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GUIDE ON **ACCESS** TO EU DOCUMENTS

Accessing
Information from
the European Union

www.access-info.org



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AUTHORS

Pamela Bartlett Quintanilla
Helen Darbshire
Andreas Pavlou

DESIGN AND LAYOUT

Raquel M^a Lozano García
raquelmlozano@gmail.com

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The Guide on Access to EU Documents was prepared by Access Info Europe.

Access Info Europe www.access-info.org is an international human rights organisation, based in Madrid, which promotes a strong and functioning right of access to information in Europe and globally.

Access Info Europe is 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. Access Info's mission is that the right of access to information be enshrined in law and work in practice.

This guide has been produced by Access Info Europe with the support of the Open Society Foundation and the European Commission. Citizens and civil society need access to accurate and timely information in order to be able to participate in the decision-making process which includes identifying who is responsible for what and when.

We hope that the guide will encourage members of the public to use their right of access to EU documents, to understand how the EU rules are applied and to monitor levels of EU transparency in practice. We also hope that it will encourage citizens to defend their right of access to EU documents before the European Ombudsman, for example.

The Guide on Access to EU Documents was written by Pamela Bartlett Quintanilla and Helen Darbishire and was edited and proofread by Andreas Pavlou.

Thanks to all our partner organisations and users of the guide for their feedback. For any comments, please email pam@access-info.org.



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OVERVIEW

This Guide on Access to EU Documents is primarily designed for **citizens** and **civil society organisations** although it is also relevant to journalists and academics who are interested in accessing documents held by the European Union.

This guide contains step-by-step information on accessing EU documents using **EU Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents**, the EU's freedom of information law (Regulation 1049/2001). The guide includes an overview of the right of access to EU documents, handy tips for the requesting process, and also information about the appeals options available to requesters if they are unhappy with a response to their access to documents requests.

The European Union has recognised that there is a fundamental human right of access to EU documents. This is enshrined in both the **EU Charter of Fundamental Rights** and in the **Treaty on the Functioning of the European Union**. Regulation 1049/2001 translates this right into an obligation which applies to all institutions, bodies, offices and agencies of the EU.

Regulation 1049/2001 contains a list of exceptions to the right of access to documents and also details the requesting process including time limits for handling citizens' requests as well as setting out the means by which citizens can appeal unfavourable decisions.

The EU is the world's first truly supranational body because it is increasingly responsible for many aspects of the everyday lives of over 500 million people in the Member States. It has been estimated that around 50% of national laws originate in Brussels, with the figure rising to 70% or 80% when it comes to economic and monetary policies. As the EU institutions, bodies, offices and agencies grow in competence, citizens must learn to use and to demand new tools for public participation and citizen-led accountability. The right of access to EU documents is one of these tools.

This Guide on Access to EU Documents is specifically about accessing documents in the possession of EU institutions. Please see the toolkits available from Access Info Europe on the websites **www.access-info.org** and **www.legalleaks.info** for details on how to request information from Member States themselves.

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1

THE EUROPEAN UNION AND THE RIGHT TO KNOW

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1 The European Union and the Right to Know

THE EU RECOGNISES A FUNDAMENTAL RIGHT OF ACCESS TO ITS DOCUMENTS

1.1 LEGAL BASIS: FOUNDING TREATIES AND EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

The European Union has recognised that citizens have a right to access documents held by all institutions, offices, bodies and agencies, and that this is necessary for the democratic functioning of the EU. In line with this, the **European Charter of Fundamental Rights** http://www.europarl.europa.eu/charter/pdf/text_en.pdf states at **Article 42** 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, bodies, offices and agencies of the Union, whatever their medium.”

Article 42

The right of access to documents “whatever their medium” is also contained in Article 15 of the **Treaty on the Functioning of the European Union (TFEU)** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF> and is accompanied by particularly strong language about the transparency of the legislative process, which underscores the public’s right to follow and participate in EU decision-making. See Box A for an extract of **Article 15**.

BOX A

Treaty on the
Functioning of the
European Union,
Extracts from
Article 15

In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents...

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures...

Finally, the **Treaty on European Union** includes a host of provisions on democratic principles; notably **Articles 10(3) and 11(2)** which respectively state that:

- “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.”
- “The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.”

Tip!

Quote the Founding Treaties and the European Charter of Fundamental Rights when you are appealing unsatisfactory responses to your access to EU documents requests. It's always a good idea to show you know your rights!

This all means that in principle, all information held in any recorded form by the EU institutions, bodies, offices and agencies should be accessible. So when an access to documents request results in a denial, the burden falls on the EU official to give a reasoned and detailed answer, based only on the exceptions found in **Regulation 1049/2001** (*For more information on exceptions please see Section 4*).

1.2 LEGAL CAVEAT: RIGHT TO “DOCUMENTS” NOT “INFORMATION”

The definition of a “document” can be found in **Article 3 of Regulation 1049/2001**:

.....
“Document” shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility”.
.....

Article 3

Regulation
1049/2001

Article 2 states that the Regulation applies to “to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.”

Given that **Regulation 1049/2001** grants public access to “documents” rather than “information”, requesters are advised specifically to mention the word “documents” when submitting requests to the EU. Otherwise, requests may be processed under the **Code of Good Administrative Procedure** <http://www.ombudsman.europa.eu/en/resources/code.faces> which refers to the “right to information” but which does not have the same timelines nor appeals possibilities.

The right of access to documents is a narrower concept than the right of access to information and can be traced back to older European laws which were drafted with the purpose of governing citizens more efficiently. More recently, access to information laws have been springing up all over the world – laws which recognise that citizens have a right to hold politicians and public officials to account by asking

Tip!

Mention the words “document” or “Regulation 1049/2001” just to be sure the correct procedure will be applied. On the other hand, don’t hesitate to request ‘information’ in a broader sense – you may well get it! It also helps to signal to the institutions the kind of information citizens are interested in knowing about.

Tip!

If for any reason the body you are interested in is not covered by the scope of Regulation 1049/2001, then it might be useful to consider if it has to report to another institution. This might be the case, for example, of documents submitted to national Parliaments for scrutiny at the Member State level.

open questions as opposed to simply obtaining access to pre-existing documents.

Access Info Europe believes that in a 21st Century democracy it is vital that citizens be guaranteed the right to know how and why decisions are being taken in their name and what policies are being promoted on their behalf. Restricting the right to know on the grounds of a legal definition of “document” is an outdated concept.

Nevertheless, this is the current situation at the EU level and it is important for requesters to be aware of this.

1.3 THE RIGHT ONLY APPLIES TO THE ADMINISTRATIVE FUNCTIONS OF SOME KEY BODIES

Although the right of access to EU documents does apply in principle to all EU institutions, bodies, and agencies, there are three institutions that are technically covered only in so far as they exercise their administrative tasks. These are the Court of Justice of the European Union, the European Central Bank and the European Investment Bank.

2

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ACCESSING EU DOCUMENTS STEP BY STEP

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2 Accessing EU Documents Step by Step

The rules for accessing EU documents are set out in **Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents** http://www.europarl.europa.eu/register/pdf/r1049_en.pdf. This Regulation applies to the EU institutions, offices, bodies and agencies but it does not affect the EU Member States as these are covered by their national access to information rules.

In the following sections we take you through the various steps that you need to follow in order to obtain access to documents from the EU institutions.

2.1 SUBMITTING A REQUEST FOR ACCESS TO EU DOCUMENTS

Requesting information from the European Union can be done in any written form, including electronic form, in one of the 23 official languages of the European Union. The EU will be obliged to answer your request in the language in which you presented it, but it is not required to translate the actual documents for you.

Requests can be submitted in writing via normal post, email, or online using **www.AsktheEU.org**, the online requesting platform launched by Access Info Europe in September 2011.

Below you will find a step-by-step guide to accessing documents held by EU institutions.



Step 1

Identify the right institution

The first step to submitting a request is to identify the appropriate body or institution. www.AsktheEU.org lists all EU institutions, offices, bodies and agencies covered by the EU access to documents Regulation and permits citizens to file requests publicly via the website, to track the responses received in real-time and to classify the outcome of their request.

Tip!

Don't hesitate to make a quick phone call to check if the body is covered by Regulation 1049/2001 and to what extent.

Tip!

There is nothing to stop you submitting the request with two, three or more bodies at the same time. In fact, this can actually be helpful in giving you a fuller picture of the information available on the subject you are researching through cross-referencing. You may also want to ask the relevant institution in each Member State for information relating to the EU, just in case they release anything that could be of interest to you.

If you are not sure whether you have identified the right institution, it's useful to bear in mind that **Regulation 1049/2001** requires that the institutions provide information and assistance to citizens on how and where applications for access to documents can be made. If the body you are targeting responds to your request stating that it does not hold the information, make sure to respond to them asking where that information should be found and who you can write to in order to have access to it.

Permanent Representations to the European Union

Each Member State of the European Union has an office in Brussels which is called the "Permanent Representation" and which serves as a contact point between the national Ministries in the Member States and the institutions of the European Union. For this reason, you might want to consider sending an access to information request to the Permanent Representations of the Member States to the European Union. Be aware, however, that these offices are actually covered by their national access

to information laws, so there will be different time frames and different exceptions to those found in **Regulation 1049/2001**.

Presidency of the Council of the European Union

You might also want to send a request to the Presidency of the Council of the European Union. The Council of the European Union is where all the Member States of the EU come together to, for example, draft amendments to proposed laws and to take decisions about the EU budget. The Member States of the EU take turns as Presidents of the Council, which is a rotating six-month post.

The Presidency of the Council plans the calendar of meetings and drafts the agendas as well as the minutes. The Presidency is also tasked with drafting a common position between the EU Member States during legislative processes and of leading the Council's negotiations with the European Parliament and the Commission. The Presidencies of the European Union are therefore likely to produce many documents of relevance to the public, but again, they will be covered by national access to information laws.

Tip!

To find out about access to information laws in the Member States of the European Union, including information on time frames and appeals processes, please visit:

www.legalleaks.info

Article 6

Regulation 1049/2001

Step 2

Know your rights

No explanations:

When submitting your request under **Regulation 1049/2001** you do not have to give reasons for why you would like access to a particular document and you don't need to explain what you are planning to do with the information.

Article 6 of Regulation 1049/2001 states that:

.....
 "Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application."

No need to give your personal details:

You are only required to give enough information about yourself in order to allow for the processing of the request, namely, your name and a contact address (either email or post) at which you can be sent the information.

In practice, some EU bodies have online web forms for submitting information which have more personal data fields that need to be filled in before the website will allow you to submit the request. In Access Info Europe's analysis this is illegitimate but it is part of current practice.

It should be borne in mind however, that the more information about yourself you provide the easier it will be for the public official to contact you in case

they need to clarify your request. It also demonstrates that you are open to dialogue and confident in the exercise of your rights.

If providing more information than your name and address bothers you, phone up the institution and ask for the relevant email address for you to send your request via email, including only what is necessary for the processing of the request, and remembering that you do not need to explain what you are planning to do with the documents received nor why you are interested in accessing them.

No fees:

Submitting your request for documents is always **free of charge**. **Regulation 1049/2001** states that the only charges that can be incurred when requesting documents are those that correspond to “the cost of producing and sending copies.” It goes on to specify that “This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.” Making appeals (“confirmatory applications”) or filing a complaint before the European Ombudsman is also always free of charge.

.....
In the EU legal system, an access to documents appeal is technically called a “confirmatory application”.
.....

Tip!

If you are requesting personal data, then you will need to show that there is a legitimate reason for requiring the EU institutions to process personal information and to provide you with it. Please see Section 3.1 for more information.

Tip!

To avoid copying costs, mention in your request that you would prefer information in electronic format. That way you will avoid paying a fee. These days it's usually possible to scan documents which are not already digitalised and then to send them as an attachment by e-mail. If you live near the centre where the documents are held, you can also request to go in and examine them on the spot.

Step 3

Decide what to say

We recommend that your request be clear and specific about the information or documents you are looking for as that will make it easier for the official to locate the document and answer you quickly.

If your request is not **sufficiently precise**, the process might be stalled as the public official may respond to you asking for clarification in order to help them identify the document you're looking for. The institution has 15 working days to provide the document, but the requesting procedure will not technically begin until they have received the clarification from you.

Try not to send requests that are **overly broad** or that cover extensive periods of time. **Regulation 1049/2001** states that "In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution." Since it is not clear what the exact deadlines are in cases of this nature, it's better to send several requests that are narrower in scope and which might reasonably be answered in fifteen working days.

You do not need to write an overly formal message when requesting EU documents but it is important to be polite and if you'd like to use any legal arguments, quote from the Treaties (*see Section 1*). Here you can find an example of a typical access to documents request:

EXAMPLE OF A TYPICAL ACCESS TO DOCUMENTS REQUEST

.....

"Dear Sir/Madam,

Under the right of access to documents in the EU Treaties, as developed in Regulation 1049/2001, I hereby request access to the following documents:

(a)

(b)

I would prefer for this information to be sent to me in machine-readable electronic format, to the email address provided below.

Thank you.

Yours sincerely,

Name Surname, name@email.com"

.....

Although **Regulation 1049/2001** does not oblige you to identify a specific document by any formal reference, several registers of documents do exist, so you might want to look through them beforehand in order to be even more precise in your request. The public official will be able to search easily using the reference number, and you may discover documents that you didn't know existed! Please see Annex II for information on the EU's documents registers and databases.

Step 4

Keep track of your request

You should keep an eye out for an acknowledgement of receipt or a reference number which will help you track your request. Also, be prepared to send a reminder email or to appeal in case the institution does not reply on time. You should also be aware that you have a **fifteen working day deadline** to reply or to appeal by sending a confirmatory application to the EU institution; otherwise your request will be considered as finalised.

Acknowledgement of receipt:

Regulation 1049/2001 states that EU institutions, bodies, offices or agencies should send an acknowledgement of receipt to confirm that they received your letter or e-mail. When sending you this acknowledgment they should also make you aware of the fifteen working day deadline they have for answering you, and give you information on your right to appeal in case they do not answer.

They should also provide a reference number for your request as this helps both parties to keep track of the process. A unique identifier also avoids any mix-ups in case that either the institution or the requestor needs to send follow-up or clarification emails about an earlier request.

Time-frames for responding to initial requests:

Regulation 1049/2001 establishes **fifteen working days** for responding to initial access to documents requests, with a possible extension of up to fifteen

additional working days in “exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents.” The requester should be notified of the delay and reasons for this delay should be provided.

If you do not receive a reply within fifteen working days you should either send a reminder email or use your right to appeal. A lack of response within the designated time limit counts as “administrative silence” and this type of mute refusal should be discouraged.

Deadline for appealing or filing a confirmatory application:

In the EU appealing an access to documents request is known as “filing a confirmatory application”. If you are not satisfied with the answer to your request, you have **fifteen working days** to respond to the EU institutions. For more information on how to file a confirmatory application, see *Sections 3 and 4*.

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A close-up photograph of a person's face, showing the nose and mouth, as they hold a large white sign with a black question mark. The person is wearing a dark grey sweater and a red beaded bracelet. The background is a light blue-grey wall.

3

**WHAT TO DO
IN CASE
OF A TOTAL
OR PARTIAL
REFUSAL**

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3 What to do in case of a total or partial refusal

There are a number of ways in which you can be disappointed with the answer to an access to documents request:

- You only get part of the information you asked for (but no formal refusal) or the documents you are given do not quite correspond to your question - this is called an “incomplete answer”;
- You are told that the information is not held by that EU institution or body;
- You are granted partial access but some information is withheld on the basis of exceptions from **Regulation 1049/2001**;
- You are refused access to all the documents you asked for;
- You don't get any reply at all (“administrative silence” or “mute refusal”).

WAYS
IN WHICH
YOU CAN BE
DISAPPOINTED
WITH THE
ANSWER
TO AN ACCESS
TO DOCUMENTS
REQUEST

In all these cases you have a right to appeal, known as filing a confirmatory application. Before appealing an **incomplete answer** check that your question was in fact clear enough or whether it was possibly open to misinterpretation. If you think that it was not clear, then you might want to follow up informally with the EU body and try to clarify.

In the case of an **information not held answer** you need to check if you think the answer is credible. If you think that the EU body does hold the information but maybe does not want to answer your request (or maybe just that the public officials were

badly informed themselves) then you could decide between an informal or formal appeal. Again, it might be worth trying an informal clarification about what you wanted before filing a confirmatory application.

In the case of **partial access, full refusal or administrative silence**, the best option is to file a confirmatory application. For more information on the appeals process, *please see Section 4*. This Section focuses on the exceptions to the right of access to EU documents and contains suggestions and arguments which may be of use when drafting a confirmatory application.

3.1 GETTING TO KNOW THE EXCEPTIONS TO THE RIGHT OF ACCESS TO DOCUMENTS

It is important to understand the exception or exceptions being applied to the document you requested in order to be able to argue back effectively when you file your confirmatory application. The first thing you should know is that EU institutions are obliged to base any refusals to provide access to documents on **one of the exceptions provided** for in **Regulation 1049/2001**.

The exceptions permitted by **Regulation 1049/2001** are covered by **Article 4** and protect interests such as EU public security, defence and international relations, decision-making, individual privacy, commercial interests and investigations, court proceedings, and relations with third parties.

Some of the exceptions found in **Regulation 1049/2001** are known as “**absolute exceptions**”, whilst others are “**relative exceptions**” that incor-

porate a **public interest test**. This means that even if the information contained in that document may harm one of the protected interests, that document would still need to be released if it was in the public interest to publish it. The balance that must be made by the EU official prior to taking a decision is whether or not the benefits to society at large would outweigh the potential harm of publication.

A) Absolute exceptions

In the case of absolute exceptions, no public interest test is applied. This means that if you request a document which is covered by an absolute exception you will be refused access to it and will not have a legal basis on which to argue for the public interest in that information during the appeals process.

European Union “public interests” and the “privacy and integrity of the individual” are absolute exceptions and therefore do not incorporate the need to carry out a public interest test. However, there is an established principle that access is the rule and secrecy is the exception. This means that any exceptions to the right of access to EU documents must be **applied strictly and interpreted narrowly**.

The EU institutions must provide reasoning for their decision and must explain how and why disclosure of that document or information might pose a **foreseeable and more than purely hypothetical harm** to one of the interests protected by the exceptions. This assessment should be done on a **case-by-case basis**.

The institution also needs to examine the possibility of **providing partial access** to the document, by blacking out only the part that can really be considered

Tip!

When filing a confirmatory application, quote the EU Charter of Fundamental Rights and the EU Treaties (*See Section 1*) and repeat the language that is highlighted in **bold**. Quoting from judgements of the European Court of Justice on access to documents is also a good idea.

For more information on ECJ jurisprudence please visit:
<http://curia.europa.eu>

Article 4.1 (a)

Exceptions to protect the EU Public Interest

"sensitive", and then providing access to the rest. When making your confirmatory application you should bear these principles in mind and always insist on getting partial access to the document you requested.

Regulation 1049/2001 protects a range of exceptions that are common in most access to information laws.

"The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State"

Article 4.1 (b)

Exception to protect individual privacy

"The institutions shall refuse access to a document where disclosure would undermine the protection of: ...privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

The European Court of Justice has ruled that when someone makes a request for personal data under Regulation 1049/2001, they must still comply with the restrictive provisions on public access that are found in Article 8 of the **EU Regulation on the Processing of Personal Data** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:NOT>

According to the EU Regulation, personal data can only be processed if it is "necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority" or "if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data

subject's legitimate interests might be prejudiced."

This means that, in contrast to **Regulation 1049/2001**, **citizens are required to give reasons for why they want access to personal data** when making a request. The burden therefore falls on the **requestor** to argue why it is necessary for the EU institutions to process someone else's personal data and to provide it to you **in response to an access to documents request**.

This exception to protect personal privacy does not apply, however, to public officials when they are acting in an official capacity. This means that documents relating to their work are not exempt from public access.

Both privacy and access to documents are fundamental human rights in the European Union since the Treaty of Lisbon came into force in 2009. In Access Info's analysis this means that the protection of personal data and the right of access to documents must be balanced on a case-by-case basis, and that neither right should automatically override the other.

Tip!

Have a look at the website of the European Ombudsman. Although the Ombudsman's decisions are not legally binding, **82% were complied with in 2011**. The Ombudsman has ruled on many matters of public interest including access to documents – you might want to quote from some of his findings when filing an appeal or confirmatory application.

Article 4.2

Exceptions to protect commercial interests, court proceedings and investigations

B) Relative Exceptions

The exceptions that incorporate a **public interest test** are found in **Articles 4.2 and 4.3 of Regulation 1049/2001** and they seek to protect commercial interests, court proceedings and other investigations as well as protecting the EU's decision-making process.

For more information please visit:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/5459/html.bookmark>

Example of the public interest test

If an individual requests documents presented to the EU by a large pharmaceutical company and if that information could harm its commercial interests, then the documents requested would be protected by the exception listed above. However, because this exception is covered by the public interest test in Regulation 1049/2001, it may still be necessary to release the commercially sensitive information if the public interest in that information outweighs the possible harm of disclosure.

If, for example, the document contains information about adverse side-effects of a particular medicine it should be made public, no matter how much harm could be caused to that company vis-à-vis its competitors or its reputation.

The European Ombudsman has ruled in favour of public access to clinical trials data in cases such as this.

“The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits, **unless there is an overriding public interest in disclosure.**”

Article 4.3

Exceptions aimed
at ensuring
effective
decision-making

“Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the 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**.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused **even after the decision has been taken** if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an **overriding public interest in disclosure**.”

The exception to protect the EU’s decision-making process can be applied both before and after a decision has been taken, but only if this would **seriously undermine** its decision-making process. The institution must establish why that particular exception applies to each document, and then it must balance the possible harm of publishing the document against the public interest in accessing it.

There is clearly a public interest in accessing information about the decisions made by the European Union, including the process by which they were taken. The EU takes decisions and makes laws that apply to over 500 million people. Furthermore, the Treaty of Lisbon highlights the importance of facilitating public access to documents related to legislative processes.

This means that information about the EU’s decision-making process should be proactively published, including the names of public representatives involved, the decision-making criteria, the range of expertise sought, and the details of impact assessments and

Article 4.4

Exceptions to protect the relations of the European Union with third parties

Tip!

If you want to have a greater impact, go public! That way it will be harder for the institution to not to release the information you requested – the more people know and talk about it, the more the public interest becomes impossible to overlook.

stakeholder consultations. This allows citizens to participate in, debate about and contribute to EU policy-making, and helps to ensure that EU decisions are taken in the general interest.

For the purposes of the Regulation, “third parties” are defined in **Article 3(b)** as “any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.”

Article 4.4 of Regulation 1049/2001 states that:

“As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.”

Despite the fact that a Member State can request the institution not to release a document, European Court of Justice jurisprudence has ruled in the **Case of Sweden v Commission (C-64/05 P)** http://ec.europa.eu/dgs/legal_service/arrets/05c064_en.pdf that Member States **do not have a right of veto** over their documents, and that it is up to the institution to have the final say on whether or not the document is released as they are the ones that are legally liable for that decision before the European Court of Justice. The Member State must explain how and why that document is covered by one of the exceptions found in **Regulation 1049/2001** and they cannot simply refer to their national law on access to information.



4

THE APPEALS PROCESS

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4 The Appeals Process

4.1 HOW TO FILE A CONFIRMATORY APPLICATION

If your request is not answered (“administrative silence”), or if the EU institution refuses to provide you with the information, or if the answer doesn’t really answer your question, you should appeal. In the EU this is called a **confirmatory application** and it is a necessary part of the appeals process, without which you are not allowed to take a case before the European Court of Justice or complain to the European Ombudsman.

To file a confirmatory application, all you have to do is write back to the body or institution which denied you the information, and outline your reasons for being dissatisfied with their answer. You should ask them to explain how and why the release of that document would specifically undermine one of the legitimate interests found in the exceptions and you should always insist that they grant you partial access – at least to the non-sensitive information.

Have a look at Section 3 for more information about the exceptions to the right of access to EU documents. Understanding the exceptions will help you to draft more convincing arguments and should give you higher chances of success.

Once you have made your confirmatory application, the institution must confirm that it has been received and is being considered. The institution has fifteen days

to reply, with the possibility of extending this another fifteen working days, but only in extreme circumstances (see Section 2, Step 4). The confirmatory application should be made in writing and it is always free of charge.

Insist on getting partial access to the information requested

Article 4.6 of Regulation 1049/2001 clearly states that “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”

This means that EU institutions are obliged to black out or otherwise remove the sensitive information and give you the rest of the document. If the information is in electronic form, then the sensitive information can be removed electronically, but in that case the public body should tell you that they have done some “editing” and mark where that editing took place. They should also justify in detail why this editing was necessary.

Partial access to documents can still be useful, for two reasons. First, you can make use of the information you do get, identify what you don't get and then start a campaign around that to push for more transparency of the particular institution or issue. Second, you can use the information you have received to make a follow-up request for the remaining information from other bodies or institutions.

Tip!

Try asking for a list of documents: If you have been denied access to the document you requested because it is covered by one of the exceptions, try asking for a list of documents that are related to your request. In this way you might identify other similar documents that are not covered by the exceptions or which actually contain more information.

Use the public interest argument

If your request for access to documents has been rejected, and if the refusal is based on an exception that includes a public interest test (See Section 4 for more details on

exceptions), you should always refer to the public interest in transparency when filing a confirmatory application.

In your confirmatory application you should ask the institution to demonstrate how and why publication of the information would harm a legitimate interest protected by one of the exceptions. You should also ask them to explain why they consider this harm to be substantial enough to override the public interest in accessing that document.

You should argue that there is a high public interest in ensuring EU transparency and accountability in general, but you should also explain specifically what the public interest is in accessing the particular document requested. If the public interest in the information is particularly high, feel free to send links of news clippings and other reports in order to bolster your arguments that the document should be released.

As far as Access Info Europe is aware, there is not yet clear jurisprudence on the application of the public interest test and the type of balancing that needs to be carried out by the institution concerned. It is hoped that over time the European Court of Justice will be asked to rule specifically on this issue.

4.2 WHAT TO DO IF YOUR CONFIRMATORY APPLICATION IS UNSUCCESSFUL

If the reply to your confirmatory application is still negative (denial confirmed), then you have the choice of taking the institution to Court, or complaining to the European Ombudsman. Each method has its pros and cons, but it is worth noting that you cannot do them both, **you must choose one or the other**.

Make a Complaint to the European Ombudsman

The first thing you should know about the Ombudsman is that his or her **decisions are not binding**. However, the Ombudsman's power to criticize the institutions in public and to attract media attention means that in many cases the EU institutions do actually comply with these recommendations. In 2011, 82% of the Ombudsman's recommendations were complied with, according to his **Annual Report** <http://www.ombudsman.europa.eu/activities/annualreports.faces>. The second thing to know is that the Ombudsman's services are also **free, fast and flexible**.

The Ombudsman investigates complaints about maladministration in the activities of the Union institutions, bodies, offices, or agencies, as set out by **Article 228 of the Treaty on the Functioning of the European Union**. One major advantage of this is that unlike the Courts, which can only investigate a breach of EU law, the Ombudsman can make recommendations related to good administration. Since good administration requires more than just acting in line with the law, you can file complaints ranging from abuse of power to lack of courtesy or excessive delays.

According to the European Ombudsman's annual report, in 2011 a quarter (23.3%) of all complaints submitted were about failures to respond to access to documents requests made under **Regulation 1049/2001**.

Take a case before the European Court of Justice

The advantage of appealing in this way is that the Court's decision is **legally binding** on an institution.

Article 24 of the Treaty on the Functioning of the European Union (TFEU)

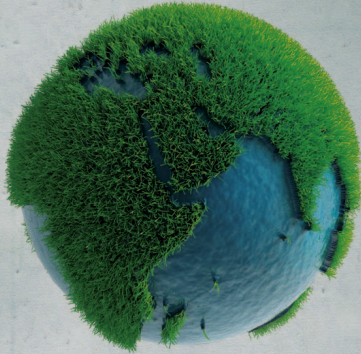
provides for the right to complain to the European Ombudsman as one of the rights of citizenship of the European Union. This right is also included in the Charter of Fundamental Rights of the EU (Article 43).

This means that the European Court of Justice can annul a decision refusing public access to documents, thereby obliging the institution holding the documents to allow public access. It also helps to develop standards on the interpretation of the various exceptions included in the Regulation by developing EU case-law on the subject.

Appeals to higher courts and to the European Court of Human Rights <http://www.ombudsman.europa.eu/en/activities/annualreports.faces> can take a long time (even years!), and since it requires the assistance of a lawyer that has passed the bar in one of the 28 Member States it can also be expensive. Still, it is worth considering because legal challenges contribute to the long term development of the right of access to information.

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annex 1



1

**REQUESTING
ENVIRONMENTAL
INFORMATION**

If you want to request environmental information, you should be aware of a few differences in the requesting process and in the way exceptions are applied. These differences are due to the application of the “Aarhus Convention” – the **United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters** <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> which applies specifically to information relating to the environment. The Aarhus Convention has been applied to EU institutions through the adoption in 2006 of the **Aarhus Regulation** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0013:EN:PDF>

Rights for all:

The Aarhus Regulation specifically mentions that all citizens have a right of access to environmental documents from the EU regardless of their nationality or place of residence, whereas **Regulation 1049/2001** and the EU Treaties technically only apply to EU citizens or residents.

Different deadlines:

The deadline for responding to initial access to documents requests in the case of environmental information is one month as opposed to fifteen working days. There is a possibility to extend this deadline by another month in the case of complex or large requests.

Narrower Exceptions:

When we request environmental information, all the exceptions in **Regulation 1049/2001** must be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether or not the information requested relates to emissions in the environment, such as radiation, waste, energy, noise etc.

The exceptions in **Regulation 1049/2001** to protect the “commercial interests of a natural or legal person, including intellectual property” or to protect “court proceedings and legal advice” are much weaker when it comes to environmental information. The Aarhus Regulation specifies that whenever these exceptions are applicable, there is always an overriding public interest in disclosure if the information relates to emissions into the environment. The only exception to this principle of greater openness is if the investigation relates to possible infringements of Community law.

Greater disclosure requirements:

The Aarhus Regulation obliges EU institutions to make environmental information “progressively available in electronic databases that are easily accessible to the public through public telecommunication networks... and equip these with search aids and other forms of software designed to assist the public in locating the information they require.”

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ANNEX 2

ACCESSING EU DOCUMENTS

[registers and databases]

1. Document Registers

The **European Parliament** has its own public register of documents, which can be found at:

<http://www.europarl.europa.eu/RegistreWeb/search/simple.htm?language=EN>

The **Council of the European Union's** document register can be found at:

<http://www.consilium.europa.eu/documents?lang=en>

The **European Commission's** document register can be found at:

<http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en>

The **European Economic and Social Committee's** register of documents can be found at:

<http://www.eesc.europa.eu/?i=portal.en.documents>

The **Committee of the Regions** (the EU's assembly of regional and local representatives) also has a register of documents:

<http://cor.europa.eu/en/documentation/Pages/index.aspx>

2. Databases

ArchisPlus: the European Commission's historical archives database.

Website:

http://ec.europa.eu/historical_archives/archisplus

EUR-Lex: the Official Journal of the European Union and legislation in force.

Website:

<http://eur-lex.europa.eu/en/index.htm>

Europa: the gateway to the European Union, with publications and documents.

Website:

http://europa.eu/documentation/index_en.htm

Legislative Observatory of the European Parliament (OEIL): provides a summary of European Union decision-making processes. It summarises all stages of procedures and the full text of all documents drawn up by Parliament.

Website:

<http://www.europarl.europa.eu/oelil>

Pre-Lex: a database of inter-institutional procedures. It enables you to follow the main stages of the decision-making process between the Commission and the other institutions and see the full text of the documents.

Website:

<http://ec.europa.eu/prelex/apcnet.cfm?CL=en>

Ted (Tenders electronic daily): Supplement to the Official Journal. You can see the calls for tender published by the institutions.

Website:

<http://ted.europa.eu/TED/main/HomePage.do>

Who is Who: The European Union Official Inter-institutional Directory. You can search by person, entity or hierarchy.

Website:

<http://europa.eu/whoiswho/public>

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Accessing Information from the European Union: Guide on Access to EU Documents was prepared by Access Info Europe as part of the ALTER Citizens Project.

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For more information please visit

www.access-info.org and www.eu-citizens.org

THE ACCESS INFO HELP DESK

The **Access Info Help Desk team** has lawyers and experts in the right of access to information ready to help you with your access to information requests.

If you have submitted a request for information and it has been ignored or denied, we'd like to hear about it. Access Info will find a way to help you, for example by giving you advice on how to appeal or by finding an expert or lawyer who might be able to assist you.

Click here to write to the Access Info Help Desk:

info@access-info.org

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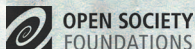


This guide is for **anyone** who needs to get access to information held by EU bodies. Whether you are an individual wanting to exercise your democratic right to know what is going on at the EU level, or you are a civil society organisation that needs EU information to advance and protect the public interest, this Guide has been designed for you.

Access Info's Guide on Access to EU Documents contains detailed information on the fundamental right of access to EU documents, and includes a step-by-step guide on how to make requests and file confirmatory applications (appeals). The guide also contains tips for arguing against non-disclosure as well as information about appealing to the European Ombudsman or the Court of Justice of the European Union.



**Europe for
Citizens
Programme**



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