European Parliament
2019-2024

Committee on Civil Liberties, Justice and Home Affairs

2022/2015(INI)

12.1.2023

DRAFT REPORT

on public access to documents – annual report for the years 2019-2021
(2022/2015(INI))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Evin Incir

PR_INI

CONTENTS

Page

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....3

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on public access to documents – annual report for the years 2019-2021 (2022/2015(INI))

The European Parliament,

– having regard to the Treaty on European Union (TEU), in particular Articles 1, 9, 10, 11 and 16 thereof,

– having regard to the Treaty on the Functioning of the European Union (TFEU), in particular Article 15 thereof,

– having regard to the Charter of Fundamental Rights of the European Union, in particular Articles 41 and 42 thereof,

– having regard to 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[1],

– having regard to the Commission proposal of 30 April 2008 for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM(2008)0229),

– having regard to the Commission proposal of 21 March 2011 for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2011)0137),

– having regard to its position of 15 December 2011 on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents[2],

– having regard to its resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions[3],

– having regard to its resolution of 17 January 2019 on the Ombudsman's strategic inquiry OI/2/2017 on the transparency of legislative discussions in the preparatory bodies of the Council of the EU[4],

– having regard to Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union

[1] OJ L 145, 31.5.2001, p. 43.
[2] OJ C 168E, 14.6.2013, p. 159.
[3] OJ C 337, 20.9.2018, p. 120.
[4] OJ C 411, 27.11.2020, p. 149.

law[5] (‘the Whistleblower Directive’),

– having regard to its resolution of 10 February 2021 on public access to documents (Rule 122(7)) – annual report for the years 2016-2018)[6],

– having regard to its resolution of 16 September 2021 on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body[7],

– having regard to its resolution of 21 October 2021 on EU transparency in the development, purchase and distribution of COVID-19 vaccines[8],

– having regard to its resolution of 16 February 2022 on the annual report on the activities of the European Ombudsman in 2020[9],

– having regard to the report on the final outcome of the Conference on the Future of Europe, published in May 2022,

– having regard to its decision of 18 October 2022 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2020[10],

– having regard its resolution of 15 December 2022 on suspicions of corruption from Qatar and the broader need for transparency and accountability in the European institutions[11],

– having regard to the annual reports of the European Ombudsman,

– having regard to the case-law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR),

– having regard to the Commission, Council and Parliament reports of 2019, 2020 and 2021 on the application of Regulation (EC) No 1049/2001,

– having regard to Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies[12],

– having regard to Rules 54 and 122(7) of its Rules of Procedure,

– having regard to the opinion of the Committee on Constitutional Affairs,

– having regard to the report of the Committee on Civil Liberties, Justice and Home

[5] OJ L 305, 26.11.2019, p. 17.
[6] OJ C 465, 17.11.2021, p. 54.
[7] OJ C 117, 11.3.2022, p. 159.
[8] OJ C 184, 5.5.2022, p. 99.
[9] OJ C 342, 6.9.2022, p. 58.
[10] Texts adopted, P9_TA(2022)0362.
[11] Texts adopted, P9_TA(2022)0448.
[12] OJ L 264, 25.9.2006, p. 13.

Affairs, (A9-0000/2023),

A. whereas the TEU provides that decisions must be taken as openly and as close to citizens as possible[13]; whereas the TFEU provides that the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible and that citizens and residents must have a right of access to documents[14]; whereas this is a very important fundamental right as it enables citizens to effectively exercise their right to scrutinise the EU's work and follow the decision-making process within the EU;

B. whereas openness builds trust; whereas the EU institutions must strive for the highest possible standards of transparency, accountability and integrity; whereas openness and the participation of civil society are indispensable for promoting good governance in the EU institutions;

C. whereas in the final report of the Conference on the Future of Europe, citizens expressed their dissatisfaction with the lack of transparency in the EU's decision-making process and voiced a desire for more citizen involvement and accountability;

D. whereas citizens' expectations as regards transparency, accountability and technical solutions have evolved in recent years; whereas this may require the adoption of new technical solutions and guidelines;

E. whereas the leading concerns raised in the inquiries closed by the Ombudsman in 2021 were transparency, accountability and public access to information and documents (29 %), followed by a culture of service (26 %) and the proper use of discretion (18 %)[15];

F. whereas in case 1499/2021/SF[16], the Ombudsman found that the Council's refusal to give full public access to documents related to legislative negotiations constituted maladministration;

G. whereas the Union's response to the COVID-19 crisis showed its ability to act, but also demonstrated the need for increased transparency within the Union;

H. whereas Parliament adopted its first-reading position on the Commission proposal for reform of Regulation (EC) No 1049/2001 in December 2011; whereas negotiations on that regulation have been at a standstill since 2012; whereas the EU has taken on many new responsibilities since the regulation came into force; whereas increased responsibility requires increased transparency in order to uphold the EU's credibility and legitimacy in citizens' eyes;

Recent developments

1. Is deeply concerned that Members, former Members, and staff of the European Parliament are alleged to have engaged in corruption, laundered money and participated

[13] Article 10(3) TEU, read in the light of the thirteenth recital of the preamble thereto and Article 1(2) and Article 9 thereof.
[14] Article 15 TFEU.
[15] https://www.ombudsman.europa.eu/en/doc/annual-report/en/156017, p. 31.
[16] https://www.ombudsman.europa.eu/en/decision/en/157727.

in a criminal organisation in exchange for influence over Parliament's decisions; recalls the importance of transparency in fighting corruption and in ensuring the accountability of persons performing public duties; notes that a high level of transparency makes it easier to track activities related to the decision-making process and may help in exposing criminal activities;

2. Notes with concern that in 2021, following a request for public access to text messages between the Commission President and the CEO of a pharmaceutical company regarding the purchase of COVID-19 vaccines, the Commission refused to even search properly for such text messages, let alone grant public access to them; recalls that registering a document is a consequence of the existence of a document and not a prerequisite for its existence; supports the Ombudsman's finding of maladministration by the Commission in this case[17];

3. Notes with concern that a common problem faced in requests for access to documents is the refusal of access by institutions on the basis of insubstantial arguments; reiterates that an institution invoking one of the exceptions to access has to make an objective and individual assessment and show that the risk to the interest protected is foreseeable and not purely hypothetical, and define how access to the document would specifically and effectively undermine the interest protected[18]; highlights that it might be possible to disclose some parts of a document when other parts need to be protected; notes with interest the case lodged against the Council for its frequent recourse to the informal 'working document' predicate[19];

4. Takes note of the fact that the Commission receives the highest number of initial applications for public access to documents (8 420 in 2021), followed by the Council (2 083 in 2021) and Parliament (499 in 2021); acknowledges that the institutions' response rate is quite positive overall (in 2021, it was 75 % for the Commission, 89.5 % for the Council and 95 % for Parliament);

5. Regrets the fact that access to the advice of the institutions' respective Legal Services is too limited; notes with interest that the Court has highlighted that the question of whether a legal opinion is particularly sensitive depends on whether the content of the opinion itself is particularly sensitive, not on whether the legislative process related to the opinion is sensitive[20];

6. Welcomes Frontex's establishment of a document register on a dedicated website; notes, however, that the register contains very few documents related to the implementation of joint operations, which is the agency's core activity; stresses that this information is necessary for understanding the agency's work; endorses the Ombudsman's recommendation, following her own-initiative inquiry 4/2021/MHZ, that the agency should take a more proactive approach to transparency with a view to

[17] https://www.ombudsman.europa.eu/en/decision/en/158295.
[18] Judgment of the CJEU of 22 March 2018, *Emilio De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167; judgment of the CJEU of 1 July 2008, *Sweden and Turco* v *Council of the European Union*, Joined Cases C-39/05 P and C-52/05, EU:C:2008:374.
[19] Case lodged on 7 May 2021, *De Capitani* v *Council of the European Union*, T-163/21.
[20] Judgment of 21 April 2021, *Laurent Pech* v *Council of the European Union*, T-252/19, EU:T:2021:203.

ensuring greater accountability for its operations;

Legislative state of play

7. Points out that, as a result of the entry into force of the TEU and the TFEU, the right of access to documents pertains to all EU institutions, bodies, and agencies[21]; notes that given the enhanced transparency obligations laid down in the Treaties, any revision of Regulation (EC) No 1049/2001 should not lower the current level of transparency; highlights the crucial role of the relevant case-law in keeping the regulation up-to-date with current developments[22]; highlights the need to codify the relevant case-law, further strengthen transparency and ensure accountability within the EU;

8. Recalls that it is not a document's medium or the fact that it has been registered that make it a document of a particular institution, but rather whether its content concerns a matter relating to policies, activities and decisions falling within that institution's sphere of responsibility;

Recommendations

9. Welcomes the Commission's intention to increase transparency within the EU based on 'transparency by default'; implores the Commission not to consider any proposal to revise Regulation (EC) No 1049/2001 that would lower the standards of transparency and access to documents; deplores the fact that negotiations have long been at a standstill and strongly urges the Council and the Commission to resume negotiations with the other institutions on the basis of Commission's proposals from 2008 and 2011; notes that any reform will need to address key issues such as the scope of the grounds for refusal, the public-interest test, transparency in the legislative process, and opposition to block exemptions; calls for the Council, the Commission and Parliament to work constructively with the ultimate aim of giving EU citizens wider and improved access to documents;

10. Stresses the importance of Parliament's Transparency Register and calls for the introduction of a mandatory requirement for all Members to make public all scheduled meetings with people external to Parliament where these meetings relate to a report or resolution of the European Parliament;

11. Calls for a revision of the Staff Regulations, especially Article 22(c) thereof, in order to align them with the standards of the Whistleblower Directive; reiterates its call for a special committee tasked with identifying potential flaws in the European Parliament's rules on transparency, integrity and corruption and with making proposals for reforms; recalls its commitment to setting up a committee of inquiry to investigate cases of corruption and improper actions by non-EU countries seeking to buy influence in the European Parliament; recalls its position that the Commission should put forward a

[21] Article 15(3) TFEU.
[22] See, for example, the judgment of the CJEU of18 July 2017, *European Commission* v *Patrick Breyer*, T-213/15, EU:C:2017:563; the judgment of the CJEU of 1 September 2021, *Andrea Homoki* v *European Commission*, T-517/19, EU:T:2021:529; and the judgment of the CJEU of 21 April 2021, *Laurent Pech* v *Council of the European Union*, T-252/19, EU:T:2021:203.

proposal to set up a new ethics body for the EU institutions as soon as possible;

12. Welcomes the Ombudsman's practical recommendations on how to record text and instant messages sent or received by staff members in their professional capacity[23]; recognises that work-related text and instant messages are 'documents' within the meaning of Regulation (EC) No 1049/2001 on public access to documents and invites the other EU institutions, bodies, offices and agencies to also recognise this; calls on the other EU institutions, bodies, offices and agencies to use a broad interpretation of the concept of 'document', which is particularly important in an information society and in the context of new forms of communication;

13. Calls for the EU institutions to have a policy of 'transparency by design' and publish documents linked to legislative files proactively, within a reasonable time frame and in a user-friendly way; calls for the EU institutions to comply fully with the judgment of the CJEU in Case T-540/15[24] on access to trilogue documents; insists that the Council should improve its rules and procedures on legislative transparency, including the accessibility and classification of legislative documents;

14. Welcomes the Commission's intention to draft new internal guidelines on transparency and access to documents and invites other institutions to follow this initiative; encourages the Commission to make sure that the guidelines entail a policy of 'transparency by design' and reflect the relevant case-law and the Ombudsman's recommendations from recent years[25];

15. Calls for the Commission and the other EU institutions, agencies and bodies to be more proactive in publishing statistics regarding how they handle document access requests, as such information would help with assessing the institutions' approach to document access;

16. Recalls that an application for access to a document must be handled promptly[26]; notes with concern that the Ombudsman receives many citizen complaints about extreme delays in gaining access to requested documents; supports the Ombudsman's views that access delayed is effectively access denied and that administrative processes should be streamlined to ensure that citizens receive access to documents in a timely manner; calls for more data on the institutions' compliance with the deadlines;

17. Notes with concern that at present, citizens can only challenge the refusal of an access-to-document request by bringing court proceedings against the institution and/or by making a complaint to the Ombudsman; calls for the EU institutions, bodies and agencies to adopt more accessible procedures for handling complaints about refusals to grant access; recommends, in this context, appointing independent, senior officials with the capacity to review, without undue delay, appeals concerning access-to-documents

[23] https://www.ombudsman.europa.eu/en/doc/correspondence/en/158383.
[24] Judgment of 22 March 2018, *Emilio De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167.
[25] See, for example, the European Ombudsman's decision in case 2142/2018/EWM (https://www.ombudsman.europa.eu/en/decision/en/122313); the judgment of the CJEU of 14 September 2022, *Pollinis France* v *European Commission*, Joined Cases T-371/20 and T-554/20, EU:T:2022:556; and the judgment of the CJEU of 22 March 2018, *Emilio De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167.
[26] Regulation (EC) No 1049/2001, Article 7.

requests;

°

° °

18. Instructs its President to forward this resolution to the Council and the Commission.