

COMPLAINT

MALADMINISTRATION COMPLAINT TO THE EUROPEAN OMBUDSMAN

REF: GESTDEM 2016/2791

Submitted by Helen Darbshire, Madrid, 4 July 2017

I. FACTUAL BACKGROUND

1. On 17 May 2016, I requested, “*full access to the Legal Advice generated by and/or provided to the Commission regarding the lobby register, including any and all legal advice that considers the treaty basis for the register and whether or not it could be mandatory. There is an overriding public interest in having this legal advice made public at this time, given the ongoing debate about the future of the lobby register, including the public consultation currently under way. This information is needed, inter alia, for citizens, civil society groups (including the organisation that I represent), and other stakeholders to participate fully in the debate about the nature of the register, as well as to ensure transparency of the decision-making process related to it so that public officials can be held to account over the eventual decisions made about the register.*”¹
2. My request was registered by the European Commission (“Commission”) on 19 May 2016, following confirmation of my postal address, under reference number GestDem 2016/2791.
3. The deadline to answer my request was extended by 15 working days by the Commission on 9 June 2016. On 30 June 2016, the deadline to answer my request was extended by another 15 working days by the Commission. On 18 July 2016, following a telephone conversation with Commission officials, I was told my request would be answered “*by the end of this week*”.
4. On 26 July 2016, I finally received an answer to my initial request of 17 May 2016. In it, I was told the following documents had been identified as fulfilling the criteria of my request:
 1. Note of the Legal Service to the Secretary General of 12 September 2006 (reference JUR(2006)30417) (“document 1”).

¹ The request and the full history can be found here:
https://www.asktheeu.org/en/request/legal_advice_on_lobby_register

2. Note of the Legal Service to the Secretariat General of 17 September 2007 (reference JUR(2007)30478) (“document 2”).
3. Note of the Legal Service to the Head of Cabinet of Vice-President Maroš Šefcovič of 2 October 2013 (reference Ares(2013)3191712) (“document 3”).
5. The Commission stated that, *“After a concrete assessment of the concerned documents, I have come to the conclusion that partial access can be granted to all documents. As regards the withheld parts, I regret to inform you that they are covered by three of the exceptions provided for in Regulation (EC) No 1049/2001. More precisely, the expunged parts are covered by the exceptions provided for in Article 4(2) second indent (“protection of legal advice”), in Article 4(3) first paragraph (“protection of the decision-making process”) and in Article 4(1)(b) (“protection of personal data”).”*²
6. Dissatisfied with the Commission’s response, I submitted a confirmatory application on 18 August 2016 challenging the application of Article 4(2), second indent, on the protection of legal advice and Article 4(3), first paragraph, on protection of the Commission’s decision-making process, and by providing overriding interests in disclosure.³ I also commented on the infringement of Articles 7(1) and 7(3).
7. On 25 August 2016, the Commission acknowledged it had received my confirmatory application of 18 August 2016, and that it was going to handle my application in 15 working days.

² The rest of the Commission’s decision can be seen here:

<https://www.asktheeu.org/en/request/2959/response/10673/attach/4/Ares%202016%203928003.pdf>

³ These arguments can be read here:

https://www.asktheeu.org/en/request/legal_advice_on_lobby_register#outgoing-6690

8. On 15 September 2016, I received a letter applying an extension to the original deadline.
9. On 5 October 2016, I finally received a response to my confirmatory application in the form of a Decision of the Secretary General (“the Decision”).⁴

II. PROCEDURAL VIOLATIONS

10. Before addressing the Commission’s substantive assessment of my request, I wish to draw the Ombudsman’s attention to the Commission’s handling of my request, which fell well below the standard set in Regulation 1049/2001, infringing Articles 7(1) and 7(3) thereof.
11. First, Articles 7(1) of Regulation 1049/2001 obliges the institution to handle applications for access to documents “promptly”. Taking from 19 May 2016, the date the Commission acknowledged receipt of the application, to 26 July 2016, the date of the reply, can in no way be regarded as ‘prompt’.
12. Second, Article 7(3) of the Regulation states that the institution may only extend the 15 working day deadline to reply in “exceptional cases”, citing as an example where there is “*an application relating to a very long document or to a very large number of documents*”. My application merely related to three documents, consisting of 2, 5 and 6 pages, rather than a ‘very long document’ or a ‘very large number of documents’ as is required by the Regulation to justify extending the deadline. It is therefore clear that there was no exceptional case justifying extending the Commission’s deadline.
13. Third, Article 7(3) of the Regulation states that this 15 working day time limit may be extended provided that “detailed reasons are given”. However, as reason for the extension, the Commission simply stated in its reply letter that: “*in view of*

⁴ The response to the confirmatory application can be found here: <https://www.asktheeu.org/en/request/2959/response/11356/attach/4/2016%202791%20C%202016%206494%20F1%20DECISION%20LETTER%20EN%20V2%20P1%20863832.pdf>

the number and nature of the applications for access to documents the Legal Service is dealing with currently, we will not be in a position to complete the processing of your request within the time limit of 15 working days, which expires today” (emphasis added). In using such general and imprecise language, it is difficult, under any possible reading of Article 7(3) to see this explanation by the Commission as satisfying the requirement that the reasons for the extension be ‘detailed’.

14. Fourth, despite already granting itself a 15 working day extension to reply—contrary to Articles 7(1) and 7(3), as explained above—the Commission extended its deadline twice more, completely outside the limits of its power under Regulation 1049/2001. The third deadline extension, which it granted itself on 30 June 2016, did not even give an indication of when it was going send the reply. Then on 18 July 2016, the Commission said it would reply “by the end of this week”, which it did not.
15. Whilst we realise that the Commission’s unnecessary delays have already occurred, and cannot in this case be remedied as such, they nevertheless clearly constitute maladministration. I request the Ombudsman to enquire as to what the Commission is doing to resolve the problem of serious delays in responding to requests and to recommend the Commission to take remedial action in future cases.

III. SUBSTANTIVE VIOLATIONS

16. The European Commission has engaged in maladministration in its handling of my request for access to documents, in that it has failed to act in accordance with the law, particularly *Regulation No 1049/2001 regarding public access to*

European Parliament, Council and Commission documents (hereinafter “Regulation 1049/2001” or “the Regulation”).⁵

17. In its Decision, the Commission set out its arguments in an unstructured format whereby its various Article 4(2) and 4(3) arguments were at times difficult to disentangle. In order to add some clarity, in contesting the Commission’s arguments I have sought to organize my arguments as follows:
18. I will first set out the main elements of the applicable legal framework.
19. It will then be argued that full access to the three documents in question does not undermine (1) the protection of legal advice or (2) the institution’s decision making process.
20. In the final section, and as an alternative argument, if it were to be regarded that disclosure *would* undermine the given interests contained in Articles 4(2) and/or 4(3) (which I argue is not the case), there would nevertheless be an overriding public interest in fully disclosing the documents.

i. Legal framework

21. Regulation 1049/2001 is designed, as is clear from recital 4 and Article 1 thereof, to give the fullest possible effect to the right of public access to documents of the institutions.⁶ Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine one of the interests protected by that provision.⁷
22. When the Commission is asked to disclose a document, it must first of all assess, in each case, whether the document falls within the Article 4 exceptions. As such

⁵ It is also difficult to ignore the irony of the Commission refusing to be transparent concerning the formulation of the Transparency Register.

⁶ *Sweden v Commission*, EU:C:2007:802, paragraph 53.

⁷ *Sweden and Others v API and Commission*, EU:C:2010:541, paragraphs 70 and 71

exceptions derogate from the principle of the widest possible public access to documents, they must be **interpreted and applied strictly**.⁸

23. In accordance with this principle that derogations are to be interpreted strictly, if the Commission decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could **specifically** and **actually** undermine the interest protected by the exception — among those laid down in Article 4 of Regulation No 1049/2001 — upon which it is relying. Moreover, the risk of that interest being undermined must be **reasonably foreseeable** and **not purely hypothetical**.⁹ The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception.¹⁰

24. Finally, in situations regarding Article 4(2) and 4(3), the Commission must explain whether or not there is an **overriding public interest** that might nevertheless justify disclosure of the document/s concerned.

ii. Article 4(2) Regulation 1049/2001, second indent – Legal Advice

25. Article 4(2), second indent, of the Regulation sets out that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice [...] unless there is an overriding public interest in disclosure.” The Court of Justice of the European Union (“CJEU”) has established that when an EU institution wishes to rely on Article 4(2), it must carry out a three step examination.¹¹

⁸ *Council v Access Info Europe*, EU:C:2013:671, paragraph 30

⁹ *Sweden v MyTravel and Commission*, EU:C:2011:496, paragraph 76

¹⁰ *Verein für Konsumenteninformation v Commission*, EU:T:2005:125, paragraph 69

¹¹ *Sweden and Turco v Council*, EU:C:2008:374, paragraphs 37-44.

26. First, the Commission must establish that the documents it is asked to disclose do in fact relate to legal advice. This is not contested.
27. Second, the Commission must examine whether disclosure would undermine the protection of the legal advice. The protection of legal advice is undermined where there is a risk that disclosure will affect the Commission’s interest “*in seeking legal advice and receiving frank, objective and comprehensive advice*” and that such a risk is “*reasonably foreseeable and not purely hypothetical.*”¹²
28. Third and last, if the Commission takes the view that disclosure would undermine the protection of legal advice, the Commission must determine whether there is nevertheless any overriding public interest justifying disclosure. This argument will be addressed in section iv, below.
29. The Commission sets out a number of arguments as to why it considers that disclosure of the parts of the documents in question would undermine the protection of the legal advice.
30. First, the Commission states that these legal opinions are particularly sensitive. It seeks to justify this by stating that documents 1 and 3 “relate to the different options as to the legal basis for a mandatory register of lobbyists” and that document 2 relates to “specific advice as to the attitude of the Commission in case of non-compliance with the Code of Conduct and to specific options for sanctions in such situations.”
31. The Commission does not explain how exactly disclosure of each of the three documents could **specifically** and **effectively** undermine the protection of the legal advice.
32. In *Sweden and Turco v Council* (“*Turco*”), the CJEU condemned the Council for relying on “*mere assertions, which were in no way substantiated by detailed*

¹² *Editions Jacob v Commission*, EU:T:2010:224, paragraph 156

arguments” and stated that “*there would appear to be no real risk that is reasonably foreseeable and not purely hypothetical of that interest being undermined.*”

33. The Commission is, like the Council in *Turco*, relying on unsubstantiated assertions, despite the burden being on the institution—rather than the person seeking access to the documents—to demonstrate why it should benefit from an exception to the general rule that all documents of the institutions should be accessible to the public.
34. Although the Court has stated that refusal to disclose a particularly sensitive legal opinion, in the context of a legislative process, may be justified, “*in such a case, it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal*” (emphasis added).¹³ In the Commission’s decision, there is no such ‘detailed’ statement of reasons, firstly, as to why the issue is ‘sensitive’ as compared to other issues that the institution deals with, or, secondly, precisely how the disclosure of the opinion would *undermine* the protection of legal advice. While a matter of high importance in terms of ensuring the integrity of and trust in European Union decision making, there is nothing about the lobby register that is particularly sensitive compared with, for example, matters of public security or the fight against terrorism.
35. Consequently, the Commission has not established that access to each of the three documents at issue could specifically and effectively undermine the protection of legal advice.
36. Second, the Commission argues that document 3 is a legal opinion of particularly wide scope ‘as it gives a detailed interpretation of Articles 298 and 352 of the TFEU [...] and is thus not only relevant in the context of the current discussions

¹³ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 69.

on the lobby register but will be relevant in the framework of future questions where the interpretation of the concerned articles may arise’.

37. The Court has accepted that in some instances there may grounds for refusing to disclose a particular legal opinion “*having a particularly wide scope that goes beyond the context of the legislative process in question*”.¹⁴ Once again, however, the burden is on the institution to give a detailed statement of reasons for the refusal, which in this case the Commission has failed to do.
38. Stating that the legal advice relates to two articles of the TFEU in no way demonstrates the ‘particularly wide scope’ of the legal opinion. To the contrary, a legal opinion providing an interpretation of a mere two Treaty articles would appear to be particularly narrow in scope.
39. Further, the Commission’s assertion that an interpretation of the meaning of the two articles could potentially be relevant where their interpretation ‘*may*’ arise similarly does not strengthen the Commission’s argument. The Commission cannot give itself *carte blanche* to refuse to disclose legal opinions concerning two articles of the Treaty which may hypothetically, at some point, be relevant to future legislation. The Commission gives no example of any other ongoing legislation where the interpretation of these articles could be important.
40. Third, the Commission argues that disclosure of the documents would lead to ‘erroneous and premature conclusions about the Commission’s rationale for opting for specific solutions in its proposal’ which would compromise its ‘interest in, and possibilities for, seeking and receiving frank, objective and comprehensive legal advice’.
41. The risk of that interest being undermined must, however, in order to be capable of being relied upon, be reasonably foreseeable and not purely hypothetical, which

¹⁴ *Sweden and Turco v Council*, EU:C:2008:374, paragraph 69.

it is certainly not in this case. The Commission again resorts to unsubstantiated generalities, which are not sufficiently precise to benefit from an Article 4(2), second indent, exemption.

42. Further, it is impossible to imagine how disclosure would lead to such ‘erroneous’ and ‘premature’ conclusions, seeing as it is clear that the opinions are purely consultative and would not prejudice any eventual Commission decision.

43. In light of the above, it is clear that the Commission has offered little more than assertions, which are not substantiated by detailed arguments. There is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of these documents might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation 1049/2001.

44. As stated above, the arguments on overriding public interest are at section iv, below.

iii. Article 4(3) Regulation 1049/2001, first paragraph – The Commission’s decision making process

45. Article 4(3), first paragraph, of the Regulation sets out that “[a]ccess to a document drawn up by an institution for internal use or received by an institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.”

46. First, in order to rely on Article 4(3), first paragraph, of the Regulation, there is a requirement that ‘the decision has not been taken by the institution’.

47. The first paragraph of Article 4(3) of the Regulation refers to documents that relate to a matter where a decision has not been taken by the institution, while the second paragraph of Article 4(3) refers to a more limited set of documents regardless of whether or not a decision has been taken by the institution. The CJEU has stated

that “it should be noted that the said Article 4(3) draws a clear distinction precisely by reference to whether a procedure has been closed or not [...]. It follows that the Union legislature took the view that, once the decision is adopted, the requirements for protecting the decision-making process are less acute, so that disclosure of any document other than those mentioned in the second subparagraph of Article 4(3) of Regulation No 1049/2001 **can never undermine that process and that refusal of access to such a document cannot be permitted**, even if its disclosure would have seriously undermined that process if it had taken place before the adoption of the decision in question” (emphasis added).¹⁵ Further, as stated above, the exceptions under Article 4(3) of the Regulation are to be interpreted strictly.¹⁶

48. The decision-making process for all these documents, which date from 2006, 2007 and 2013, has been finalized. Indeed, the Commission itself admits it, stating that “the decision-making process linked to the adoption of the follow-up (2014) Interinstitutional agreement has been finalized.” The fact that the information contained in the documents is ‘very relevant’ or that there is now a new proposal, does not mean that it can benefit from the exception. As is clear from the above-cited case law of the CJEU, once the decision is adopted, meaning the 2014 Interinstitutional agreement (“IIA”), refusal of access to the requested documents cannot be permitted under Article 4(3), first paragraph.
49. This means that the Commission cannot rely on Article 4(3), first paragraph, of the Regulation.
50. Even if a decision has not been taken by the Commission—which is not the case—in order to rely on Article 4(3), first paragraph, of the Regulation, the Commission must establish that “access to the document in question [...] [is] likely specifically and actually to undermine the protection of [its] decision-making process and

¹⁵ *Sweden v MyTravel and Commission*, EU:C:2011:496, paragraphs 77-80.

¹⁶ *Council v Access Info Europe*, EU:C:2013:671, paragraph 30

*that the risk of that interest being undermined [is] reasonably foreseeable and not purely hypothetical.”¹⁷ It has further been held that “the decision-making process has to be ‘seriously’ undermined. That is the case, in particular, where the disclosure of the documents in question has a **substantial impact** on the decision-making process. The assessment of seriousness depends on all the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question” (emphasis added).¹⁸*

51. The Commission is concerned that the documents could allow external parties to exert pressure on the decision and on the negotiation process. The Commission adds that as the revision of the IIA is attracting a lot of attention from parties representing opposing interests, the risk of external pressure is reasonably foreseeable and not purely hypothetical.
52. The Commission here merely pays lip service to the wording of the case law which requires that the interest protected by the exception is reasonably foreseeable and not purely hypothetical, but without explaining *how* access to the documents could **specifically** and **actually** undermine the interest protected by the Article 4(3) exception.
53. Furthermore, and unlike for the Article 4(2) exceptions, refusal of requested documents is only permitted if disclosure would **seriously** undermine the institutions decision-making process, in that it would have a **substantial** impact on the decision-making process, which the Commission similarly does not demonstrate in this case.
54. The fact that the requested documents could allow external parties to exert pressure on the decision and on the negotiation process cannot constitute in itself

¹⁷ *Toland v Parliament*, EU:T:2011:252, paragraph 70.

¹⁸ *MasterCard and Others v Commission*, EU:T:2014:759, paragraph 62.

an objective reason sufficient to justify the concern that the decision-making process would be seriously undermined, without calling into question the very principle of transparency intended by the Treaty.

55. In light of the above, it is clear that the Commission has again offered little more than assertions, which are not substantiated by detailed arguments. There is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of these documents might seriously undermine the Commission's decision-making process within the meaning of the first paragraph of Article 4(3) of Regulation 1049/2001.

iv. Overriding public interest in disclosure

56. Even if it were to be regarded that disclosure *would* undermine the given interest set out at Article 4(2), second indent, and Article 4(3), first paragraph, of the Regulation, there would nevertheless be an overriding public interest in fully disclosing the documents.

57. The Commission argues in its Decision that it has not been able to identify any public interests capable of overriding the interests protected by Article 4(2), second indent, and Article 4(3), first paragraph, of Regulation 1049/2001, and dismisses the arguments contained in the confirmatory application.

- Overriding public interest in a balanced and informed public debate to facilitate better decision making

58. There is overwhelming public support for a mandatory transparency register; 80% of EU citizens agree there should be mandatory regulation of lobbying.¹⁹ The European Ombudsman²⁰ as well as civil society organisations, including leading groups such as ALTER EU and Transparency International, have taken a clear

¹⁹ https://www.access-info.org/wp-content/uploads/Infographics_EU_citizens_Opinion_Poll_ENGLISH_ONLINE.pdf

²⁰ <http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/67708/html.bookmark>

position in favour of a legally-binding register. Independent legal advice commissioned by ALTER EU concluded that there is a legal basis for a mandatory register.²¹

59. The European Parliament, the only directly-elected body of the EU institutions and representative of EU citizens, has also declared since 2008 that it prefers a legally-binding transparency register "on the basis of Article 352 TFEU".²² On the other hand, the Commission in its transparency register roadmap outlined a "choice of IIA instrument" as the more appropriate option.²³ The path being taken by the Commission diverges from the view held by many stakeholders and citizens that reform of the transparency register need be based on Article 352 TFEU.

60. It should also be noted that the Court stated in *Turco* that openness “*contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*”²⁴

61. The Commission argues in its Decision that a public consultation is enough to guarantee a balanced and informed public debate to facilitate better decision making.

62. However, a public consultation only allows the public to discuss what is publicly known. By not sharing its legal assessment of an initiative of public interest, the European Commission is stymying public debate on this topic, as the public is

²¹ http://www.foeeurope.org/legal_framework_mandatory_lobby_register180613

²² [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581950/EPRS_BRI\(2016\)581950_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581950/EPRS_BRI(2016)581950_EN.pdf)

²³ http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_sg_010_transparencyr_04022015_updated_fvp_en.pdf

²⁴ According to recital 6 of Regulation 1049/2001, “*wider access should be granted to documents in cases where the institutions are acting in their legislative capacity [...] Such documents should be made directly accessible to the greatest possible extent*” (emphasis added).

prevented from discussing in a truly informed manner, and from comparing and contrasting the different legal perspectives, including in responses to the public consultation. If the Commission truly wants to “ensure full accountability, a balanced debate and citizen participation”, it should fully disclose the requested documents.

63. There exists an overriding public interest in having the documents made fully public in order to allow an informed public debate on the reform of the transparency register.

– Overriding public interest in obtaining the best possible outcome in transparency register reform

64. The current register system contains various loopholes and deficiencies in serving the purpose for which it was created: to know what interests are being represented at EU level, who represents those interests, and with what budgets.

65. In 2015, Transparency International filed 4,253 official complaints on inaccurate or implausible entries (around half of the total number of entries at the time),²⁵ and ALTER EU has also published studies on loopholes concerning, for example, a number of law firms who are not registered in spite of the fact that they also carry out lobbying activities.²⁶ There is also a need to expand the scope of the register regime to include Permanent Representations and the Council in as lobbying also is directed towards them.²⁷

66. The Commission’s recent public consultation on the register sought input on “*what can be improved and how, in order to ensure that the Register fulfils its full*

²⁵ <http://www.transparencymonitoring.eu/2015/09/press-release-more-than-half-the-entries-on-the-brussels-lobby-register-are-inaccurate-incomplete-or-meaningless-2/>

²⁶ http://alter-eu.org/sites/default/files/documents/Lawfirmsstudy31052016_0.pdf

²⁷ <http://alter-eu.org/member-state-offices-in-brussels-wide-open-to-corporate-lobbyists>

potential.”²⁸ The Commission in its Decision argues that it is not clear how releasing the requested documents would add to transparency. The answer is that it is in order to understand the Commission’s pursuit of an Inter-Institutional Agreement despite criticism that such a path will not lead to a closing of many of the loopholes and deficiencies in the current system. Such access is also in the public interest given the European Parliament’s preference for a legally-binding mechanism. There is an overriding public interest in knowing, for example, if the Commission may have suppressed one option in favour of another which would produce a weaker outcome.

67. It is essential that the public be able to access the policy options in order to ensure that the path taken by the Commission to address the reform of the transparency register is indeed, optimal.

- Overriding public interest in ensuring accountability of EU institutions and citizen participation

68. According to Article 15(1) TFEU, *“In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.”*²⁹

69. Further, according to recital 2 of Regulation 1049/2001: *“Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.”*

²⁸ http://ec.europa.eu/transparency/civil_society/public_consultation_en.htm

²⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN>

70. Indeed, the Transparency Register website states that "*The decision-making process must be transparent to allow for proper scrutiny and to ensure that the Union's institutions are accountable.*"³⁰
71. The overriding public interest in full publication of the documents requested derives from the public's right to good governance and to hold public bodies accountable, as guaranteed by the EU Treaties. Without access to the documents requested, it is impossible for the public to hold the Commission accountable for pursuing the Inter-Institutional Agreement outlined in its roadmap as opposed to a legislative proposal.³¹
72. The overriding public interest in full access to the requested documents is also supported by the public's right to participate in the decision-making process, as guaranteed by the EU treaties. Without full access to the documents, the public is unable to make an informed opinion on the path taken by the Commission to reform the transparency register and is hence prevented from exercising its fundamental right to freedom of expression.³² Hence, if the public is unable to make an informed opinion due to the lack of necessary information, it is unable to exercise its right to participate effectively in the decision making process (informally or formally such as through public consultations).

IV. CONCLUSION

³⁰ http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do;TRPUBLICID-prod=3_lasxQi3yxazrDugevCKsqMPLP8NEK3yL1xDWuVtPrm4EB8y7HB!-989180051?locale=en&reference=WHY_TRANSPARENCY_REGISTER

³¹ http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_sg_010_transparencyr_04022015_updated_fvp_en.pdf

³² The European Court of Human Rights has confirmed that the right of access to information is an inherent part of freedom of expression in a series of cases: Case of Társaság a Szabadságjogokért v. Hungary (App. No. 37374/05), ECHR, 14 April 2009; Case of the Youth Initiative for Human Rights v. Serbia; Case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria. This has also been confirmed by the UN Human Rights Committee in its General Comment No. 34.

73. In light of the above, I call on the Ombudsman to request the Commission to publish the three documents identified, in full.