

# Chapter 11

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

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### ABSTRACT

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

### 1. INTRODUCTION

Public access to documents is a form and expression of free access to information, which is a prerequisite for accountability (Bovens 2007: 107), allows political participation, and is the basis on which confidence in government can be built (Curtin 1998: 107 & 110). Public access to docu-

ments is thus obviously linked with democratic governance, adding legitimacy to legislative or administrative acts, and ensuring the accountability of those who adopt them (Kranenborg 2008: 1094-95; Moser 2001: 4). This is so because, in a word, openness and transparency, “lift the veil of secrecy” (Davis 1998: 121). The inextricable link between access to information, one of whose

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expressions is public access to documents, and democratic governance has clearly been stated by Advocate-General Tesouro: “the basis for the individual’s right to information should be sought in the principle of democracy”<sup>1</sup>. However, given the multiplication of entities exercising some form of power on the international, the regional, the national and local level, information concerning governance –and, as a consequence, the number of documents containing that information– have increased geometrically. This situation can only be dealt with by means of new ways to improve and facilitate access to information/documents.

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

## **2. PUBLIC ACCESS TO DOCUMENTS IN THE EU**

In the EU, access to documents has been utilized to improve openness and transparency, and counter what has often been described as “*democratic deficit*”. It has constituted a fundamental element

of good governance and administration (Söderman 2000), bolstering the legitimacy of EU decision-making processes (Frost 2003: 89) and improving the quality of their outcomes.

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

Later, the Treaty of Amsterdam provided in its art. 255 para. 1 that: “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents”. This provision of primary Community law was subsequently implemented by the adoption of Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31 May 2001, pp. 43-48, hereinafter: ‘the Regulation’).<sup>2</sup> Now, the right of access to documents is also mentioned: in the European Code of Good Administrative Behaviour, whose art. 23 applies precisely to requests for public access to documents; art. 42 of the Charter of Fundamental Rights of the EU on the right of access to European Parliament, Council and Commission documents,<sup>3</sup> and art. 15 para. 3 of the TFEU, which enlarges the scope of the right to cover all EU institutions, bodies, offices and agencies. These last two provi-

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