PART II ACCESS TO DOCUMENTS

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Chapter 1
Public Access to Documents: Regulation (EC) No 1049/2001

1.01 Access to Documents Generally

Just as the Freedom of Information Act[1] (FOIA) provides the starting point for understanding the legal framework governing the public's right to obtain access to government information in the United States, the starting point for understanding that framework for the European Union is *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.*[2] Like the FOIA, Regulation No 1049/2001 (the Access Regulation) establishes a legally enforceable right of access to documents, spells out the procedures governing exercise of that right, delineates exemptions from required disclosure, and authorizes both judicial (and Ombudsman) review of decisions to deny access.

While the Access Regulation was preceded by a 1993 Code of Conduct granting requesters a right of access to EU documents, the legal status of that Code was somewhat ambiguous.[3] The Access Regulation, however, is grounded on Article 255 of the Treaty on European Union, as added by the Treaty of Amsterdam in 1999, which states that "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to . . . documents subject to the principles and the conditions to be defined . . ."[4] and thus "enshrines the principle of public access to European Parliament, Council and Commission documents."[5]

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[1] 5 U.S.C. § 552. For a blackletter statement of the Freedom of Information Act, *see generally* A Blackletter Statement of Federal Administrative Law, 54 Admin. L. Rev. 1, 60 (2002).

[2] Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC) (regarding public access to European Parliament, Council and Commission documents), *available at* http://www.iue.it.EC/Archives/pdf/1049EN.pdf.

[3] **See § 1.03 *infra*.**

[4] Treaty Establishing The European Community (Consolidated Version), O.J. (C 325) 33, 24.12.2002, a*vailable at* http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf. This right-of-access language is identical to Article 42 of the Charter of fundamental rights of the European Union. OJ. (C 364) 18.12.2000, p. 1. That Charter was, according to Advocate General Léger, "intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law." Quoted in Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002 at 236 n.15 (3.31.03), *available at* http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf.

[5] Report from the Commission on the implementation of the principles in Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, COM (2004) 45 final (January 2004), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0045en01.pdf. [hereinafter "2004 Implementation Report"]. One author questioned whether the decision to place the right of access in that part of the Treaty applicable to the three institutions (Council,

The Access Regulation begins with a series of "Whereas" clauses. The first of these sets out the foundation for the Regulation – Article 1 of the Treaty on European Union,[6] which "enshrines the concept of openness" – and then precedes in the next clause to provide the classic arguments for greater openness in government: It "enables citizens to participate more closely in the decision-making process," "guarantees that the administration enjoys more legitimacy and is more effective and more accountable to the citizen in a democratic system," and "contributes to strengthening the principles of democracy."[7]

Perhaps the most important language of the Whereas clauses is found in clause 11, stating "In principle, all documents of the institutions should be accessible to the public." Although this clause then goes on to qualify that statement, cautioning that "certain public and private interests should be protected by way of exceptions," the principle establishing a presumption of public access – also enshrined in the FOIA – provides a foundation for interpreting the regulations by both the institutions covered and reviewing courts.

1.02 Application to Parliament, Council, Commission, and other Entities

1.021 Parliament, Council, and Commission

By its terms, the Access Regulation is designed "to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission . . . documents . . . in such a way as to ensure the widest possible access to documents."[8] Each of these institutions has adopted implementing rules.[9]

Commission and Parliament) and not in the section dealing with reasonably general principles of the Union could be interpreted as an attempt to deny the fundamental status of the individual's 'right' to information. . . . Instead the implication "could be inferred that the right of access to documents remains as matter of the *internal* functioning of a number of the institutions themselves." This author concludes: "Such inference is not however supported by the more general and foundational provisions introduced by the Treaty of Amsterdam itself." Curtin, Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout?*, 37 Common Market L. Rev. 7 (2000) at 14.

[6] Treaty on European Union, signed 7 February 1992, *available at* http://europa.eu.int/en/record/mt/top.html

[7] See also Declaration No. 17 to the Treaty: "transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration." *Available at* http://europa.eu.int/en/record/mt/final.html.

[8] Council Regulation 1049/2001, supra note 2, at art. 1(a).

[9] Commission Decision of 5 December 2001, Detailed Rules for the Application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, 2001 OJ (L 145), *available at* http://www.statewatch.org/secret/comrules.htm [hereafter Commission Access Rules]. **The European Parliament initially adopted a Decision on public access to documents on Dec. 29, 2001, O.J. (C 374), 29.12.2001, p. 1, *available at* http://www.statewatch.org/news/2001/dec/eprules.pdf; the Parliamentary Rules of**

The Access Regulation applies not only to documents submitted to or considered by Council members at the ministerial level, but also to the Council's preparatory bodies, including COREPER and other committees, groups, working parties, and other entities listed in the Council's Rules of Procedure.[10] The Presidency is considered part of the Council.[11]

The Council initially took the position that documents that had not been considered by the Council itself or one of the specifically listed preparatory bodies (but only by officials in the General Secretariat) were *not* covered by the Access Regulation because they were not held by the Council. However, following a recommendation by the Ombudsman,[12] the Council accepted the proposition that documents in the possession of the General Secretariat are Council documents for purposes of the Access Regulation.[13]

By virtue of a decision by the Court of First Instance[14] and a Commission Decision on Comitology[15] that preceded adoption of the Access Regulation, comitology committees are considered part of the Commission for purposes of the Access Regulation.

1.022 Other EU Entities

The Parliament, Council, and Commission declared unequivocally a month after the 31 May 2001 adoption of the Access Regulation that agencies and similar bodies created by these institutions should be subject to that Regulation and that other institutions and bodies should adopt their own internal rules on public access based on the Regulation.[16] The Commission

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Procedure include a provision (as of 2004), Rule 172, on Public Access to Documents, *available at* http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+RULES-EP+20040501+RULE-172+DOC+XML+V0//EN&HNAV=Y. The Council amended its Rules of Procedure via a Decision in November 2001, Council decision of 29 November 2001, 2001/840/EC, 2001 O.J. (L 313) 40 (amending the Council's Rules of Procedure), *available at* http://ue.eu.int/uedocs/cmsUpload/L313_40_EN.pdf.

[10] Rules of Procedure, Document 6124/04 of 23.2.2004.

[11] European Ombudsman, ANNUAL REPORT 1998, OJ C 300 of 18.10.1999, p. 97, point 2.2.

[12] European Ombudsman, Annual Report 2001, 196, 199, http://www.euro-ombudsman.eu.int/report01/pdf/en/rap01_en.pdf.

[13] See Martin Bauer, "Transparency in the Council," *in* Martin Westlake & David Galloway, The Council of the European Union 375 (3d ed. 2004)

[14] Rothmans International BV v. Commission, Case 188/97, ECR II-2463 (July 19,1999).

[15] Council Decision 1999/468 of 28 June 1999, 1999 O.J. (L 184) 23 (laying down procedures for the exercise of implementing powers conferred on the Commission).

[16] Joint Declaration [etc], OJ L 173 of 27.6.2001, p.5, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_173/l_17320010627en00050005.pdf. The Ombudsman had earlier declared that other EU bodies and institutions have a legal obligation to adopt access rules and that failure to do so would constitute maladministration. European Ombudsman Decision and Recommendation in his own-initiative inquiry into public access to documents held by Community Institutions, 616/PUBAC/F/IJH 15 Dec. 1997, available at http://www.euro-ombudsman.eu.int. [MORE CITE?]

adopted its proposal for an amendment applying the regulations to Community bodies in July 2002,[17] and a year later the Council adopted 15 regulations applicable to Community agencies that applied the Access Regulation to documents held by these agencies and bodies and required them to adopt their own regulations by 1 April 2004.[18] (The Regulations also subjected to judicial and Ombudsman review decisions of those agencies and bodies refusing access to documents.)

1.023 Courts

Courts are not community institutions mentioned in Article 255(i) of the Treaty and thus are covered by the Access Regulation, although documents from the courts are subject to disclosure under the Historical Archives regulation after the passage of 30 years.[19] There is no automatic right of access for third parties to case-files in the courts, in contrast to the practice of U.S. Courts in maintaining public dockets. The Court of Justice apparently exercised its discretion to permit "its Research and Documentation Service to publish on the Court's Internet website those notes which have been prepared in respect of cases which have finally decided by the Community judicature."[20]

1.024 Member States

The Access Regulation applies to documents from third parties, including Members States, when they are in the possession of institutions subject to the Access Regulation, although they are not available for obtaining information in the possession of Member States. Access to documents prepared by Member States is discussed below.[21]

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[17] COM (2002) 406 final.

[18] Regulations (EC) No. 1641-1655/2003, OJ L 245 of 29.9.2003, pp. 1-41. *See, e.g.,* the Council Joint Actions of 20 July 2001 that established an EU Institute for Security Studies (2001/555/CFSP, OJ L 200 of 25.7.2001, p.5) and an EU Satellite Center (2001/555/CFSP, OJ L 200 of 25.7.2001, p.5) and Council Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust (OJ L 63 of 6.3.2002, p.1) – in each case these bodies are required to adopt rules on public access to documents that take into account principles and limits of the Access Regulation. The EU Institute for Security Studies Board adopted rules on 17 July 2002 (http://www.iss-eu.org/about/content/ruls.pdf) and the Satellite Centre Board adopted similar rules on 16 July 2003. See generally 2004 Implementation Report § 2.1.3.

[19] See Council Regulation (EEC, Euratom) 354/83 of 1 February 1983, 1983 O.J. (L 043) 1 (governing historic archives), and the Council Annual Report on Access to Documents 2003 (April 2004), at 9, *available at* http://ue.eu.int/uedocs/cmsUpload/EN-AR-02.pdf. Access to historic archives is discussed below at § -----. Note that the 2004 Implementation Report § 2.1.3 states that the Access Regulation will not apply to the courts "except in cases where they are not acting as judicial bodies," but this comment is not explained.

[20] Noel Travers, Access to Documents in Community Law: On the Road to a European Participatory Democracy, 35 Irish Jurist 164 (2000). For additional discussion of judicial disclosure issues, *see id.* at 219 & m.132.

[21] See infra § 2.12.

When a Member State, under Article 5, "receives a request for a document in its possession, originating from an institution," the Member State may –

(a) release or withhold the document if "it is clear that the document shall or shall not be disclosed";

(b) consult with the institution "to take a decision that does not jeopardize the attainment of the objectives" of the Access Regulation; or

(c) "refer the request to the institution."

Although the Preamble (clause 15) directs Member States "not to hamper the proper application of this Regulation and . . . [to] respect the security rules of the institutions," Member States nonetheless under Article 5 retain some ability "to decide on the release of EU documents under their own national access rules . . .." Since Article 5 leaves "little discretion to Member States to deviate from the opinion of the institution," it amounts "to a regression from the former system, which left Member States free to decide requests for access to EU documents (classified or not) under their own rules on access to documents."[22]

1.03 History of Adoption

1.031 Code of Conduct on Public Access

The European Union's first effort to effect a public right of access to documents began shortly after adoption of the Treaty on European Union (Maastricht Treaty). Specific proposals (by the Netherlands, Denmark, Sweden, and the Parliament) had been made to include access and openness provisions in the treaty, but those were not accepted by the drafters.[23] Only Declaration No. 17 – a broad statement of the principle that "transparency . . . strengthens the democratic nature of the institutions and the public confidence in the administration" – appeared in the final Treaty.

Commentators cite the difficulties of the Treaty ratification process as laying the foundation for adoption of specific rules governing citizens' access to documents.[24] As one

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[22] See Magdalena Elisabeth de Leeuw, The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?, 28 Eur. L. Rev. 324 (2003) at 340-41, citing (at note 68) the conflict between the Council and Sweden concerning the release by Sweden of Council documents. Svenska Journalisten förbundet v. Council, Case 174/95, ECR II-2289 (1998).

[23] See generally Achim Berge, Improved Rules on Public Access to Documents? Nn.37, 54-56 (Master Thesis Paper 2000), available at http://www.uni-frankfurt.de/~sobotta/thesisart255.doc.

[24] See, e.g., Laurens Jan Brinkhorst, Transparency in the European Union, 22 Fordham Int'l L.J. S128 (1998-1999); Morten P. Broberg, Access to Documents: A General Principle of Community Law, 27 Eur. Law Rev. 194 ___ (2002); Jean-Claude Piris, After Maastricht, Are the Community Institutions More Efficacious, More Democratic, and More Transparent?, 19 Eur. L. Rev. 449 (1994).

observer suggests, "The essential point was that the citizens of Europe, civil society, and non-governmental organizations had become fed-up with the secrecy of the Commission and of the Council."[25]

The Council took the first concrete steps toward openness on 6 December 1993, when it adopted a new version of its Rules of Procedure that provided for the possibility of public debates and public disclosure of the record of votes and explanations of votes[26] and a Code of Conduct concerning public access to Council and Commission documents.[27] Two weeks later the Council adopted rules implementing this Code of Conduct;[28] a few months later the Commission issued a decision implementing the Code.[29]

The Code of Conduct was criticized for a number of shortcomings.[30] Two important ones were its exclusion of documents written by third parties (the "authorship rule") and its broadly written exemptions.[31] The Code was the subject of a lawsuit brought by The Netherlands arguing that the Code was not valid because it did not confer the full citizens' rights as required by Treaty. "The Netherlands was not attacking the provision for access to documents, but was seeking court recognition that access is a fundamental right or, of that didn't happen, to convince the Court to annul the Council decision with a view to replacing it with rules providing greater access."[32] The European Court of Justice dismissed the challenge and held that the Code could in fact confer rights:

> so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.[33]

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[25] Brinkhorst, supra note 24, at S132.
[26] Council Decision 93/662 EC of 6 Dec. 1993, 1993 O.J. (L 304) 1 (adopting Council Rules of procedure).
[27] Code of Conduct 93/730/EC of 6 Dec. 1993, 1993 O.J. (L 340) 41, (concerning public access to Council and Commission documents) *available at* http://www.statewatch.org/COMCODE.html. Background on adoption of the Code of Conduct can be found, *e.g.*, in Tony Bunyan, Deirdre Curtin and Aidan White, *Essays for an Open Europe,* Statewatch (Nov. 2000), *at* http://www.statewatch.org/secret/essays2.htm at Ch. 1.
[28] Council Decision 93/731/EC/ECSC/Euratom on public access to documents, 1993 O.J. (L 340) 43, *available at* http://www.statewatch.org/COUNCODE.html.
[29] Commission Decision 94/90ECSC, EC, 1994 O.J. (L 46) 58 (Euratom on public access to Commission documents).
[30] E.g., Tony Bunyon, Secrecy and Openness in the European Union (Sept. 30, 2002), available at http://www.statewatch.org/secret/freeinfo/index.html; Curtin, supra note 5.
[31] See de Leeuw, supra note 22, at 325.
[32] Broberg, supra note 24, (at 10 in Westlaw version).
[33] Kingdom of the Netherlands v. Council of the European Union, Case C-58/94, 1996 E.C.R. I-02169 (Apr. 30, 1996), point 37.

The Court stopped short, however, of declaring access to documents to constitute a "general principle of law."[34]

1.032 Adoption of Access Regulation

The Access Regulations emerged from an intriguing and Byzantine interplay among the Commission, Council, and Parliament. Although none of the Commission's preparatory documents was officially published during the development of the Regulation, a complete legislative history of the Access Regulation with links to drafts and discussion papers has been compiled by the nongovernmental organization Statewatch.[35] The role of the various countries and institutions involved in developing the Access Regulation has been perceptively explored in the literature.[36]

The final Regulation defining the principles, conditions, and limits governing access to documents was adopted by the Council and Parliament in May 2001 and went into effect on 3 December 2001.[37] Each of the three institutions adopted their own rules to implement the Access Regulation.[38]

1.04 Overview and Basic Principles

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[34] Broberg, supra note 24, at 6. The Advocate General argued that a general principle of public access to documents, arising from the principle of democracy, existed before the Code was adopted. **Opinion of the Advocate General Tesauro in *Netherlands v. Council, supra* n.____.** Legal scholars apparently disagree on whether the Court supported the Advocate General's Opinion. See sources cited in Berge, supra note 23. Advocate General Fennelly, in a lecture delivered at Edinburgh, Feb. 4, 2000, "Transparency and Access to Documents in the European Union," observed that in the *Netherlands v. Council* case, "the Court wished to encourage the establishment of a legal principle of public access to documents, but that it was constrained by the tenuous legal basis for Community action from going further than an explicit rejection of the attack on the Council's resort to its power to adopt internal rules." Quoted in Travers, supra note 20, at 183 **n.65.** Broberg, supra note 24, at note 42.

[35] Found at http://www.statewatch.org/secret/observatory.htm, the "Observatory" has sections on current drafts on the table, current Decisions on public access to EU documents and the Commission proposals, reports from the European Parliament committees, European Parliament vote on 1st reading report, proposals by the Council, and critiques and comments by civil society, along with discussion papers. The European Ombudsman criticized the Commission's secrecy surrounding development of its Access proposal. Jacob Söderman, The EU's Transparent Bid for Opacity, Wall St. J. Europe (Feb. 24, 2000).

[36] A comprehensive analysis of the politics surrounding development of the Access Regulation is found in Bo Bjurluf & Ole Elgström, Negotiating Transparency, 42 J. Common Mkt. Studies 249 (2004)**;** *see* Tony Bunyon, Secrecy & Openness in the EU, Statewatch (Oct. 1, 2002), www.freedominfo.org/case/eustudy.htm, at Ch. 5.

[37] ***Supra* note **2.**

[38] ***Supra* note **9.**

The Access Regulation is similar in many ways to the FOIA. It establishes a general right of access to documents, granted to all persons; no showing of particular interest in a requested document is necessary. The term "document" is broadly defined. The general right of access is qualified by specifically delineated exceptions setting out the public and private interests to be protected by nondisclosure. Requirements for requesting documents are set out, and an administrative appeal is allowed. Refusal to grant access may be challenged through judicial review; in the alternative, a complaint may be made to the European Ombudsman.

While these basic principles also underlay the Code of Conduct, the Access Regulation did introduce "innovations which have considerably broadened the right of access"[39]:

- Right of access is extended to all documents – including documents from third parties – held by the institutions covered.
- Certain exceptions are subject to a public-interest counter-balance; if there is an overriding public interest in disclosure, the document will be released even if an exception applies.
- Each institution must establish a public register and make additional documents directly available over the Internet.
- The principle of partial access (applied to the Code of Conduct under case law) is incorporated in the Access Regulations.
- The one-month time limit for reply is reduced to 15 working days (with an extension if justified).

Chapters 2-4 explore the provisions of the Access Regulation in detail.[40]

Chapter 2
Administrative Provisions Governing Access

2.01 Who May Obtain Access

Consistent with Article 255 of the Treaty on European Community, the Access Regulation may be invoked by citizens of the Union and natural and legal persons residing or

[39] 2004 Implementation Report at 7-8.

[40] Though is has no legal force or effect, a "Users Guide on Access to European Parliament, Council and Commission" has been prepared to facilitate public use of the Access Regulation, *available at* http://www.europarl.eu.int/opengov/pdf/2001_1834_en.pdf. Compare Citizens Guide on Using The Freedom of Information Act and The Privacy Act of 1974 to Request Government Records, H.R. Rep.109-226 (20 Sept. 2005), *available at* http://reform.house.gov/UploadedFiles/FOIA%20Report.pdf.

having their registered office in a Member State.[41] The Commission and Council have nonetheless, in their implementing rules under Article 2(2) of the Access Regulation, granted the right of access to all other natural and legal persons.[42] The Parliament has extended this right "where possible,"[43] but it apparently in practice does not refuse to respond to requests from citizens in non-EU countries who do not reside in the EU.[44]

While the Access Regulation does not apply to requests for documents made by Member States and Community institutions and bodies,[45] individual Members of the Parliament may use the Regulation to obtain documents from the Council and Commission,[46] just as Members of Congress in their individual capacity may use the FOIA to obtain documents from federal agencies.

Under Art. 6.1, as under the FOIA (and under the Code of Conduct[47]), the Access Regulations require no statement of reasons on the part of a person requesting disclosure of documents.

2.02 Documents Covered

Article 2.3 specifies that the Access Regulation "shall apply 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

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[41] Article 255(1) of the Treaty, quoted in text accompanying note **4 *supra*; Access Regulation art. 2(1).

[42] Council Decision 2001/840, supra note 9, amending Article 1 of Annex II of Council's Rules of Procedure; **Commission Decision of 5.12.2001 (2001/937), Article 1.2 of Annex II of the Commission's Rules of Procedure. [**check cites] However, persons to whom the right is extended under these Decisions may not lay a complaint before the Ombudsman, although they may, if access is denied, bring an action in the Court of First Instance. Commission Decision of 5 December 2001 amending its rules of procedure, OJ L 345, 29.12.2001, Annex p.95, art. 1.**

[43] Rule 172.1.2 of the European Parliament Rules of Procedure.

[44] 2004 Implementation Report § 2.2.2. This report goes on to note that "since more and more applications are being lodged by e-mail, it is not always possible to check whether applicants are citizens of the Union." Id.

[45] The Regulation is "without prejudice to existing rights of access to documents for Member States," Whereas cl. 16, and "the principle of loyal cooperation" continues to govern relations between the institutions and Member States, id. cl. 15.

[46] Hautala v. Council of the European Union, Case 14/98 1999 E.C.R. II-2489 (July 19, 1999), *available at* http://www.statewatch.org/docbin/caselaw/cfit14-98.html**;** and Council of the European Union v. Hautala, Case 353/99 P, 2001 E.C.R. I-9565 (Dec. 6, 2001) (that the applicant was a member of the European Parliament not in issue in case seeking access to Council document). **See also decision (document 14692/02) that is the subject of Turco v. Council, Case T-84/03 (Pending) (Council treated applicant, a Member of Parliament, like any other applicant).**

[47] See, e.g., Interporc Im- und Export GmbH v. Commission, Case 124/96, 1998 E.C.R. II-231 (Feb. 6, 1998), point 48, applying the Code of Conduct.

of activity of the European Union." As defined in Article 3(a), "document" covers "any content, whatever its medium," thus including information on paper, in electronic form, including e-mails and sound, visual, or audiovisual recordings, so long as the documents concern "a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility."

Under the Code of Conduct, an "originator" or "authorship" rule allowed the author of a document in the possession of the institution to have absolute veto power over disclosure. The Access Regulation pointedly changed this, applying the exemptions to documents whether created by or received by the institution.[48]

Access to sound recordings and data bases has proved challenging to the institutions. As to sound recordings, the burden of reviewing, making decisions on partial release, and copying has led the Parliament to require that citizens "justify such applications, especially in the case of repetitive applications."[49] The Commission, which has received fewer applications for recordings, requests the applicant to listen to them in Commission offices.[50] In the U.S. this issue has been less troublesome because of the agencies' ability in most cases to charge for searching and copying of disclosed records. At the same time, access to data bases has proved problematic in both the EU and U.S. The Commission regards "as a document any report extracted from such [data base] systems which corresponds to normal use of them."[51] Apparently the Commission does not treat the data base itself as a document subject to disclosure. Courts in the United States have not been consistent on this subject, but the weight of decisions appears to tilt against treating data bases as records subject to disclosure under FOIA.[52]

Like FOIA, the Access Regulation imposes no obligation for an institution to create a document in response to a request for access;[53] the Regulation authorizes access only to documents already in existence when the request is made.

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[48] See the characterization of this changes as a controversial compromise in Bjurluf & Elgström, supra note 36.

[49] 2004 Implementation Report § 2.3.4.

[50] Id.

[51] 2004 Implementation Report § 2.3.5.

[52] Compare Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429 (D.C. Cir. 1992) (computer compilation of records must be disclosed) and DeLorme Publ'g Co. v. Nat'l Oceanic & Atmospheric Admin., 917 F. Supp. 867 (D. Me. 1996) (digitized data used in electronic charting system is agency record subject to disclosure), with Tax Analysts v. Dept. of Justice, 913 F. Supp. 599 (D.D.C. 1996) [**check subsequent appeal] (JURIS database is not an agency record due to contractual limitations imposed by provider) and Bazier v. U.S. Dept. of the Air Force, 887 F. Supp. 225 (N.D. Cal. 1995) (database of Supreme Court cases not an agency record).

[53] Applying the Code of Conduct, the Court of First Instance observed that the right of access to documents does not imply a right to information that does not exist in the form of a document, but applies only to documents in existence. **Order of 27 Oct. 1999, Case T-106/99, *Meyer v. Commission,* ECR II-3275, points 35-36. Likewise, responding to a complaint against the failure of the Council to establish certain lists, the Ombudsman dismissed the complaint on the basis that the Access Regulations impose no obligation on an institution to create a**

Under FOIA, the Supreme Court has established the requirements of possession and control for determining whether something constitutes an "agency record" subject to that statute.[54] The Access Regulation, for its part, applies under Art. 2.3 to "documents held by an institution." Each institution has adopted its own interpretation of the concept of "held by an institution."

> A "Parliament document," as specified in the Parliament's Rules of Procedure, covers—
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> the documents drafter or received by the members holding a mandate [the President, Vice-President, and the Quaestors], by the bodies [the Bureau, Conferences of Group Presidents, Committee Chairs, and Presidents of Delegations], committees and delegations, and by the Secretariat. The documents drafted by other members or by political groups are Parliament documents when they have been lodged in accordance with the Rules of Procedure. Parliament therefore considers that the documents drafted by members or by political groups that have not yet been lodged, and the documents by third parties held by members do not come within the scope of the Regulation.[55]

While the Council has not defined "Council document," it does distinguish Council documents – drawn up by Member State governments or delegates in the context of their work on the Council – from documents drawn up by a Member State and expressing that Member State's position as such.[56] Likewise, while the Commission has established no definition of "Commission document," it regards any document held by the President, a Vice-President, a Member of the Commission, or a member of a cabinet "in the same way as documents held by one of its departments."[57] Also, documents drafted by committees that assist the Commission in the performance of its duties are considered Commission documents.[58]

2.03 Procedures for Obtaining Access

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document. Ombudsman Complaint 1015/2002/PB of 29.5.2002. See Council's 2003 Annual Report at 32.

However, even where a document does not exist, Article 6 of the "Code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public," O.J. (C 189) 1 (5.7.2001), requires staff of the General Secretariat to provide the public with information requested, within their area of responsibility, and to ensure that the information is as clear and comprehensible as possible. Decision 2001/C 189/01 of the Secretary-General of the Council/High Representative for Common and Foreign Security Policy of 25 June 2001. The Commission has also established an e-mail portal for answering questions from the public, available at http://europedirect-cc.cec.eu.int/websubmit/?lang=en.

[54] Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989).
[55] 2004 Implementation Report § 2.3.3.
[56] Id. at 2.3.3 & 3.5.2. See discussion of access to Member State Documents infra § 2.12.
[57] 2004 Implementation Report § 2.3.3.
[58] *Rothmans*, 1999 E.C.R. II-2463, par. 62.

Requests for information, called "applications" under Art. 6 of the Access Regulation, must be made in writing and may be in any of the languages referred to in the EC Treaty. Mail, fax, or e-mail are all accepted,[59] and according to data collected, e-mail is the most widely used medium for making applications.[60]

Applications must be "sufficiently precise" to allow the institution to identify the document. (FOIA requires that the requester "reasonably describe" the record sought in accordance with applicable rules.[61]) Unlike in the U.S., where imprecision on the part of a requester will often lead to denial of the request, EU institutions are committed under Art. 6.2 of the Access Regulation to seeking clarification from the applicant and are committed to assisting the applicant in doing so.[62]

2.04 Repetitive or Burdensome Requests

Art. 6.3 addresses what has become a chronic problem under the open records regimes of many nations: requests for very long or large numbers of documents:

> 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.

This provision does not permit the institution unilaterally to limit the application to a specific time-frame, for example. And while the applicant may be asked to come in to read the documents and obviate copying, this may not be a sufficient solution.[63] The only defenses an institution has against what it considers unfair, repetitive, or unreasonable applications are to obtain a limiting of the request through consultation with the applicant, as provided in Art. 6(3), or to invoke the principle of proportionality.

The Commission has invoked the principle of proportionality and refused to process applications that would impose an administrative burden undermining the principle of good administrative practices. In one instance, the Commission denied access to an entire investigatory file without having conducted an individualized review of each document in that file. The Commission divided the documents into categories and then proffered reasons for denial of each category without carrying out an examination of each individual document. The Court of First Instance, considering a challenge to that failure, recognized that

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[59] E.g., Commission Access Rules art. 2.

[60] Council Annual Report on Access to Documents 2004 at 14 (May 2005), *available at* http://ue.eu.int/uedocs/cmsUpload/new08896.en05INT.pdf (reporting that in 2004 there were 8529 e-mail applications for documents, compared with 698 applications by letter).

[61] 5 U.S.C. § 552(a)(3)(A).

[62] E.g., Commission Access Rules art. 2 ("if an application is imprecise . . . the Commission shall invite the applicant to provide additional information making it possible to identify the documents requested").

[63] 2004 Implementation Report § 4.3.

> It is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyze the proper working of the institution.[64]

Nonetheless, even in this circumstance, the institution is not off the hook:

> where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents.[65]

Finding that the Commission failed to explore alternatives with the applicant or to explain specifically why any alternatives would represent an unreasonable amount of work, the Court overturned the institution's refusal to process the application.[66]

In an observation reminiscent of agency complaints in the U.S., the Commission's *2004 Implementation Report* charged that "Some systematic and repetitive applications can constitute unfair use of the Regulation." The Commission decried the "professional applicants, who also make use of the remedies available to them," that "are putting the institutions on the defensive by confronting them with demands which the latter cannot satisfy . . . ."[67] Presaging this concern, one author writing for the advocacy NGO Statewatch asserted that the Commission rule singling out the situation where an application for documents is "complex"[68] has no basis in the Regulation.[69] The Parliament likewise proposes to find a fair solution where there have been "repeated" or "successive" applications. This provision has been criticized as being "clearly beyond the legal scope of Article 255(3) EC, as it adds to the regulation instead of merely implementing it."[70]

2.05 Time Limits

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[64] Verein für Konsumenteninformation v. Commission, Case 2/03, 2005 WL 840133 (April 13, 2005), *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62003A0002.

[65] Id. at par. 114.

[66] See also British American Tobacco (Investments) Ltd v. Commission, T-170/03.

[67] 2004 Implementation Report § 4.3.

[68] Commission Access Rules art. 2, par. 2 (extending the time for "complex or bulky applications").

[69] Tony Bunyan, Secrecy and Openness in the European Union (posted Sept. 30, 2002), *available at* http://www.freedominfo.org/case/eustudy/.

[70] See de Leeuw, supra note 22, at 345.

Under Art. 7.1, an initial application must be answered in 15 working days. This can be extended for an additional 15 working days under Art. 7.3 in exceptional cases. (Appeals made by way of a confirmatory application are subject to the same 15/15 rule under Art. 8.1.) If an application is imprecise and the Commission invites additional clarification, "the deadline for reply shall run only from the time when the Commission has this information."[71]

The Commission has reported that in some cases the institutions, particularly the Commission, were required to extend the time limit for reply; the Commission considers the deadline of 13 working days to be "generally insufficient to process the applications" because of the need to look for and locate documents (especially old ones), to identify documents where the application is vague, to find staff with necessary expertise to assess potential damage from disclosure, to consult with third parties, or to translate the applications and replies.[72]

By contrast, the Council reported that in 2004, "the average time for processing initial applications was 9 working days."[73]

2.06 Charges or Fees

The institutions under Art. 10.1 may charge for actual cost of producing and sending copies of documents to an applicant, but not for costs of identification, search, or compilation. The Commission rules allow a charge of EUR 0,10 per page, plus carriage costs, if the volume of documents requested exceeds 20 pages.[74] "However, it appears that the option of invoicing is rarely used because of the cumbersome procedures and the fact that the cost of invoicing and collection of the sums would be higher than the amounts collected."[75]

2.07 Response to Initial Applications

Under the Access Regulation[76] and the rules of the institutions[77], an acknowledgement of receipt of an initial application should be sent to the applicant as soon as the application is logged in. (This step is customarily undertaken under FOIA, though the statute does not require it.) As is required by FOIA, the Access Regulation requires any response that refuses access in who or part to be in writing, to state the reasons for the refusal, and to inform the applicant of the

[71] Commission Access Rules art. 2 & 3.
[72] 2004 Implementation Report § 4.2.
[73] Council Annual Report on Access to Documents 2004, supra note 60, at 10.
[74] Id. art. 7, & 3.
[75] 2004 Implementation Report § 4.4. Compare the history of FOIA fees in the US, where the statute initially carried no limitation on fees and has been amended a number of times to place various limitations on fees and requirements for fee waivers. See 5 U.S.C. § 552(a)(4)(A)
[76] **Access Regulation art. 6.1.**
[77] E.g., Commission Access Rules art. 3 par. 1.

right to an administrative appeal.[78] The responding institution may offer brief reasons if more detailed disclosure could reveal the contents of the documents sought.[79]

Additionally, where the institution responds that a requested document does not exist, there is a presumption supporting the agency's conclusion that may be rebutted by "relevant and consistent evidence" presented by the applicant.[80]

2.08 Disclosure of Segregable Portions of Documents

Under Article 4.6, as under FOIA,[81] segregable portions of documents must be disclosed upon request. This language codifies the holdings in the *Hautala* cases,[82] where the Courts ruled that classification of an entire document as secret did not preclude disclosure of less sensitive parts. The decisions in that case pointed to a partial right of access allowing a balance "between the interests of the public in having partial access to the document, on the one hand, and of the burden of work that provision of such partial access represented, on the other" – a restriction not appearing in the Access Regulation.[83] These decisions were confirmed by The Court of Justice in *Mattila v. Council*,[84] which held that The Council and Commission must in every instance consider whether to make a partial release and that the courts have authority to enforce that requirement.[85]

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[78] **Access Regulation art. 7.1.**

[79] ***Sison v. Council*, T-405/03, pars. 60-63. *See* the additional discussion of Reasons for Refusal infra § 2.09.**

[80] Id.; British American Tobacco International (Investments) Ltd. v. Commission, Case 311/00, 2002 E.C.R. II-2784 (June 25, 2002), point 35; JT's Corporation Ltd. v. Commission, Case 123/99, 2000 E.C.R. II-3269 (Oct. 12, 2000), point 58**; WWF.EPO v. Council, T-264/94.**

[81] 5 U.S.C. § 552(b) (sentence immediately following exemptions) ("Any reasonably segregable portion of a record shall be provided . . . .").

[82] *Hautala*, 1999 E.C.R. II-2489, point 87; *Council v. Hautala*, 2001 E.C.R. I-9565, points 25-31. This is an example of how "the courts were arenas for judicial processes that interpreted existing transparency rules simultaneously with the Council decisionmaking process." Bjurluf & Elgström, supra note 36.

[83] E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, at 236 (Mar. 31, 2003), *available at* http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf.

[84] Olli Mattila v. Council of the European Union and Commission, Case C-353/01 P, 2004 E.C.R. I-01073 (Jan. 22, 2004), points 30-32.

[85] For historical discussions of the foundation for according access to "information" as opposed to "documents," Curtin, supra note 5, at 16-18; Bo Vesterdorf, Transparency – Not Just a Vogue Word, 22 Fordham Int'l L.J. 902 (1998-1999). Before the 1974 Amendments to the FOIA, agencies often endeavored to withhold entire documents containing only small amounts of exempt information and even withheld entire files because some material was exempt. The 1974 amendments added a sentence at the end of section 552(b) mandating "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

Recognizing the potential additional burdens placed on the institutions by the requirement for partial disclosures, one author has concluded that it is incumbent upon the institutions to take appropriate measures to allow such [partial] access and, if necessary, for the budgetary authority to vote credits allowing the allocation of the resources necessary to this end. It would appear that the principle of proportionality can now only be invoked in cases where the administrative burden would be manifestly disproportionate and would obviously conflict with sound administration.[86]

The Council has, consistent with the partial disclosure requirement, instituted a practice of deleting delegation identification in preparatory documents.[87]

2.09 Reasons for Refusal

Just as the FOIA requires agencies to give reasons for any denial of access, [88] so also must an EU institution proffer reasons for refusing access to documents under the Access Regulation.[89] The institution "must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed …."[90] The institution must

> provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.[91]

The duty to give reasons finds grounding beyond the Access Regulation and directly in Article 190 of the EC Treaty.[92] The failure of an institution to give reasons for denying access to every document withheld has led to judicial annulment of that failure.[93]

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[86] M. Schauss, "L'accès du citoyen aux documents de institutions communautaires," J.T.D.E., 2003, p. 1, here p. 3 (as cited in *id.* at 236 n.16).

[87] Council Annual Report on Access to Documents 2004, supra note 60, at 23.

[88] 5 U.S.C. § 552(a)(6)(A)(i).

[89] Art. 7.1 ("the institution shall either grant access . . . [or] state the reasons for the total or partial refusal").

[90] Jose Maria Sison v. Council of the European Union, Joined Cases 110/03, 150/03 & 405/03, 2005 WL 101335 (April 26, 2005), point 60, citing by analogy Netherlands and van der wal v. Commission, C-174/198 P and C-189/98P, 2000 E.C.R. I-1, par. 24.

[91] Id, point 61. "The fact that a statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed." Id at point 63. Despite this clear mandate in the Regulation and by the courts, a Parliament report on public access under the Access Regulation during its first year of operation found that "the Commission involved as a reason for refusal in 38% of the cases 'various exceptions and unspecified exception'." **European Parliament Report etc., A5-0298/203 final (11.9.2003) (Comm. At "Citizens' Freedoms and Rights etc.) at 11.**

[92] Vesterdorf, supra note 85.

Where documents are withheld because they originated from a Member State that objected to release, the institution's reasons are adequate if they cite the Member State's objection; the institution does not itself have to proffer further justification for nondisclosure,[94] and the Member State itself need not give reasons for its decisions.[95]

2.10 Administration of the Regulation

2.101 Council

The General Secretariat receives and processes initial applications for access made to the Council. If a confirmatory application is filed, the General Secretariat re-examines the documents and prepares a draft reply; the documents and draft are reviewed by the Council Working Party on Information. A final decision is adopted by the Council based on a simple majority.

2.102 Commission

All applications for access are to be sent to the Secretariat-General of the Commission or to the relevant Directorate-General or department.[96] The power to take decisions on confirmatory applications is delegated to the Secretary-General (except OLAF activities).[97]

2.103 Parliament

Rule 97 of the European Parliament's Rules of Procedure governs public access: "One of the Vice-Presidents shall be responsible for supervising the handling of applications for access to documents."[98]

2.11 Applicability to Third-Party Documents

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[93] WWF UK v. Commission, Case 105/95, 1997 E.C.R. II-313 (Mar. 5, 1997) (decided under The Code of Conduct).
IFAW Internationaler Tierschutz-Fonds gGmbH v. Commission, Case 168/02, 2004 WL 2709130 (Nov. 30, 2004)

[95] Isabella Scippacercola v. Commission, Case 187/03, 2005 WL 887116 (March 17, 2005), point 58.

[96] Commission Decision of 5 December 2001 amending rules of procedure, 2001/937/EC, ECSC, Euratom, OJ L 345/94 (29.12.2001), Annex containing Detailed Rules for the Application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Document, art. 2, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_345/l_34520011229en00940098.pdf.

[97] Id. at art. 4.

[98] Rules of Procedure of the European Parliament (16th ed., July 2004), Rule 97, "Public Access to Documents," par. 6, *available at* http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+RULES-EP+20040720+RULE-097+DOC+XML+V0//EN&HNAV=Y.

Under Article 2.3, the Access Regulation applies to "all documents held by an institution, that is to say documents drawn up or received by it and in its possession." Thus the Access Regulation applies to a requested document prepared by a third party, defined in Article 3(b) as meaning "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."

The debate over "originator control"(sometimes called the "authorship rule") was the subject of substantial dispute during development of the Access Regulations; third-party originators of documents had been given veto power over disclosure under the Code of Conduct.[99] The politics of the controversy have been described thusly:

> In Sweden, the sender of a document ('the originator') cannot influence whether the document will be classified as open or not. In the continental tradition, originator control was seen as natural. Differences also existed as to whether states and organizations outside the EU – for example, NATO – should be able to exert such control and on how rights of third parties, *inter alia* NGOs, would be affected.[100]

The result of this controversy was a compromise under which third-party originators of requested documents would be consulted, but their negative opinion would not be binding on the institution except where the request is for a sensitive document or where the author is a Member State (discussed in the next section). The required consultation with and notice to third-parties is comparable to the submitter-notification rules adopted by agencies in the U.S. pursuant to Executive Order 12600.[101]

Both the Council and Commission have detailed provisions in their rules for consultation with third parties. If the document is neither sensitive nor authored by a Member State, then the institution may withhold or disclose it without consultation if it appears clear or obvious that the document shall not or shall be disclosed under an exemption in the Access Regulation.[102] Where

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[99] Under the authorship rule, as adopted in the Code of Conduct, "an institution was not authorized to disclose documents originating from a wide category of third parties, including Member States, and the person requesting access was obliged, where necessary, to make his request directly to the third party in question." *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130**,** point 53. The authorship rule was upheld and applied by the Court of Justice in Interporc Im- und Export GmbH v. Commission, Case 41/00 P, 2003 E.C.R. I-02125 (Mar. 6, 2003). However, the authorship rule under the Code of Conduct "must be construed and applied strictly." Co-Frutta Soc. coop. rl. v. Commission, Case 47/01, 2003 E.C.R. II-04441 (Oct. 16, 2003), point 57, citing Rothmans International BV v. Commission, Case 188/97, 1999 E.C.R. II-2463 (July 19, 1999), at par 55, and David Petrie v. Commission, Case 191/99, 2001 E.C.R. II-3677 (Dec. 11, 2001), at par. 66. See generally Curtin, supra note 5, at 21.

[100] Bjurluf & Elgström, supra note 36.

[101] 3 C.F.R. 235, *reprinted in* 5 U.S.C.A. § 552.

[102] **Council Access Rule art. 2.2;** Commission Access Rule art. 5.2-3.

the answer is not clear or obvious, then the third party shall be consulted and given time to reply and provide its views on the matter.[103]

The third party's views are not determinative. If the General Secretariat disagrees with a third party's negative opinion, the Council is "seized of the matter." A negative opinion of the originator will be influential in the Council's assessment whether an exception applies.[104] The Commission may also give access to a document "against the explicit opinion of the author."[105] If the Council or Commission determines to release the document, its originator must be given 10 working days before disclosure to apply for an injunction before the Court of First Instance pursuant to Article 243 of the EC Treaty.[106] "In practice, reasons are generally given for refusals, and account is taken of the third party's opposition. It is very rare that the institutions would notify an originator of their intention to divulge a document against his/her will, and even in the cases that have arisen, disclosure did not give rise to litigation."[107]

Where sensitive documents are involved under Article 9 of the Access Regulation, the institutions are required to adhere to the decision of a third-party originator.

2.12 Applicability to Documents from Other Institutions or Member States

The requirement for consultation with the originator of a document applies between institutions and between institutions and Member States.[108]

As to consultation with other institutions, where an application is made for documents held by one institution but originating from another, a 9 July 2002 Memorandum of Understanding provides for sharing of information and consultation among the European Parliament, the Council, and the Commission to ensure coordination of decisions and expedited handling of applications.[109]

As to documents originating from Member States, under Art. 4.5 of the Access Regulation, "A Member State may request the institution not to disclose a document originating from that Members State without its prior agreement." While this language literally suggests

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[103] The Council provides for "a reasonable time limit" for the reply (art. 2.3); the Commission affords a deadline "no shorter than five working days" (art. 5.5).

[104] See the Council's reply to the confirmatory application made by Mr. Ulf Oberg (document 744/02), *cited in* [**chap. 15, n.44 – not in final volume, however].

[105] Commission Rules art. 5.6.

[106] Commission Rules art. 5.6; Council Rules art. 2.4.

[107] 2004 Implementation Report § 3.5.1.

[108] Compare 10 U.S.C. § 130c, which authorizes the withholding of "sensitive information" to the extent that the withholding is requested by a foreign government of international organization. 10 U.S.C. § 130c(a). The provision requires that certain criteria be satisfied (in § 130c(b)) and has been held to constitute a b(3) statute exempting such information from disclosure under FOIA. ACLU v. Dept. of Defense, 04 Civ. 4151 (AKH), S.D.N.Y. (Sept. 29, 2005).

[109] [citation needed]**

that the institutions remain free to disregard such a nondisclosure request from a Member State, in practice they have not done so: "It is not for the institutions, in fact, to take a decision contrary to a decision adopted by a Member State pursuant to its own national laws."[110] Member States have an effective veto over disclosure of documents originating from them, and the Courts have held that absent an agreement to disclose from an originating Members State, the institution may refuse access without relying on an exemption in the Access Regulation.[111] Additionally, the Member State is not bound to give reasons for its request for nondisclosure; the only reason that need be given by the institution denying access is that "the national authorities had requested that it not be disclosed," and there is no responsibility on the part of the institution to explore partial access if the Member State opposes "disclosure of the whole document."[112] Finally, there is no requirement that the document be confidential under the applicable law of the Member State.

The need to deal with requests for documents originating from a Member State principally arises at the Commission, since the Council has

> restrictively interpreted the concept . . . to take account of the fact that Member State representatives take part in its work. According to this interpretation, representatives of Member States' governments or their delegates are not, in the context of their involvement in the work of the Council and of its committees and groups, persons or entities outside the institution; rather, they form part of it.[113]

Although the courts consistently uphold Member State vetoes of disclosure of documents originating from them,[114] challenges to and complaints against withholding by the Commission of documents whose disclosure was opposed by originating Member States have been filed with the courts and the Ombudsman.[115]

2.13 Exceptions – Generally

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[110] 2004 Implementation Report § 3.5.2.

[111] Judgment, *Scippacercola*, 2005 WL 887116, points 56-57; Judgment, *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130, point 58; Judgment, Mara Messina v. Commission, Case 76/02, 2003 E.C.R. II-03203 (Sept. 17, 2003), points 40 and 55. The Court in *IFAW* pointed out that Art. 4.5 of the Access Regulation "reflects Declaration No 35, by which the Conference agreed that the principles and conditions set out in Article 255 EC would allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement," and observed that "it is neither the object nor the effect of that regulation to amend national legislation on access to documents." Point 57.

[112] *Scippacercola*, 2005 WL 887116, points 58, 68, 77.

[113] 2004 Implementation Report § 3.5.2.

[114] E.g., *Messina*, 2003 E.C.R. II-03203.

[115] *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130**; Nuova Agricast srl v. Commission, T-139/03 and T-151/03; S.I.M.S.A. srl v. Commission, T-287/03; complaint to the Ombudsman 1753/2002/GG.**

While the Access Regulation contains exceptions, like FOIA's exemptions, the general frameworks for applying them differ widely. FOIA's exemptions are permissive, not mandatory, and only where privacy is implicated is a balancing required between the public interest in disclosure and any individual interest in privacy. By contrast, the Access Regulation's exceptions are compulsory, although some must expressly be balanced against the interest of the public in disclosure; where this public interest is overriding, the documents must be disclosed.

Exception 1 requires the institution to refuse to disclose a document where disclosure would undermine protection of:

(a) the public interest as regards:

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

(b) privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

Exception 2 requires the institution to refuse to disclose a document where disclosure would undermine 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.

Finally, Exemption 3 applies various rules to access to documents drawn up by an institution for internal use, documents received by an institution in relation to a matter where the decision has not yet occurred, and documents containing opinions for internal use as part of deliberations under certain circumstances.

As is the case under FOIA,[116] all of the exceptions to disclosure contained in the Access Regulation are to be construed and applied strictly, in a manner not defeating the application of the general rule.[117] Likewise, as under FOIA,[118] the institutions have no authority or discretion to deny access for reasons not explicitly set out in the Access Regulation. "The only limitation

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[116] Dep't of Air Force v. Rose, 425 U.S. 352, 366 (1976).
[117] *WWF UK*, 1997 E.C.R. II-313, point 56.
[118] While there is language in some decisions to the contrary, the most widely accepted view has been advanced by the court in Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971), which rejected the argument that an agency has equitable discretion to refuse to disclose requested information on the ground that subsection (d) of the FOIA, providing that the act "does not authorize withholding of information . . . except as specifically stated," is to be read literally.

on this general right of access is that it must be exercised subject to the limits or exceptions as explicitly worded in the text of the legal instrument. . . ."[119]

2.14 Other Provisions

The Access Regulations contain requirements relating to dissemination of certain information without regard to an application, similar to those found in FOIA and instituted by the E-FOIA Amendments. Specifically, information should be made available in a Register on the subject matter and content of documents (Art. 11), and documents shall "as far as possible" be made available to the public in electronic form (Art. 12). Finally, under Article 13, specified documents must be published in the EU's Official Journal.

2.141 Conformity of Other Access Rules

Article 18(3) of the Access Regulation directs the Commission to examine the conformity of other provisions in Community legal acts on the same subject matter that might undermine application of the Regulation. The Commission has not identified any incompatible rules; it observed in one annual report that "the Commission examined more than 120 specific provisions contained in current Community legislation concerning the conditions under which certain documents or pieces of information can be transmitted" and concluded that "none of these rules appear to be incompatible with the principles set out in Regulation 1049/2001."[120]

In addition, Article 2.6 provides that the Access Regulation "shall be without prejudice to rights of public access to documents held by institutions which might follow from instruments of international law or acts of the institutions implementing them." This allows application of other access provisions, such as those relating to environmental information,[121] notwithstanding potential conflict with exceptions contained in the Access Regulation.

This concept of conformity carries forward the principle established under the Code of Conduct that a party can use whichever access rule is most favorable to disclosure. In *Interporc v. Commission*[122] the Court of First Instance held that an applicant for access under the Commission's Decision implementing the Code of Conduct could also seek documents under court rules when the applicant was also a party in a judicial proceeding. Likewise, in another case[123] the Court held that a confidentiality requirement applying to customs investigations could not preclude access that would be required by the Code of Conduct. In this respect, the Access

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[119] Curtin, supra note 5, at 15.

[120] 29.4.2003 Comm'n Access Report at 8

[121] E.g., UN/EC Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998, *available at* http://www.unece.org/leginstr/cvenvi.htm. See generally Jensttamer, The Arhus Convention, available at www.[need cite].

[122] Interporc Im – und Export GmbH v. Commission, ECR II-3521 (1999), 1 C.M.L.R. 181, pars. 44-45 (2000).

[123] *JT's Corporation*, 2000 E.C.R. II-3269**.**

Regulation's disclosure requirements appear to override confidentiality requirements of other statutes, in contrast to the operation of exemption 3 of the FOIA.[124]

2.142 Historical

Archives Article 18.2 requires the Commission to examine the conformity of the regulation governing historical archives[125] with the Access Regulation "in order to ensure the preservation and archiving of documents to the fullest extent possible." Archive documents "are covered by the public's right of access and their disclosure can be refused only on the basis off the exceptions set out in Article 4 and the provisions relating to sensitive documents in Article 9."[126]

2.143 Annual Reports

Article 17 of the Access Regulation requires each institution to publish an annual report providing, for the preceding year, data on the number of instances where the institution refused to grant access, the reasons for the refusals, and the number of sensitive documents not recorded in the Register. In practice, the reports have contained detailed substantive discussions regarding administration by the institution of the Access Regulation, ranging from profiles of the categories of requesters to descriptions of court cases filed challenging denial of access.[127]

2.144 Interinstitutional Committee

Article 15 requires the institutions to establish an "interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents." The early annual reports of the institutions contained descriptions of the membership and activities of this committee.[128] The Committee did not meet, however, in 2003 or 2004.[129]

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[124] Under 5 U.S.C. § 552(b)(3), a statute specifically requiring withholding or allowing withholding under specific criteria will prevail over the FOIA's disclosure mandate.

[125] Council Regulation 354/83, supra note 19 (concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community).

[126] 29.4.2003 Comm'n Report at 7. On 9 Aug. 2002, the Commission adopted a proposal to amend Council Regulation 354/83 to bring it in line with the Access Regulation COM (2002) 462 final. The Parliament concurred. PE 319.253. (both cited in 29.4.2003 Comm'n Report at 7 nn.17-18.) The Council adopted Reg. 1700/2003 in September 2003. See Council 2003 Annual Report at 9.

[127] E.g., Report from the Commission on the Application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, COM (2003) 216 final (Apr. 29, 2003), *available at* http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0216en01.pdf; Council Annual Report on Access to Documents, supra note 60.

[128] E.g., Report from the Commission on the Application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European

2.145 Training

Article 15(1), directing that the institutions should develop good administrative practices to facilitate right of access guaranteed by the Regulation, laid basis for need for training of staff, especially since processing of requests are decentralized. A network of responsible officials within various Directorates-General was created to serve "as a forum for the exchange of information, experience and good practice." Also, a practical guide has been developed for officials to assist in processing requests, and a module on public right of access has been incorporated into the training course for new officials.[130]

Chapter 3
Exceptions

3.01 Generally

Exceptions to the right of access are contained in the first three paragraphs of Article 4 of the Access Regulation. Because these are similar to the exceptions contained in the 1993 Code of Conduct, the case law interpreting the earlier language remains relevant.

The exceptions that protect important public interests and individual privacy allow no overriding public interests to trump the nondisclosure mandate, while others relating to commercial interests, court proceedings, investigations, and deliberations are subject to being trumped by an overriding public interest. The first category has been called "absolute," while the second has been called "relative."[131] Both are mandatory however; an institution has no discretion to disclose excepted documents, nor to withhold where no exception applies. This stands in marked contrast to the FOIA, under which – in the absence of an independent statutory or regulatory directive to the contrary[132] -- an agency retaining the discretion may disclose information covered by one of the statute's exemptions.[133]

The Ombudsman has observed that the burden is on the requester to demonstrate an overriding public interest, unless it is manifest.[134] A private or personal interest is not sufficient to satisfy this "overriding public interest" test, since disclosure to one means disclosure to all. Additionally, the public interest in disclosure must go beyond the general interest in

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Parliament, Council and Commission Documents, COM (2003) 216 final, § 1.2 (Apr. 29, 2003), available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0216en01.pdf**; Report from the Commission on 29.7.2005.**

[129] *E.g.*, Report from the Commission on. . . . 29.7.2005.

[130] 29.4.2003 Commission Access Report at 11.

[131] de Leeuw, supra note 22, at 332. Under the Code of Conduct, all exceptions were "absolute" except that relating to the deliberative process.

[132] Laws pertaining to protection of personal privacy and trade secrets have been held to mandate nondisclosure. [Cite Chrysler v. Brown and relevant privacy case.]

[133] See generally [cite case].

[134] Ombudsman's decision on Complaint 412/2003/GG against the Commission.

transparency, since this already underlies the Access Regulation.[135] According to the Commission's report on implementation of the Access Regulation, the institutions routinely conclude that the public interest in disclosure is not overriding.[136]

3.02 Public Interests

The first category of exceptions in Article 4(1) protects aspects of the public interest – public security, defense and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State – and the privacy and integrity of the individual. No balance or showing of harm is required.

3.021 Security

The concept of security covers both internal security of a Member State and external security, including law enforcement.[137]

3.022 International relations

The Court of First Instance has given wide discretion to the Council regarding withholding of documents falling under the international relations exception. The Court held that judicial review of Council decisions to withhold documents relating to its activities under Title V of the Treaty on European Union, which relate to political responsibilities, will be confined to reviewing whether procedural rules have been complied with, the decision properly reasoned, and the facts accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.[138] For example, a document that "contains formulations and expressions which might cause tensions with non-member countries,[139] or that "could compromise the European Union's position in current or future negotiations with third countries,"[140] can be denied on "international relations" grounds. Access may not be denied, however, if the document comprises descriptions and factual findings, particularly when already in the public domain, or where other factors remove any risk of negative repercussions on relations with the countries concerned.[141]

3.023 Defence and military matters

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[135] See point 8 of the Council's opinion on the Ombudsman's draft recommendation in complaint 1542/2000/(PB)SM, quoted in the Special Report from the European Ombudsman on this complaint.

[136] point 3.4.5 [need cite here]

[137] *Svenska Journalistforbundet*, 1998 E.C.R. II-2289, point 121-122.

[138] *Hautala*, 1999 E.C.R. II-2489, points 71-72.

[139] *Hautala* ,1999 E.C.R. II-2489, point 73.

[140] *Mattila*, 2001 E.C.R. II-02265, point 65.

[141] Judgment, Aldo Kuijer v. Council of the European Union, Case 211/00, 2002 E.C.R. II-488 (Feb. 7, 2002), points 60-68.

The "defence and military matters" exception is new in the Access Regulation, but it has seldom been invoked.

3.03 Privacy Interests

Under Article 4.1(b), the privacy and integrity of the individual is protected "in particular in accordance with Community legislation regarding the protection of personal data."[142] There is no balancing of the public interest in disclosure where personal privacy is at stake, as there is in this arena under the FOIA[143] and as there is as to other interests protected under Articles 2 and 3 of the Access Regulation.

Nonetheless, there remains a tension in the EU, as there is in the US, between access to government information and protection of personal privacy. For example, in his 2001 report on "Openness and data protection," the European Ombudsman criticized the Commission's position "which implies that any document containing the names of an individual is covered by the data protection rules. Since most documents contain somebody's name, the Commission's view means that access to documents would, in practice, be decided by applying the data protection rules, not the public access Regulation."[144] The Ombudsman urged the Parliament to clarify that "data protection rules are concerned with the protection of private and family life . . . . This would make clear that the purpose of data protection is not to restrict the information available to citizens about public activities."[145]

Some observers believe that the Ombudsman's reports unduly tilts in favor of the right of access. For example, The Network of Experts in Fundamental Rights conclude that "it is necessary . . . to balance the interests of the applicant with those of the person affected . . . while taking into account the possibility of granting only partial access to certain documents." "[I]t is essential that the Community institution does not grant right of access to documents when the interests of the applicant do not have any reasonable relationship of proportionality with the resulting violation of the right of the person concerned to protect his privacy . . . ."[146] A pending

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[142] See generally part III, Data Protection.

[143] FOIA's exemption 6 allows withholding of information where disclosure "would constitute a clearly unwarranted invasion of personal privacy," which has been held to require "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976).

[144] Comments of the European Ombudsman on Openness and Data Protection (14 Nov. 2001), at 2, http://www.euro-ombudsman.eu.int/letters/en/20011114-1.htm.

[145] Comments of the European Ombudsman on Openness and Data Protection (14 Nov. 2001), at 6, http://www.euro-ombudsman.eu.int/letters/en/20011114-1.htm.

[146] Report of the Network of Indep. Experts in Fund Rts Rept. 236-37, 31/3/03. See the discussion in footnote 24 of this Report on the methodology followed by the Court of Justice to achieve such a balance, ECJ, 14 Oct. 1999, *Adidas*, C-223/98, ERC, p. I-7081 and also on the Portuguese compromise relating to this subject.

case involves access to lists of participants at meetings of a committee consisting of Member States' experts.[147]

3.04 Court Proceedings

The court-proceedings exception applies both to Community courts and to national courts.[148] However, the exception covers only documents prepared for specific court proceedings, including not only pleadings and documents lodged, but also internal documents and correspondence concerning the case.[149]

Parties are ordinarily free to disclose their own written submissions, except in those cases where disclosure might adversely affect the proper administration of justice,[150] though not the pleadings of the other party.[151]

3.05 Legal advice

The Council has consistently taken the position that any documents or portions containing advice by the Legal Service, including opinions, fall under the legal-advice exception (subject to the overriding public interest), and asserted that even after adoption of any act to which a legal opinion refers, disclosure of the opinion would undermine the interest of the Council in receiving independent legal advice. The Ombudsman argues, to the contrary, that opinions relating to the Council's legislative activities do not fall under Article 4.2 but are covered by Article 4.3.[152] The practical effect of the Ombudsman's position would be that these opinions can only be withheld "if disclosure . . . would seriously undermine the institution's decision-making process." Case law, so far, has consistently supported the Council's position.[153] The question is the subject of a pending case before the European Court of Justice; the Court of First Instance had clearly held that the wording of Article 2 of the Access Regulation "cannot support the argument that only documents capable of undermining the protection of legal advice drawn up in the context of court proceedings are covered."[154]

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[147] Case T-170/03, British American Tobacco (Investments) Ltd. v. Commission.

[148] *Netherlands*, 2000 ECR I-1.

[149] Judgment, Interporc Im- und Export GmbH v. Commission, Case 92/98, 1999 E.C.R. II-3524 (Dec. 7, 1999), points 41-42.

[150] Order of 3 April 2000, Germany v. Parliament and Council, C-376/98, ECR-I-2247, point 10.

[151] *Svenska Journalistforbundet*, 1998 E.C.R. II-2289, points 135-139.

[152] Ombudsman's Special Report relating to complaint 1542/2000(PB0SM, draft recommendation of 27 March 2003 concerning Complaint 1015/2002(PB)IJH.

[153] Order of 3 March 1998, Carlsen a.o. v. Council, T-610/97 R, ECR II-485; Judgment of 8 Nov. 2000, Case T-44/97, Ghignone a.o. v. Council, ECR IA-223, points 47-48; Order of 23 Oct. 2002, Case C-445/00, Austria v. Council, point 12.

[154] Case T-84/03, Turco v. Council (OJC 112 of 10.5.2003, p. 38), par. 56, appeal taken, Case C-39-05 P. "Since legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings, . . . the express

3.06 Commercial interests

Article 4.2 requires the institutions to refuse access to documents where disclosure would undermine protection of "commercial interests of a natural or legal person, including intellectual property." The commercial information exemption to the FOIA has generated considerable controversy and litigation in the U.S.,[155] but has not yet seen widespread application by the institutions.

3.07 Inspections, Investigations and Audits

The "inspections, investigations and audits" exception is a successor to the exception relating to "inspections and investigations" of the 1993 Code of Conduct, which has been interpreted in case law.[156] According to one observer, this exception, although not explicitly mentioned, "mainly refers to infringement proceedings under Articles 226 to 228" of the EC Treaty[157] and has practically no importance for the Council.

3.08 Internal Use documents

While the internal-use exception replaces a discretionary "facultative" exception in the Code of Conduct protecting the confidentiality of the institution's proceedings, Article 4.3 is subject to a more stringent harm test than its predecessor.[158] Not only must an institution invoking this exception demonstrate that disclosure would "seriously undermine the institution's decision-making process," but, even where the "seriously undermine" criterion is met, the

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reference to 'legal advice' among the exceptions necessarily has a meaning distinct from that of the exception relating to court proceedings." Par. 65.

[155] E.g., Thomas M. Susman & Harry A. Hammitt, Business Uses of the Freedom of Information Act, BNA Corporate Practice Series (CPS Portfolio No. 14-3rd, 2004).

[156] *WWF UK*, 1997 E.C.R. II-313, points 62-64; Judgment, Bavarian Lager Co. v. Commission, Case 309/97, 1999 E.C.R. II-03217 (Oct. 14, 1999); Judgment, Denkavit Nederland BV v. Commission, Case 20/99, 2000 E.C.R. II-3013 (Sept. 13, 2000), points 43-49; Judgment, *Petrie* , 2001 E.C.R. II-3677, points 67-96.

[157] Bauer, supra note 13. Bauer continues:

> When the Access Regulation was adopted, the Commission included in the minutes (document 9204/01 ADD 1) that it could agree "to infringement proceedings not being expressly included in the list of exceptions in Article 4(2) of the Regulation, as it considers that the text as worded does not affect current practice with regard to the protection of confidentiality for the purposes of its duties in monitoring compliance with Community law."

[158] According to B&E at 259, the "harm's test principle" under which "the negative effects of granting access must be weighed against public interest in openness" was initially set out by the Court of First Instance in T-124/96, which influenced the Council's decision when crafting the Access Regulations. [complete cites]

document must still be released if there is an overriding public interest in disclosure. Contrary to the previous rules, the requester's intentions or personal interest are irrelevant.[159]

Where decision has not yet been taken, access must be refused if "disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure." This exception covers all documents "drawn up by an institution for internal use or received by an institution."

Where decision has been taken, disclosure may still be refused if it "would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure" only if the documents contain "opinions for internal use as part of preliminary consultations within the institution concerned." Other categories of information must be disclosed after the decision has been taken.

The different institutions appear to approach the protection of internal documents with differing attitudes. For example, even though this exception covers all documents relating to ongoing discussions on draft legislative acts, it has been applied by the Council only to those portions that allow identifying the delegation that has taken a position recorded in the requested document. According to the Council, this allows the requester access to the arguments exchanged while preserving confidentiality for delegations needed to provide flexibility for negotiations and compromise.[160] Additionally, after the interim act in the co-decision procedure or the final legislative act has been adopted, the Council's Rules of Procedure require public disclosure of preparatory documents – excepting Legal Service opinions and material covered by another exception – relating to the act and prepared before adoption.[161]

The Commission, by contrast, often relies on this exception. As one commentator puts it:

> The Commission is also by necessity a closed body. It must act as one in proposing a legislative act, taking into account the interest of the Community as a whole. . . . The Commission could not have fulfilled the role that has been assigned to it if any dissent within its ranks were publicized. The confidential nature of the Commission is of the essence, even if it is steeped in French culture.[162]

3.09 Classified or Sensitive Documents

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[159] See Judgment, British American Tobacco International (Investments) Ltd. v. Commission, Case 111/00, 2001 E.C.R. II-3000 (Oct. 10, 2001), points 42-43.

[160] See Council's reply to letter sent by the European Ombudsman following complaint (1641/2003/OV) made by Ms. Buitenweg, MEP (Document 13142/03). A pending case raises this issue. Case T-84/03, Turco v. Council, *supra.*

[161] Council Rules of Procedure, Article 11(6) of Annex II. Martin Bauer points out that this exception "is scarcely used by Council, as it would need to demonstrate that release of a document could seriously undermine the Council's decision-making process in abstract terms." Bauer, supra note 13.

[162] Brinkhorst, supra note 24, at S130.

Initially, the Code of Conduct did not explicitly exclude sensitive documents, such as documents relating to the Common Foreign and Security Policy and to Police and Judicial Co-operation in Criminal Matters. In 2000 the Council acted to exclude from access under the Code documents classified as "TRES SECRET/TOP SECRET," "SECRET," OR "CONFIDENTIEL."[163] This action, named the "Solana Decision" after the Secretary-General of the Council, excepted specifically security, defense, military, and crisis management and required that requests for sensitive documents only be considered by security-vetted personnel.[164] It also excluded sensitive documents from listing in the Council's Register.[165]

The Access Regulation overturned the Solana decision. "Sensitive documents" are defined in Article 9.1 of the Access Regulation as documents originating from a Community institution or agency, a third country, or an international organization that are classified as "TRES SECRET/TOP SECRET," "SECRET," or "CONFIDENTIEL" pursuant to the rules of the institution in the interest of public security, defence and military matters." The classification rules are set out separately in a Council Decision, Commission Decision, and Parliament Rules of Procedures.[166]

The definition does not cover documents classified "RESTREINT UE." While the Commission has opined that this divergence may constitute "a potential source of incoherence,"[167] the Council considers that this exclusion does not pose any problem in practice.[168] In fact, a "classified" document that is not "sensitive" can only be withheld if an exception applies; if no exception applies, then the document must be declassified and disclosed.[169]

Under Article 9.3, "sensitive documents shall be . . . released only with the consent of the originator," and the originator's refusal to allow access need not be based on any exception in the Access Regulation or on any provision of law of a Member State. However, an institution refusing access to a sensitive document shall nonetheless, under Article 9.4, "give the reasons for its decision in a manner which does not harm the interests protected in Article 4."

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[163] Council Decision 2000/527 of 14 August 2000, 2000 O.J. (L 212) 9 (amending Decision 93/731/EC on public access to Council documents).

[164] See generally de Leeuw, supra note 22, at 328; Bunyan, supra note 69.

[165] Council Decision 2000/23, 2000 O.J. (L 9) (on the improvement of information on the Councils' legislative activities and the public register of Council documents) overturning an earlier determination. **See General Secretariat to CORE PER, ref: 6423/1/98 REV 1, 11-3-98.**

[166] Council Decision, 2001/264/EC, 19 March 2001, 2001 O.J. (L 101) (adopting Council security regulations); Commission Decision 2001/844/EC, 29 Nov. 2001, 2001 O.J. (L 317) (amending its internal Rules of Procedure); **European Parliament Rules of Procedure, Anex VII (OJ L 91 of 5.3.2003, p.91).**

[167] Commission Report on the Implementation of the Access Regulation, point 3.3 [date needed]

[168] Council's Annual Report on the implementation of the Access Regulation for 2003, p. 23.

[169] Commission Decision 2001/973, 29 Dec. 2001, 2001 O.J. (L 345) 94, at art. 6.

Just as the President retains the authority, through Executive Order, to determine the classification rules governing disclosure under the FOIA of documents with defense, national security and foreign relations implications,[170] so also does each institution's classification rules determine application of the Access Regulation. This scheme has been criticized because **"the exceptions, as laid down in the [Access] Regulation, are disclosed more stringently then the institutions' internal security rules."**[171] **[Check quote??]**

3.10 Time limit applied to exempt documents

Under Article 4.7, the exceptions in paragraphs 1-3 apply for no more than 30 years; only documents relating to privacy or commercial interests and sensitive documents may continue to receive protection after this time. This same standard applies to disclosure of materials in the historical archives.[172]

Chapter 4
Review of Decisions to Deny Access

4.01 Administrative Review (Confirmatory Applications)

Confirmatory applications under Article 7.2 may be filed by an applicant asking the institution to reconsider a total or partial denial of access; this process is similar to an administrative appeal of a denial of access under the FOIA. Also, as under the FOIA, an applicant may file a confirmatory application when the institution fails to respond within the Regulation's time limits.[173]

The decision on the confirmatory application shall be notified to the applicant in writing, stating reasons for the refusal and informing the applicant of the right to bring an action in court or to lodge a complaint with the Ombudsman.

4.02 Judicial Review

Under, Clause (13) of the Access Regulation, "to ensure that the right of access is fully respected," there shall be "the additional possibility of court proceedings or complaints to the Ombudsman." Thus, pursuant to Article 8(1), where there is a denial of access the institution "shall inform the applicant of the remedies open to him or her, namely instituting court

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[170] 5 U.S.C. § 552(b)(1).

[171] See de Leeuw, supra note 22, at 339. For a general discussion see Curtin, supra note 5, at 25.

[172] Council Regulation 354/83, supra note 19, at art. 1.4 (opening historical archives to the public after 30 years); Art. 2 of Regulation No. 354/83 has been amended to provide that access to documents covered by the privacy/integrity exception can be refused after 30 years. Council Regulation (EC, Euratom) 1700/2003, 22 Sept. 2003, 2003 O.J. (L 243) 1 (amending Regulation 354/83).

[173] **Art. 7.4 ("failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application").**

proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC treaty, respectively." As of September 2005, the Court of First Instance had issued judgments in approximately 2 dozen cases and the European Court of Justice a half-dozen cases involving access to documents, though a number of these cases involve interpretation of the Code of Conduct, the predecessor to the Access Regulation.[174]

In most of the early cases arising under the Code of Conduct, judicial review was principally focused on procedural issues (such as the duty of the institutions to give reasons for denying access.) On *Hautala v. Council*,[175] the court questioned "whether there has been a manifest error of assessment of the facts or a misuse of power," suggesting a movement toward a more substantive assessment by the courts, of an institutions' actions.[176]

The Court, in reviewing a denial, may examine the requested document in camera, as is provided under the FOIA.[177] Following adoption by the institutions of the Access Regulation, a new article was added to the Rules of Procedure of the Court of First Instance providing that where a document to which access has been denied is produced in proceedings relating to the legality of the denial, the document must not be communicated to other parties.[178] The Court now, according one author, "frequently requests the production of the litigious documents, which enables it to verify, whether the assessment made by the institution was flawed by a manifest error."[179]

An application for judicial review must be filed within a specified time period from the date a request is denied, but an out-of-time filing may be allowed if the delay is excusable.[180] Costs of the legal proceeding and attorneys fees may be assessed against the losing party.

4.03 Petition to Ombudsman

Petition to the Ombudsman regarding denial of access to information is an alternative to judicial review (except where the applicant does not reside or have a registered office in a Member State[181]); the US has no counterpart to this institution, nor is there any other alternative

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[174] The cases are listed and summarized by Statewatch at http://www.statewatch.org/caselawobs.htm. They may be accessed under "case-law" through the judiciary's Web site, http://www.curia.eu.int/en/transitpage.htm#.

[175] *Hautala*, 1999 E.C.R. II-2489.

[176] See Curtin, supra note 5.

[177] 552 U.S.C. § (a)(4)(B).

[178] **Rules of Procedure of the Court of First Instance, art. 67(3) (effective 1 Feb. 2001).**

[179] Bauer, supra note 13, citing *Kuijer*, 2002 E.C.R. II-488, point 69.

[180] Athanasios Pitsiorlas v. Council of the European Union and Banque Centrale Europeenee, Case C-193/01 P, 2003 E.C.R. I-04837 (May 15, 2003).

[181] **Treaty of the European Community Art. 194(1).**

to judicial review of denials of access under FOIA.[182] The Ombudsman may not entertain an inquiry if there are parallel proceedings before the courts.[183]

The Ombudsman begins an investigation by providing a copy of the complaint to the institution concerned and requesting an opinion in response. If the institution does not settle the dispute and the complainant does not withdraw the complaint, the Ombudsman proceeds to investigate the matter to determine whether an instance of maladministration has occurred. If none is found, the matter is closed.

If the Ombudsman finds that there has been maladministration by the institution by virtue of its failure to disclose the requested information, he will attempt to reconcile the parties, provide a "critical remark" to the institution and close the case (where there appear no general or serious implications from the maladministration), or send a draft recommendation to the offending institution.[184] In this latter circumstance, the offending institution must provide its own opinion on the draft recommendation.

Why would a disappointed applicant for access to a document select the Ombudsman route of appeal rather than going to Court? After all, "The Ombudsman's critical remarks, recommendations, and report are non-binding. Thus, even if the Ombudsman finds 'maladministration,' he may be unable to afford the complainant any relief."[185] However, a complaint to the Ombudsman is informal, speedy, and likely to involve a far smaller investment by the applicant than a court proceeding. Another is that the Ombudsman has the power to stigmatize maladministration and to pursue a compromise solution – both may be successful tools for wresting documents out of a bureaucracy.[186]

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[182] Legislation introduced in 2005 would create an Office of Government Information to perform functions comparable to the European Ombudsman as regards access to government information. S. 394, 109th Congress, 1st Session.

[183] E.g., Decision of the European Ombudsman on Complaint 1897/2002/BB against the European Commission (Feb. 18, 2003), *available at* http://www.euro-ombudsman.eu.int/decision/en/021897.htm.

[184] The Ombudsman's "Decisions Concerning Lack or Refusal of Information" are listed chronologically at his Web site, http://www.euro-ombudsman.eu.int/decision/en/lri.htm. Unfortunately, no useful summary of his activities in this area is provided.

[185] Simone Cadeddu, The Proceedings of the European Ombudsman, 68 Law & Contemp. Probs. 161 (2004), *available at* http://www.law.duke.edu/journals/lcp/articles/lcp68dwinter2004p161.htm. Because "there is no powerful parliamentary committee behind the Ombudsman" and because there is a small chance of "press-led condemnation of non-compliance," "the freedom to reject the Ombudsman's views is therefore seemingly far greater at the Community level than at most national levels." Peter Gjerloeff Bonnor, The European Ombudsman: A Novel Source of Soft Law in the European Union, 25 Eur L. Rev. 39, 53-54 (2000).

[186] For example, in one instance, even after the Council formally accepted two draft recommendations from the Ombudsman, the Ombudsman concluded that in practice the Council had not fully complied with one and thus followed through by submitting a special report to the European Parliament. Special Report from the European Ombudsman to the European

Chapter 5
Dissemination of Information via the Register, Internet, Official Journal

5.01 Public Register of Council Documents

Under Article 11 of the Access Regulation, institutions must provide public access to a register of documents containing references to documents (date, reference number, subject matter, and, where possible, a short description of content). The Council had created a public register of its documents in 1998;[187] this was made available on the Internet after 1 Jan 1999.[188] Initially, the Register only listed documents; applicants still had to apply for them. Later, links were made available to text of documents that were accessible to the public. The Commission,[189] Council,[190] and Parliament[191] each has its own Register of documents.

Full texts of documents can be accessed directly through the Register, including a large number of legislative documents, documents made public by their authors, and documents made available to an applicant under the Access Regulation.[192] The Register was expanded to include classified documents, subject to certain restrictions, and to provide access to the public list of

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Parliament following the draft recommendation to the Council of the European Union in complaint 917/2000/GG, O.J. 2001 (L 145) 43.

[187] Register of documents of the Council: http://register.consilium.eu.int. Information on access to Council documents in the public register can be found at http://ue.eu.int/cms3_fo/showPage.asp?id=254&lang=en&mode=g. **A under a March 1998 Decision, the Register of documents would contain unclassified Council documents. Public register of documents, General Secretariat to COREPER, ref: 6423/1/98 REV 1, 11.3.98.**

[188] **Guidelines for a public register of Council documents (document 6423/1/98 REV 1 of 19 March 1998). Under Council Decision 2001/320/EC of 9 April 2001 on making certain categories of Council documents available to the public, OJ L 111 of 20.4.2001, p. 29, certain categories of documents relating to legislative activities will be published on the Internet through the public register, without any application. Effective 3 Dec. 2001, this Decision was incorporated in a new Annex III to the Council's Rules of Procedure.** Council Decision 2001/840, supra note 9, at 40.

[189] Register of documents of the European Commission: http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

[190] Register of documents of the Council: http://register.consilium.eu.int/utfregister/frames/introfsEN.htm.

[191] Register of documents of the European Parliament: http://www4.europarl.eu.int/registre/recherche/Menu.cfm?langue=EN.

[192] By contrast, the FOIA requires electronic dissemination of only records released under that statute that, "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D).

items of the provisional agendas of Council meetings and its preparatory entities relating to the Council's legislative activities.[193]

References to nonsensitive documents submitted to the Council or one of its preparatory bodies, relating to decision-making, are entered on the Register through an automatic archiving system as soon as the document is produced. Documents circulated during a meeting and other kinds of unnumbered documents that were not immediately entered into the Register must be transformed as soon as possible into an official (ST) document and recorded in the register.[194]

5.02 Internet Access

Article 12.1 requires that the institutions "as far as possible make documents directly available to the public in electronic form or through a register . . . ." The Council and Parliament provide direct access to the full text of documents through their registers.

The Commission has developed the Web site "Openness and access to documents" on the EUROPA server enabling the public to become more familiar with their rights and make use of them.[195] This site "provides access to the register of internal and preparatory documents…, to the register of the President's correspondence, and to various other sources of information on the Commission's activities."[196] Agendas and minutes of Commission meetings can be accessed directly from this site. The Directorates-General and other Commission departments disseminate a large quantity of documents via the EUROPA server and provide access to around 50 databases."[197] Commission rules list documents to be "automatically provided on request and, as far as possible, made directly accessible by electronic means."[198] The Commission has established "Europe Direct" to answer questions and direct an inquiry "around the mass of information available."[199]

5.03 Official Journal

The Official Journal (OJ) of the European Communities is available on paper or electronic form in the EU's 11 official languages. Article 13 of the Access Regulation provides minimum standards for publication of documents in the OJ: Documents listed in paragraph 1

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[193] Council Decision 200/23/EC, supra note 166, on the improvement of information on the Council's legislative activities and the register of Council documents. **Note that the 2.2004 Network of Experts in Fund. Rts. Report at 137-38 argues that "even documents to which access may be denied, in part or in totality, under any of the exceptions listed under Article 4, should be registered, and their existence therefore made known to the public. Indeed, this is required if the right to partial access to documents . . . is to be effectively exercised."**

[194] *Kuijer*, 2002 E.C.R. II-488, point 69.

[195] http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

[196] **29.4.2003 Comm. Rept. at 9 (listing, at 10, other documents available on the Web site).**

[197] **29.4.2003 Comm'n Report at 11.**

[198] **29.12.2001 Comm. Dec. art. 9. Categories of documents made directly accessible are detailed in Art. 9 of implementing rules, OJ L 345 of 29/12/2001, p. 94-98.**

[199] See the portal at http://europa.eu.int/europedirect/index_en.htm.

must be published; publication of documents listed in paragraph 2 is optional. Institutions may provide additional categories of documents to be published in the OJ.