Chapter 11

ICTs, Public Access to Documents, and Transparency in the European Union: The Role of the European Ombudsman

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ABSTRACT

This chapter examines the relationship between Information and Communication Technologies (ICTs) and transparency in the public sphere. The link between the two is rather easy to conceive: ICTs facilitate flow and management of information, which is crucial to achieve openness and accountability and advance public debate. In this chapter, the issue is examined in the context of the European Union (EU), from the point of view of public access to documents and the role of the European Ombudsman (EO). The author presents the applicable legislative framework and discusses the role of the EO in facilitating and promoting public access to documents, with emphasis on the EO’s mandate, the procedure followed, and its possible outcomes. The last part of the chapter examines the decision of the EO on a recent case concerning public access to documents of interest to a wide public, whereby it is illustrated that ICTs, by facilitating access to documents and information, advance openness, transparency, good governance, and accountability.

1. INTRODUCTION

Public access to documents is a form and expression of free access to information, which is a prerequisite for accountability (Bovens 2007: 107), allows political participation, and is the basis on which confidence in government can be built (Curtin 1998: 107 & 110). Public access to documents is thus obviously linked with democratic governance, adding legitimacy to legislative or administrative acts, and ensuring the accountability of those who adopt them (Kranenborg 2008: 1094-95; Moser 2001: 4). This is so because, in a word, openness and transparency, “lift the veil of secrecy” (Davis 1998: 121). The inextricable link between access to information, one of whose
expressions is public access to documents, and
democratic governance has clearly been stated by Advocate-General Tesauro: “the basis for the
individual’s right to information should be sought in the principle of democracy”
1. However, given
the multiplication of entities exercising some form of power on the international, the regional, the
national and local level, information concerning governance—and, as a consequence, the number
of documents containing that information—have increased geometrically. This situation can only
be dealt with by means of new ways to improve and facilitate access to information/documents.

In the EU there is a legislative framework on
public access to documents produced by, or in the possession of, EU institutions, and there are
ways to challenge the latter’s refusal to grant access to requested documents. Relevant rules can
be found both in primary and in secondary EU law, and the tools at the disposal of those seeking
access to documents are two: either take their case before the Court of Justice of the EU (art. 263 of
the Treaty on the Functioning of the European Union, hereinafter: TFEU), or lodge a complaint
with the EO (art. 228 TFEU). This second option is discussed in more detail below. An examina-
tion of the mandate, the role and the procedure followed by the EO reveals the importance of the EO in
defending access to documents and advancing good administration in the EU, while a recent case decided by her, one where access to documents concerning the entry of Greece into
the Eurozone was requested, provides an interesting example of how ICTs can facilitate flow of
information and access to documents, and as a result enhance democracy.

2. PUBLIC ACCESS TO
DOCUMENTS IN THE EU

In the EU, access to documents has been utilized to improve openness and transparency, and counter
what has often been described as “democratic deficit”. It has constituted a fundamental element
of good governance and administration (Söderman 2000), bolstering the legitimacy of EU decision-
making processes (Frost 2003: 89) and improving the quality of their outcomes.

The “starting point of the gradual recognition” of access to documents as a right in the EU can be
traced back to the Treaty of Maastricht (Kranenborg 2008: 1083), in an era when the democratic
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access to Commission and Council documents (Diamandouros 2008: 654). The seventeenth Decla-
ration of the Treaty of Maastricht emphasised the importance of transparent decision-making in
enhancing democracy and strengthening public confidence in EU administration (Declaration
No. 17 annexed to the Treaty of Maastricht, OJ C 191, 29 July 1992, p. 101). This resulted in
the Council, the Commission and the Parliament adopting codes of conduct concerning public
access to documents whereby they, however, delineated the scope of the right in a rather narrow
manner (Moser 2001: 7-8).

Later, the Treaty of Amsterdam provided in its art. 255 para. 1 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 European Parliament, Council and Commission documents”. This provision of
primary Community law was subsequently imple-
mented by the adoption of Regulation 1049/2001 of the European Parliament and of the Council
regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31 May 2001, pp. 43-48, hereinafter: ‘the Regulation’).2 Now, the right of access to docu-
ments is also mentioned: in the European Code of Good Administrative Behaviour, whose art. 23
applies precisely to requests for public access to documents; art. 42 of the Charter of Fundamental
Rights of the EU on the right of access to European Parliament, Council and Commission documents,3
and art. 15 para. 3 of the TFEU, which enlarges the scope of the right to cover all EU institutions,
bodies, offices and agencies. These last two provi-