

## SEMINAR: ACCESS TO DOCUMENTS IN THE EU AND BEYOND: REGULATION 1049/2001 IN PRACTICE (417D95)

Brussels, 20-21 November 2017

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25.	<a href="#"><u>Decision of the European Ombudsman</u></a> setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues
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## 2. Reports and analysis

26.	<a href="#"><u>Annual reports from the Commission</u></a> on the application in 2012 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents
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31.	<a href="#"><u>EU Transparency Register</u></a> , EPRS Briefing, May 2016
32.	<a href="#"><u>Transparency of lobbying at EU level</u></a> , EPRS Briefing, December 2015

## 3. Selected case-law

33.	Judgment of the Court of 7 September 2017, French Republic v Carl Schlyter, <a href="#"><u>C-331/15 P</u></a> , ECLI:EU:C:2017:639
34.	Judgment of the General Court of 16 April 2015, Carl Schlyter v European Commission, <a href="#"><u>T-402/12</u></a> , ECLI:EU:T:2015:209
35.	Judgment of the Court of Justice of 18 July 2017, Commission v Patrick Breyer, <a href="#"><u>C-213/15 P</u></a> , ECLI:EU:C:2017:563
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45.	Judgment of the Court of First Instance of 9 September 2008, MyTravel Group plc v Commission of the European Communities, <u>T-403/05</u> , ECLI:EU:T:2008:316
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61.	Order of the Vice-President of the Court of Justice of 10 September 2013, Commission v Pilkington Group, <u>C-278/13 P(R)</u> , ECLI:EU:C:2013:558
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66.	Judgment of the General Court of 22 May 2012, EnBW Energie Baden-Württemberg v Commission, <u>T-344/08</u> , ECLI:EU:T:2012:242
67.	Judgment of the General Court, 4 May 2012, Sophie in 't Veld v Council of the European Union, <u>T-529/09</u> , ECLI:EU:T:2012:215
68.	Judgment of the Court of Justice of 25 October 2011, Solvay, <u>C-110/10 P</u> , ECLI:EU:C:2011:687
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75.	Judgment of the Court of Justice of 7 January 2004, Aalborg Portland, <u>C-204/00 P</u> (joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), ECLI:EU:C:2004:6
76.	Judgment of the Court of Justice of 20 September 2001, Courage and Crehan, <u>C-453/99</u> , ECLI:EU:C:2001:465
77.	Judgment of the Court of Justice of 24 June 1986, AKZO Chemie v Commission, <u>C-53/85</u> , ECLI:EU:C:1986:256
78.	Judgment of the European Court of Human Rights of 17 February 2015, <u>Guseva v Bulgaria</u> (Application No. 6987/07)
79.	Judgment of the European Court of Human Rights of 8 November 2016, <u>Magyar Helsinki Bizottság v. Hungary</u> (Application No. 18030/11)

80.	<u>Statewatch Case Law Summary</u> , EU access to documents Regulation, prepared by Steve Peers, Professor of Law, University of Essex
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*Non-disclosed personal data (Art. 4(1)(b) of Reg 1049/2001)*

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# Right to information in the European Union within diverse legal contexts (EU Treaties, the Charter and ECHR)

## Setting the Scene

- 1) The contribution of the Charter
- 2) The ECHR jurisprudence: ideas, objectives and standards
- 3) Where should the implementation of the Regulation be improved?
- 4) Where's the harm? Evaluating harm from disclosure in democratic society.

## Principle of openness has four forms

- access to documents (art 15(3) TFEU, art 42 CFR)
- publicity of procedures (art 15(2) TFEU)
- communication (art 15(1) TFEU)
- good data management – public information needs to be easily obtainable (art 298 TFEU? Art 15 TFEU, Art 51(1) CFR)

## Regulation 1049/2001

- In force since 2001
- Two attempts to update the Regulation have failed
- The Lisbon Treaty developed legislative transparency further – outdated Regulation leaves much room for institutional discretion
- The significance of the Charter and the ECHR has not been fully embraced

## Particularly contested matters

- Legislative transparency (Member State positions, legal advice, "space to think")
- Definition of "public interest"
- Data protection and privacy
- Protection of investigations ("general presumptions")
- Court documents
- Compliance with the Aarhus Convention
  - *Lex generalis – lex specialis* e.g. in relation to agencies
  - Applicability of EU legislation – national legislation in cases of shared management or administration

# Why is the Charter relevant?

- Article 42 CFR
- In addition, includes helpful references
- Openness as a fundamental right - authorities' general obligation to promote the observance of fundamental rights (Art 51(1) CFR)
- Art 52(3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

## Article 53 CFR - Level of protection

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

- duty to interpret all legislation in a manner that respects fundamental rights-> We should care about the ECHR and relevant jurisprudence!

## Human Rights Committee 102nd session

### General comment No. 34, para 19.

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment<sup>1</sup> to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond<sup>1</sup> to requests.

## ECHR and relevant case law

- Right of access to documents emerging, based on the right to receive and impart information : "a matter which has been the subject of gradual clarification in the Convention case-law over many years"
- ECHR "provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".

## Council of Europe Convention on Access to Official Documents (CETS No. 205, 2009)

**Article 2(1):** “Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.”

**Article 3 (1) –(2)** “Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting [...]”

2 Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.”

# Threshold Criteria for right of access to State-held information set in **18030/11**

- The purpose of the information request: necessary for the exercise of freedom of expression?
- The nature of the information sought: does it meet a public interest test to prompt a need for disclosure? Does disclosure „provide transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allow participation in public governance by the public at large”?
- The role of the applicant: journalist, NGO, academic researcher, blogger, popular user of the social media
- Is the information „ready and available”?

## The Convention test:

Is the interference in question justified?

- 1) “prescribed by law”
- 2) pursued one or more legitimate aims
- 3) “necessary in a democratic society”?

## Where should the implementation of the Regulation be improved?

- The Regulation builds on a different logic
- However, many of the general principles would seem applicable.
- Definition of public interest, which remained a dead letter
- CJEU been reluctant to refer to ECHR

## Protection of privacy

- “it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights” (name of an MP initiating a procedure at the Constitutional Court; Case of the Hungarian Civil Liberties Union)
- Conduct of professional activities
- Degree of exposure that could have been foreseen

## Court documents - Rules of ECtHR -14 November 2016 - Rule 331 – Public character of documents

1. All documents deposited with the Registry by the parties or by any third party in connection with an application [...] shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise[...].
2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice.

## Where should the implementation of the Regulation be improved?

- Compliance with the Aarhus Convention
- *Lex generalis – lex specialis* e.g. in relation to agencies – what is the applicable law? Role of professional confidentiality rules?
- Applicability of EU legislation – national legislation in cases of shared management or administration

**How could the principle of transparency be further strengthened improved?**

- publicity of procedures (art 15(2) TFEU)
- Public access is not about communication, which has a separate function.
- good data management – public information needs to be easily obtainable – registers? Data bases?

## Where's the harm? Evaluating harm from disclosure in democratic society.

- “The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.” ([Turco](#))
- “the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.” ([AIE](#))



European  
Commission

# Access to Documents

## in the European Commission



European  
Commission

## Article 15 (3) of the TFEU

**Right of access to documents of all EU institutions, bodies, agencies, subject to conditions in secondary legislation**

► Regulation 1049/2001

► Commission Decision 2001/937



European  
Commission

## Wide personal scope (beneficiaries)

Commission Decision 2001/937:

- Third-country nationals can submit applications



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## Wide material scope

'Documents' also include:

- important and not short-lived emails - these are registered in the Commission's document management system
- information that is extractable from a database using a routine search operation
- documents held by Commissioners and their Cabinets



European  
Commission

## Two-stage procedure

- Initial stage: DGs, SG Directorates  
**15 (+ 15) working days**
- Confirmatory stage: Secretary-General, by delegation for the European Commission,  
based on a draft approved by the Legal Service  
**15 (+ 15) working days**



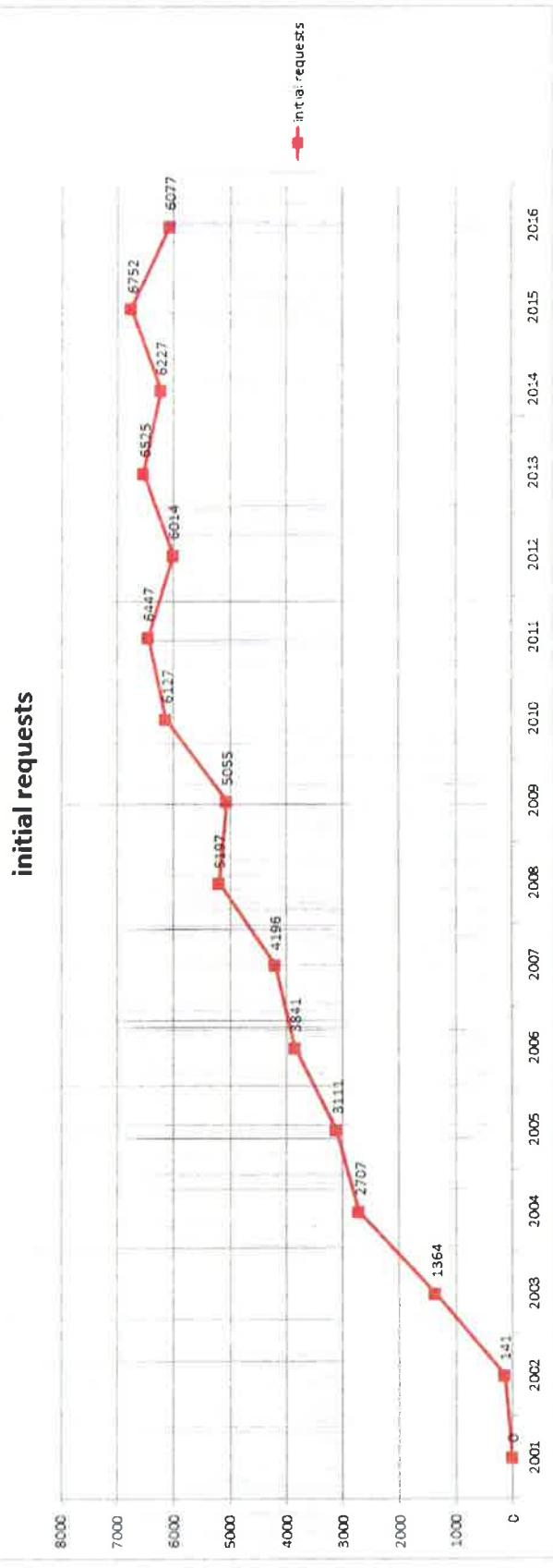
European  
Commission

## Consultations

- **Third-party authors; overruling in case their position is not (prima facie) justified (based on Article 4(4) and (5) and the Detailed Rules)**
- **Member States whose positions are reflected in the documents (based on loyal cooperation)**



# Increasing numbers





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## Increasing numbers



**295 confirmatory applications in 2016**

# Wide openness (initial stage)

