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# Key Recommendations on Strengthening EU Transparency

This document sets out Access Info Europe’s recommendations for improving European Union transparency in law and in practice.

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision making, and for holding governments accountable.

The recommendations for improvement follow years of analysis and activism by Access Info to improve transparency in the European Union. They are based on our detailed analysis of Regulation 1049/2001 against international standards, including an evaluation of Regulation 1049/2001 using the global RTI Rating indicators, which resulted in a score of 96 out of a maximum 150 points. This is a solid result but puts the EU behind 33 countries globally and clearly indicates that the EU is not a leader when it comes to transparency regulation.

These recommendations are also based on our identification of the need for improvement in the implementation of Regulation 1049/2001, based on problems identified via our monitoring of requests, in particular those files across AsktheEU.org, Access Info’s online request platform, which facilitates citizen access to EU documents by channelling requests directly to the EU institutions.

**The Treaty on the Functioning of the European Union sets out, in Article 15, a fundamental right of access to information**:

*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 … 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.*

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## 1. Improvements to Regulation 1049/2001

The EU’s access to information law or freedom of information act is Regulation 1049/2001 on Access to European Parliament, Council and Commission documents.

Regulation 1049/2001 was written before many of the worlds over 100 access to information laws and whilst it is a generally strong instrument, it falls short of the international standards on the right of access to information as they have developed, including through the jurisprudence and opinions of the world’s major human rights instances, over the past 14 years.

In order to improve transparency of the European Union institutions and bodies, action needs to be taken in the following areas, in particular as part of reform to Regulation 1049/2001:

### 1.1. Recognise all persons are beneficiaries of the right

The right of access to information has been recognised as a fundamental human right by the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee. Anyone should be able to exercise this right irrespective of their residence or nationality.

Regulation 1049/2001 currently states, however, 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, subject to the principles, conditions and limits defined in this Regulation.”

Although Regulation 1049/2001 is a reflection of the treaty provisions on the right of access to documents, there is nothing to stop European Union legislators interpreting the treaty provisions in a way that is even more protective of the fundamental right of access to information and thereby, consistent with international standards, granting a right of access to all persons irrespective of their residence or nationality.

Indeed, the Implementing Regulations of the Council and Commission already provide for all requesters to be treated equally regardless of where in the world they come from or live and the Parliament has a policy to do so “where possible”.

Such an approach to the right of access to documents should be incorporated into Regulation 1049/2001 in any future reform, and in the meantime should be part of internal rules and practices of all EU bodies and agencies.

### 1.2. Increase the scope: include all institutions, bodies and agencies

The right of access to documents should apply to all documents of the Union institutions, bodies, offices and agencies.

Regulation 1049/2001 should be redrafted to reflect the language in the TFEU, simply stating that it applies to all “documents of the Union institutions, bodies, offices and agencies.”

### 1.3. Reform the exceptions to access

### 1.3.1. Harm and public interest test for all exceptions

The exceptions in Regulation 1049/2001 need to be brought into line with international standards on the right of access to information so that each and every one of them is subject to both a harm and a public interest test, thereby ensuring that information necessary for participation and accountability enters the public domain.

Such a test is mandated, inter alia, by the Council of Europe Convention on Access to Official Documents, a treaty that was developed with the active participation of many EU member states (Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the UK all participated in the drafting).

Regulation 1049/2001 should be modified to make clear that EU documents are public by nature and that therefore the application of exceptions needs to be fully justified. All exceptions should be subject to both a harm and a public interest test; blanket exceptions should not be permitted as they are not consistent with the right of access to documents.

Currently the exceptions for public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State, and the privacy and the integrity of the individual are not subject to a public interest test; which they should be.

The introduction of a public interest test for all exceptions would ensure that in future there is a proper assessment of cases in which any potential harm caused by publication is overridden by a range of public interests, which would include the protection of fundamental rights and the rule of law, sound management of public funds, or the right to live in a healthy environment, and emissions into the environment.

#### 1.3.2. Balance privacy and personal data against the right to documents

Regulation 1049/2001 should contain language which adequately reflects the fact that the right of access to documents is now recognised as a fundamental right in Article 15 of the TFEU, and hence has to be balanced against the right to private life (Article 7 Charter of Fundamental Rights) and the protection of personal data (Article 16 of the TFEU). This was not previously the case, as reflected in the jurisprudence of the European Court of Justice (for example, the *Bavarian Lager* case).

A revision of Article 4(1)(b) on personal privacy should introduce harm and public interest tests in order to strike an appropriate balance between the different rights when it comes to personal data processing whilst insuring that information about public officials and others acting in their professional capacities in relation to EU affairs can be accessed by members of the public.

In order to help balance the different rights with regards the names of public officials and third parties, EU institutions should enact a policy whereby they provide advance notice to all individuals involved in decision-making processes that their names and professional affiliations are prima facie public.

#### 1.3.3. Review status of classified documents upon receipt of a request

Regulation 1049/2001 should make clear that whenever classified or restricted documents are requested, an assessment will be made on a case-by-case basis to determine whether at that point in time any exceptions apply, as subject to a harm and a public interest test.

### 1.4. Align Regulation 1049/2001 with the Aarhus Convention

Any requests for documents containing environmental information should be handled in line with the Aarhus provisions in order to achieve maximum access, and there should be an absolute public interest override for access to information about emissions into the environment.

It is important that Regulation 1049/2001 be amended to make clear that when a request submitted under the Regulation referring to documents which contain information identified by Regulation 1367 as environmental information, there is a particularly strong presumption that the information will be disclosed unless the narrow exception of environmental protection applies. A public interest should always be deemed to exist when the information relates to emissions into the environment.

There should be a full review of the interaction of the two regulations in order to ensure that they are properly applied in a way which gives requesters easy and rapid access to information.

### 1.5. Ensure reasonable timeframes

A 15 working day timeframe to answer a request for access to EU documents is sufficient. In addition to these 15 working days, as currently provided for in the current Regulation, certain complicated requests can have an extension applied, in which case the requester should be notified.

Language in Regulation 1049/2001 should be strengthened and clarified to ensure that only one extension can be applied, requesters need be notified, and that this extension be only an additional 15 working days. Unspecified extensions should never be applied.

### 1.6. Introduce information officers

Regulation 1049/2001 should introduce a requirement that every EU body appoints an information officer. Not only does this figure contribute to upholding the right of the public to information, but they often contribute to increased efficiency of information management within the public body.

Such a position does not imply creation of an entirely new post, as many bodies already have someone responsible for handling access to documents requests and for those which do not, this could be undertaken, for example, by the body’s data protection officers.

### 1.7. Ensure good administration in the legislative process

Access Info Europe notes with great concern that questions have been raised in Brussels, including during court proceedings, about the impact of transparency on the record-keeping. Any suggestion that there will be less than detailed record keeping in an effort to avoid the TFEU transparency obligations is troubling. This is not a matter for Regulation 1049/2001 to solve but that as a matter of good administrative practice there should never be the option to take less than detailed notes or make less than specific reports in anticipation of publication.

Access Info Europe is also aware of instances where legal advice has been delivered orally and is therefore not available for sharing with the public when requested.

In line with the Treaty of Lisbon, the EU institutions should make a detailed record of relevant information, such as legal advice, the minutes of meetings and documents that form part of the decision-making process so that they fulfil the requirement to work as openly as possible. This is both for record-keeping purposes and to promote citizen participation in EU decision-making. It also allows for EU accountability before national Parliaments and citizens.

Regulation 1049/2001 could contain a provision requiring detailed record keeping by EU institutions, particularly in the context of legislative procedures.

### 1.8. Make EU Ombudsman Decisions on transparency binding for EU institutions

The system for appealing refusals to provide information is burdensome if citizens wish to secure a binding decision as they need to go to the European Court of Justice which requires hiring a lawyer, can take a number of years, and can be expensive.

Appeals to the European Ombudsman are relatively simple to file and are free of charge, but the decisions are not binding.

Like many other Ombudsmen and Information Commissioners across Europe, the EU Ombudsman should be given binding powers when it comes to transparency issues, which in 2013 made up a quarter of Ombudsman Complaints. This would not require a Treaty change; it can be done by reforming the access to documents Regulation.

### 1.9. The right of access to documents should be consistent across EU institutions and bodies

Some institutions have adopted their own Decisions on Public Access to Documents which contain different exceptions from those set out in Regulation 1049/2001, even though the treaties limit exceptions to those which have been adopted by the Parliament and Council via an ordinary legislative process.

For example, the ECB’s Decision on Access to Documents states that requests shall be handled within 20 working days rather than the 15 working day time limit. The ECB Decision also includes exceptions that are not in Regulation 1049/2001, and it doesn’t include a provision similar to Article 6.2 of Regulation 1049/2001 which requires institutions to assist requesters and to guide them on how and where applications can be made.

The procedures and exceptions for access to EU documents should be the same for all EU bodies in order to avoid confusion and unnecessary complications. All exceptions should only be set out via an ordinary legislative process with the agreement of the European Parliament and the Council.

## 2. Proactive Publication

### 2.1. Ensure key information is proactively published and accessible

Not enough information is made public proactively by EU bodies. The registers of the Council, Commission, and Parliament are incomplete and the European Union Open Data Portal does not contain much information needed for accountability and participation. Information is scattered across multiple websites, registers and the portal, which makes it harder to find.

The proactive dimension of the right of access to documents should be incorporated into Regulation 1049/2001 with a requirement that EU bodies proactively publish key information related to: expenditure, procurement, subsidies, infringement proceedings, decision-making on policy and law-making, etc., which should be published in a timely manner, in accessible formats, that are non-proprietary, and without restrictions such as copyright on re-use.

Information and documents which are in the public interest should be published proactively and should be easily searchable, readable and accessible. This would also reduce the administrative burden for institutions to answer access to EU documents requests.

### 2.2. Proactive publication of legislative documents

In the context of the TFEU requirement to “ensure publication of the documents relating to the legislative procedures”, questions have been raised about when a document formally becomes a “legislative document.” This could include, for example, the question of whether a “non-paper” is a legislative document or not.

This question should be solved by virtue of the content of the document: if it refers to a legislative process or is in any way used in legislative decision making then it should be considered a legislative document.

Documents relating to legislative programmes, preliminary civil society consultations, impact assessments, as well as documents relating to the implementation of Union law and policies linked to a legislative procedure, should at a minimum be proactively published and accessible on a user-friendly and coordinated inter-institutional site and published in a special electronic series of the Official Journal of the European Union.

Information about minutes and attendees of Council Working Parties, about how the Council relates to other EU bodies when taking decisions, and about what the positions of the Member States are during Council debates or negotiations could also be made proactively available. Such information should always be made available when it relates to a legislative process.

#### 2.2.1. Transparent legislative process must include preparatory documents

The EU institutions should make public preparatory documents relating to the legislative process on a common Internet site reproducing the lifecycle of the procedure concerned. This is consistent with the TFEU requirement of transparent and open legislative procedures.

Regulation 1049/2001 reform could introduce language requiring proactive publication of preparatory documents relating to the legislative process.

#### 2.2.2. Make trialogues transparent

85% of EU laws are agreed in first reading, during which trialogues - negotiations between the Council, Commission, and Parliament - play an important part of the decision-making process. However, trialogue meetings remain the most important blind spot in decision-making lacking adequate levels of transparency. They happen behind closed doors often without any public record.

EU institutions should publish information about trialogues proactively – provide agendas in advance of the meeting, including the date, time and location of the meeting, expected attendees and topics to be discussed.

The minutes of trialogue meetings, including the duration of the meeting, the names of the people that were present and a summary of the issues discussed, agreements reached, and next steps to be taken, as well information about the documents exchanged, should be published proactively.

### 2.3. Collect and publish information on lobbying activities

Information about contacts and meetings between MEPs, public officials and lobbyists should be collected and published proactively by EU institutions, including information on the names of people present, the date, time, place and duration of the meeting, the topics discussed and any conclusions or actions points agreed upon.

Institutions should also proactively publish the names of all those involved in work on legislative files as well as engaged in all other key decision-making processes.

These actions will help to ensure that decision making is as open as possible and in order to allow citizens to understand and form an opinion on how a decision was reached or how a piece of legislation was drafted. Standards on which information needs to be recorded should be developed.

## 3. Transparency in Practice

In order to improve transparency of the European Union institutions and bodies in their current implementation of the right of access to EU documents, action needs to be taken in the following areas:

### 3.1. Remove the obligation for postal address to register requests

Access Info Europe is currently awaiting a decision from the European Ombudsman on a change in practice by the Commission regarding the ‘new’ obligation to provide postal addresses to submit requests for access to EU documents.

The Commission stated that it changed the rules on 1 April 2014 to require a postal address to make access to EU documents requests to ensure that it can guarantee delivery of “replies triggering the possibility for administrative or judicial redress.”

This is despite the fact there is nothing in the European Union’s access to documents rules stating that postal addresses must be provided, and that many requests, amounting to thousands or even tens of thousands, have been successfully processed by the European Union since 2001 without the need for a postal address.

Answering a parliamentary question by MEP Julia Reda, the Commission admitted in response to parliamentary questions that the policy is based on just one case of “abuse” over the past 14 years.

The policy is an unreasonable and disproportionate burden and an interference with the right of access to documents as set out in the EU treaties.

The Commission should remove the requirement of a postal address to make access to EU documents requests. The Commission should explore alternatives such as electronic delivery which would be speedier, permit provision of documents in electronic formats, and would cost less.

### 3.2. Define “document” broadly and comprehensively

EU bodies regularly distinguish between “documents” and “information” requests, answering the latter only under the Code of Good Administrative Practice, which means that citizens do not have legal recourse if the information is not provided.

Regulation 1049/2001 already contains a sufficiently wide definition of document as “any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)”. This should permit the public to request information without having to ask for specific documents.

We urge the EU institutions and bodies to adopt a comprehensive transparency policy whereby requests which seek information are processed in the same way as requests which seek particular documents, thereby enabling citizens to appeal when information is not (fully) disclosed.

### 3.3. MEPs should be accountable for their expenses and expenditure

The Parliament should collect and publish expenses and expenditure of MEPs to ensure appropriate use of public funds. Citizens have a right to know how public money is spent by elected representatives, particularly given that just over a quarter of the Parliament’s budget is dedicated to MEPs' expenses, including salaries, costs for travel, offices and the pay of personal assistants.

### 3.4. Ensure third parties are aware of the EU’s transparency obligations

European Union institutions should proactively inform third parties, countries and individuals of its obligations to provide information to the European public under Regulation 1049/2001. Outsiders should know from the outset that the European Union will need to publish certain information in order to fulfil the fundamental right of access to EU documents.

### 3.5. Strengthen presumption of openness and limit application of exceptions

There is a pressing need to replace the general presumptions of secrecy with a greater culture of openness in which there is a presumption that information is in the public domain unless presumptions apply.

Areas of EU activity where there has been resistance to shifting to the paradigm of a presumption of openness include legal advice, infringement proceedings, the activity of working groups in the Council, and international negotiations (such as the TTIP) where third countries have influenced the decisions as to whether or not to make certain information public, in spite of the EU’s access rules.

A particular concern is the overreliance on the personal privacy exception, which recently has been used to deny, inter alia, information about how much Commissioners earn or spend on official travel [www.asktheeu.org/en/request/commissioners\_expenses\_2012\_and\_2].

There remain problems with access to information about the names of government officials and lobbyists participating in meetings in Brussels.

Whilst the European Court of Justice has upheld the right of private individuals to protect their personal data, we strongly believe that a proactive approach by the European Commission could avoid this limiting transparency in a way that prevents public scrutiny of public decision-making or spending. This can be done simply by requiring that participants in meetings and recipients of EU funds agree in advance to provide their basic data in order that there be true accountability of decision making and the expenditure of taxpayer’s funds.

As a matter of practice, all EU bodies should ensure that when refusing documents where there is a demonstrable harm to the relevant protected interest and that there is no overriding public interest in the publication of the information. Refusal letters should contain a thorough justification as to why the exception was applied. Every effort should be made to provide partial access when only part of a document contains information that falls under an exception.

### 3.6. Institution-by-institution recommendations

Access Info Europe has also published two sets of recommendations on the transparency of the Council of the EU and the European Central Bank following an analysis of requests from 2011 to 2013 via the online request platform AsktheEU.org.

Recommendations to Council of the EU: <http://www.access-info.org/pub-and-toolkits/10674>

Recommendations to European Central Bank: <http://www.access-info.org/pub-and-toolkits/14712>

Access Info Europe is currently formulating recommendations after an analysis of access to documents requests made to the European Commission from 2011 to mid-2015 via AsktheEU.org. *These will be published in Autumn 2015.*