpose of the latter would be eroded.

**Public interest arguments of the requester should be taken into account.** When handling requests for access to documents that contain personal data, the institutions have to consider that it is possible for a requester to pass Step One and show that it is necessary to have the data transmitted for a specific purpose in the public interest.

In practice when requesters do indeed lay out public interest arguments to gain access to personal data within requested documents, we often see that EU institutions state that the arguments put forward do not pass Step One. This automatic disregard of public interest arguments means that there is not a fair balance between the right of access to documents and the right of protection of personal data. Essentially, this renders the public interest test meaningless.

It is, however, possible for a requester to lay out that the transfer of personal data is necessary for a specific purpose in the public interest, and we have seen this through jurisprudence of the CJEU and decisions of the Ombudsman:

- **Izuzquiza and Others v Parliament (Case T-375/22):** the Court deemed that it was necessary for a specific purpose in the public interest to release the allowances and expenses

[35] https://www.asktheeu.org/en/request/documents_on_meeting_between_elo

granted to Mr Lagos, a Member of the European Parliament who has been convicted in a court of law. The Court stated that the purpose of facilitating enhanced public scrutiny and accountability in relation to Mr Lagos' access to public funds and, therefore, contributing to transparency as to how taxpayers' money is spent, must be considered to be a specific purpose in the public interest within the meaning of Article 9(1)(b) of Regulation 2018/1725.

- **ClientEarth v. European Food Safety Authority (C-615/13 P):** release of personal data was deemed necessary to ascertain the objectivity of external experts working with The European Food Safety Authority. To support claims of necessity a study was provided which identified potential links to experts and industrial lobbies. A specific suspicious link was drawn between the data subjects in question and the data requested. It was decided by the court that the current internal review mechanisms were therefore not sufficient, making disclosure necessary.
- **Dennekamp v European Parliament (T-115/13):** the disclosure of names of MEPs participating in an additional pension scheme was deemed necessary because of suspicions of their voting behaviour being influenced by their financial interests. This suspicion, along with the fact that there was a lack of internal review mechanisms on this subject, led the court to decide that disclosure was necessary, even without proof of influenced decision-making.
- **Case 795/2022/OAM:** Ombudsman stated that further access to personal data should be granted in relation to suspicions of a former member of the Committee of the Regions of double funding of some travel expenses at the EU and national level.[36]
- **Case 1794/2019/OAM:** Ombudsman states that personal data should be released regarding a suspicion of a conflict of interest regarding a revolving doors case.[37]

**Recommendation**

- There should not be an automatic denial of access to personal data within requested documents, a proper balancing test must be carried out between the right of access to documents and the right of protection of personal data.
- Proving the transfer of personal data is necessary for a specific purpose in the public interest should not be an unreachable benchmark. Requester arguments should be fully taken into consideration and judged on a case-by-case basis.

[36] Decision on the refusal by the European Committee of the Regions to give full public access to the expenses and travel itineraries of a former Irish member (case 795/2022/OAM)

[37] Proposal of the European Ombudsman for a solution in case 1794/2019/EWM on the European Commission's refusal to provide full access to documents relating to an event attended by Commission officials and by a former Commission head of unit

## 7. Compliance with CJEU rulings and Ombudsman decisions

The Maastricht Treaty created the European Ombudsman as a body to which EU citizens could turn to with problems concerning the administrative work of EU institutions. Through its work, the European Ombudsman aims to uphold the highest standards of transparency, ethics, and accountability within the EU administration. [38]

The Access to Documents Regulation states that to ensure that the right of access to documents is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

Therefore, requesters seeking public access to documents may submit a complaint to the European Ombudsman if an EU institution has rejected, in full or in part, their confirmatory application, or indeed they have not replied. In response to a complaint on a refusal of access, the Ombudsman will inspect the documents in question and decide whether the EU institution was correct in its decision. If the Ombudsman finds that the refusal was unjustified, it will decide that maladministration has taken place and ask the institution to reconsider the original decision.

Generally, while the Ombudsman's decisions and recommendations are not binding, there is a high rate of acceptance by the Institutions.[39] However, there are a growing number of cases where institutions have chosen to disregard the European Ombudsman's ruling of maladministration concerning refused access to documents cases and have instead chosen to maintain their original decision.

If institutions choose to ignore the Ombudsman's decisions, it leaves requesters without an effective means to challenge the unjust denial of their right to access EU documents, as not all individuals have the financial or legal resources to take their case to court. This ultimately means that they lack proper channels to address their concerns and obtain justice. Ignoring the Ombudsman's recommendations not only undermines the Ombudsman's authority but also erodes public confidence in the fairness and accessibility of EU institutions. Therefore, it is imperative that the institutions respect and implement the Ombudsman's findings to safeguard the integrity of the right to access EU documents.

The rulings of the CJEU, including the General Court, are binding and under Article 266 TFEU the Institutions are required to take the necessary measures to comply with the CJEU judgment. However, despite multiple judgments of the CJEU and the General Court providing interpretation of the Access

[38] Spoerer, M., More O'Ferrall, R. The European Ombudsman's role in access to documents. ERA Forum 23, 253–266 (2022)
[39] Spoerer, M., More O'Ferrall, R. The European Ombudsman's role in access to documents. ERA Forum 23, 253–266 (2022)

to Documents Regulation in favour of disclosure, the institutions continue to misapply its provisions to deny access to documents. For example, in 2018 the CJEU ruled that the Commission must disclose draft impact assessments carried out with a view of potential adoption of legislative initiatives by the Commission.[40] Despite this ruling, in the subsequent years, the Commission has delayed or denied access to draft impact assessments leading to repeated actions before the General Court.[41] In another case, a former European Parliament official repeatedly brought an action before the CJEU to obtain access to documents relating to inter-institutional negotiations (trilogues) in an ongoing legislative process.[42] Despite the CJEU ruling in favour of the disclosure of legislative documents in these cases, the institutions continuously refuse to make these documents available to the public proactively, leading to repeated applications before the court[43] and increased administrative burden from processing of multiple requests for access to trilogue documents.[44]

**Recommendation:**

- To fully respect the right of access to EU documents, and to ensure that individuals have a reliable and effective means of redress, institutions must adhere to the CJEU rulings and Ombudsman's decisions and recommendations.

## 8. More documents should be proactive publication and document registers must be complete

The right of access to documents can be implemented in practice in two ways, either through reactive transparency, by responding to requests, or proactive transparency, by proactively publishing documents.

Document registers are important for the realisation of the reactive element of access to documents, as they are "a research tool which is intended to enable citizens to identify the documents which are likely to be of interest to them".[45] In order to be able to exercise their right of access to documents

[40] Case C-57/16 ClientEarth v Commission, para. 131
[41] See e.g., Case T-611/21 ClientEarth AISBL v Commission and Case T-792/21 ClientEarth AISBL v Commission
[42] Case T-540/15 De Capitani v Parliament; Case T-163/21 De Capitani v Council
[43] Case T-590/23 De Capitani v. Council
[44] See e.g. requests for access to various documents related to inter-institutional negotiations (trilogues) filed on *AsktheEU.org* portal: https://www.asktheeu.org/en/search/trilogue/all
[45] Case T-42/05, Williams v. Commission, para 72

under the Access to Documents Regulation, "citizens must have sufficient information as to what documents are in the hands of the Institutions".[46]

In terms of the proactive dissemination element of access, the Access to Documents Regulation states that to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents. The Regulation specifically refers to direct accessibility of legislative, policy and strategy documents through this register.

The Commission, Parliament and Council, have all set up their own public document registers, with their own rules as permitted under Article 12 of the Access to Documents Regulation. While the three institutions are legally obliged to use the registers as a tool to ensure the effectiveness of the right of access to documents, there are practical issues with the registers, the main issues being the lack of content published, which ultimately limits people's right of access to EU documents.[47]

The Ombudsman has stated that Article 11 of the Access to Documents Regulation, which states that the institutions must implement the registers, applies to all "documents" that have been drawn up or received by an institution, or are in its possession. Therefore, all documents must be included in the register (subject to exceptions under Article 4 or Article 9):

> "If the legislator had intended the term "document" to have a different, more limited meaning in Article 11 of Regulation 1049/2001, he could have been expected to include a provision to that effect".[48]

Therefore all "documents" within the broad understanding of the definition under Article 3(a) of the Regulation 1049/2001 should be referenced in the register. This includes all non-transitory documents within the sphere of responsibility of the institutions, regardless of whether they concern legislative or other – administrative – activities. This should not only include final documents, but also documents drawn up or received during proceedings.[49]

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[46] Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission, para 19

[47] Matthias Haller, Domenico Rosani, 'EU Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe', (2024), 61, Common Market Law Review, Issue 2, pp. 449-490

[48] Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission, para 18

[49] Matthias Haller, Domenico Rosani, 'EU Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe', (2024), 61, Common Market Law Review, Issue 2, pp. 449-490

More proactive publication would improve the implementation of the right of access to documents, while at the same time reducing the administrative burden on EU public institutions.[50] This should be done in a timely manner, updated on a regular basis.

Regarding environmental information, the institutions and agencies of the EU should systematically and proactively collect and publish information on the state of the environment and, importantly, on the enforcement and compliance with the existing environmental law. In this regard, the CJEU has recognised the obligation of public authorities "to be in possession of accurate and up-to-date environmental information"[51] to ensure the quality of environmental decision-making. The European Ombudsman has also noted that the Aarhus Regulation aims to ensure that environmental information is progressively made available and is disseminated to the public in the widest possible manner.[52]

Currently, key registers set up to increase access to environmental information and transparency of environmental decision-making are limited in scope and information uploaded in them often untimely and incomplete. For example, while there is a database for infringement decisions and short press releases sum up the infringement packages, both contain very limited information,[53] complaints filed by the public or NGOs, letters of formal notice, reasoned opinions or answers by the Member State are not included in the database.[54] A recent study commissioned by the Directorate-General for Parliamentary Research Services also found that European Investment Bank lagged behind other international development banks in relation to the scope and timing of publication of environmental information.[55] Despite falling into a broader category of legislative documents that require greater transparency, especially in the context of environmental decision-making, the information in the Comitology Register is still incomplete. A report commissioned by the European Parliament recently recommended the Commission proactively publish information such as agendas, attendance lists, summary records, draft measures, votes and individual positions of the Member States in the Comitology Register.[56]

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[50] Matthias Haller, Domenico Rosani, 'EU Document Registers: Empirical Gaps Limiting the Right of Access to Documents in Europe', (2024), 61, Common Market Law Review, Issue 2, pp. 449-490

[51] C-234/22, Roheline Kogukond MTÜ and Others v Keskkonnaagentuur, para.44

[52] European Ombudsman Decision on the European Commission's refusal to give full public access to documents concerning statistical data on pesticide active substances reported by Spain (case 1170/2021/OAM), 1 March 2022, para. 25

[53] EEB, BirdLife International, "Stepping Up Enforcement, Recommendations for a Commission 'Better Compliance' agenda to ensure the application of EU environmental law", p. 11

[54] EEB, BirdLife International, "Stepping Up Enforcement, Recommendations for a Commission 'Better Compliance' agenda to ensure the application of EU environmental law", pp. 11 - 12

[55] LE Europe, Study on the active publication of 'environmental information' by financing entities, May 2024, p. v and Section 6

[56] Curtin D and Rubio A, 'Regulation 1049/2001 on the right of access to documents, including the digital

**Recommendation**

- Institutions should proactively publish all documents in the public interest. All documents in their registers should be referenced and published in a timely and user-friendly manner.
- There should be proactive and systematic gathering and publishing of information related to the state of the environment and enforcement of environmental law.
- Environmental information in existing registers, such as the Comitology Register, infringement procedures database and European Investment Bank public register, should be comprehensive, up-to-date and published systematically without unjustified delay.

## 9. Sufficiently staffed and adequately trained units

One major problem that access to documents departments face is a lack of resources. Understaffed units mean that staff are overloaded, they are then unable to provide appropriate assistance to the requesters, as per Article 6 of the Access to Documents Regulation, and deadlines cannot be met. Subsequently, this causes the violation of the right to documents of citizens as they are unable to enjoy their right in practice.

Access to documents is a fundamental right in the EU and sufficient resources should be allocated to ensure that citizens can enjoy this right. There is a real need for resources so that units can not only be sufficiently staffed, and officials can be adequately trained.

EU public officials are the front line for the application of access to documents, it is important that they are well versed on the applicant's rights, the process and the importance and movement towards institutional transparency. The Ombudsman has recommended that each EU institution implements provisions for staff to receive appropriate information and training on document registration and retention.[57] This training should encompass important decisions by the Ombudsman and jurisprudence of the CJEU in the area of access to documents. Staff should also be trained on international and regional standards on the right to information.

**Recommendation**

- Access to documents units should be well-resourced and adequately staffed.

context' (2024), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament pp. 13 and 49.

[57] European Ombudsman, A short guide for the EU administration on policies and practices to give effect to the right of public access to documents (SI/7/2021/DL)

- EU public officials handling requests must receive regular training on document access, including key decisions from the Ombudsman, relevant CJEU jurisprudence, and international and regional standards on the right to information.

## 10. Requester's language preferences must be taken into consideration

Under Article 6 of the Access to Documents Regulation, applicants have the right to submit their access to documents requests in any of the official languages of the EU:

> "Applicants for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 14 of the EC Treaty."

In practice we have seen requesters submitting a request in an official language of the EU, but getting replies to that request in English.

While there is no obligation for the Institutions to translate requested documents into the requester's preferred language, the requester should be able to receive an answer to their request in their chosen official EU language. Documents should also be released in open electronic formats so that the requester can translate online.

**Recommendation**

- EU officials should respond to access to documents requests in the requester's preferred official EU language.
- Documents not in the requester's language should be provided in open electronic formats wherever possible to facilitate online translation.

## Conclusion

While the Access to Documents Regulation provides a solid legal framework for EU institutions, bodies and agencies, there remain significant gaps in its application, largely due to inconsistent practices and a lack of adherence to established standards and rulings by the CJEU and the European Ombudsman. Addressing these gaps is essential to realising the fundamental right of access to EU documents, a cornerstone of transparency and democratic participation in the European Union.

The recommendations outlined by Access Info provide a clear roadmap for improving the implementation of the Access to Documents Regulation. By following these recommendations, EU institutions, bodies and agencies can make the fundamental right of EU documents a reality in practice and uphold their commitment to openness and accountability. Doing so will enhance public trust in the EU and will empower citizens, civil society, and other stakeholders to engage fully in the democratic processes of the Union.