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**THE RIGHT TO OPEN PUBLIC ADMINISTRATIONS IN EUROPE:  
EMERGING LEGAL STANDARDS**

**SIGMA PAPER NO. 46**

*The aim of this paper is to explore the most problematic aspects of information access legal regimes and to provide some guidelines to policy makers, including legislators, governments and public administrators. The analysis is based on the comparison of Freedom of Information Acts (FOIAs) and their administrative/judicial enforcement in 14 EU member states and the EU institutions.*

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English - Or. English



Support for Improvement in Governance and Management  
A joint initiative of the OECD and the EU, principally financed by the EU

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**Paper prepared for Sigma by  
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## THE SIGMA PROGRAMME

The Sigma Programme — Support for Improvement in Governance and Management — is a joint initiative of the OECD and the EU, principally financed by the EU.

In 2010, Sigma supports the public governance reform efforts of the following partners:

- **EU candidates and potential candidates** – Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey and Kosovo (under UNSCR 1244/99)<sup>1</sup>.
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- Drafting of studies, handbooks and other reference material;
- Methodological, technical and strategic input to optimise other Commission assistance;
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<sup>1</sup> In accordance with UN Security Council Resolution 1244, since June 1999 Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

<sup>2</sup> As agreed with the European Union, Sigma activities are being undertaken initially in nine prioritised countries: Egypt, Jordan, Lebanon, Morocco and Tunisia (ENPI-South); Armenia, Azerbaijan, Georgia, Moldova and Ukraine (ENPI-East).

## EXECUTIVE SUMMARY

Administrative transparency is on the rise as a policy issue, but it is not new. Both the Council of Europe and the OECD have devoted long-standing attention to this issue. However, over the last ten years, an impressive number of legislative measures and administrative reforms have been put in place in EU member states. This recent “acceleration” has several roots. Administrative transparency has been recognised by courts, constitutions and treaties as a fundamental right of the individual. It has also been proposed as one of the key instrumental freedoms, essential for economic and social development and for promoting international investment. More crucially, the promotion of the “right to know” of the people is increasingly perceived as an essential component of a democratic society.

In liberal democracies, in fact, the right of access to the information held by public authorities serves three main purposes. First, it enables citizens to more closely participate in public decision-making processes. Second, it strengthens citizens’ control over the government, and thus helps in preventing corruption and other forms of maladministration. Third, it guarantees the administration a greater legitimacy, as long as it becomes more transparent and accountable, i.e. closer to an ideal — ‘glass house’.

Nonetheless, experience in OECD and EU countries has shown that promoting openness in government and administration in practice is a very difficult task. Ensuring the “right to know” of citizens through appropriate access to information stored in public offices remains an elusive policy goal. The need to preserve primary public and private interests (from confidentiality of international relations to privacy of individuals) is difficult to reconcile with the quest for transparency in concrete cases. Public officials and politicians, in fact, often tend to emphasise or overestimate the benefits of confidentiality to the public interest. As a consequence, legitimate barriers to public access to information are often extended to include many other issues that, in a healthy democracy, would normally be in the public domain.

Despite such difficulties, many countries, including those in Central and Eastern Europe, which have recently instituted democratic political regimes and administrations, have introduced Freedom of Information Acts (FOIA) in recent years. The fact that a FOIA is passed in parliaments does not guarantee per se more openness and transparency in governments and administrations, especially when it is not followed by adequate implementation. Yet, the adoption of a FOIA does constitute a first crucial step on the way to an open government: not only does it introduce the idea that citizens have the right to exert a widespread control over the action of public authorities, it also paves a better way for social groups, journalists and individuals to make a judicial case to protect their “right to know” in comparison, for example, to countries where a FOIA has not been promulgated.

This paper illustrates the emergence of common rules, mechanisms and criteria employed in Europe to balance the policy goal and legal obligation of disclosure of information with the requirements of confidentiality. In particular, the paper examines the regulations on access to information where they exist and how transparency policies are implemented in 14 European Union member states. The countries reviewed belong to different European administrative traditions, which allocate disparate weights to the issue of transparency in the handling of public affairs. The countries are Austria, Czech Republic, Estonia, Finland, France, Germany, Italy, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. Transparency policies and regulations of European Union institutions have also been reviewed.

The overall aim of the paper is to provide useful guidance for policy-makers and practitioners willing to improve the openness and transparency of their administrative systems either through enacting FOIAs or

though the amelioration of the information of public interest management. Openness is a basic European principle for public administrations that EU candidate countries are asked to approximate during the accession process. The identification of EU legal standards in this field may, thus, help prospective member states to converge towards shared democratic political and administrative ways of public governance.

The emerging European standards are discussed in the next pages from a practical policy-making perspective. They concern five main aspects that are central to any transparency legal regime:

- How to define the scope of legislation on free access to information, especially with regard to the range of *beneficiaries* of the “right to know” and to the *object* of that right;
- How to circumscribe the *discretion* of the administration in deciding about the *exceptions* to the general principle of free access (legislative techniques— such as the “harm test” and the “balancing test” – are reviewed);
- How to deal with the issue of the “*unreasonable workload*” that the principle of free access may impose upon the administration;
- How to promote the *regular publishing of information* that may be of interest to a relatively large number of individuals or groups without harming relevant public and private interests;
- How to set up an *independent and effective system of review* over decisions refusing access to information by complementing the control exerted by courts with the control exerted by independent administrative bodies such as information commissioners.

The paper is divided into three parts. Part I illustrates the main transparency policy trends in Europe and the gradual recognition of access to documents as a fundamental right. Part II highlights the emergence of common legal standards with regard to the five crucial issues mentioned above. Against this backdrop, the final part of the paper (Part III) provides guidelines for legislators and governments that are willing to adjust their transparency regimes and administrative practice to meet emerging common European standards.

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## PART I. TRANSPARENCY IN EUROPE: MAIN TRENDS AND TRAJECTORIES

### I.1. Access to Information as a Fundamental Right

The right of access to administrative documents has only recently been recognised as a fundamental right. By contrast, in the past, and for a long time in Europe and other western countries, administrative transparency was considered an appealing but innocuous idea. At best, it was a merely political, non-binding guideline. Its implementation was not commanded by law, but rather entrusted to the good will of the government of the day or even to the discretion of the front-line civil servant.

The early remarkable exception was Sweden, where a principle of public access to official records had been introduced as early as 1766 within the framework of a regulation on freedom of the press. The same regime applied to Finland, which at the time was part of the Kingdom of Sweden. A Finnish autonomous regulation was introduced in 1951, followed by Norway and Denmark in 1970. A similar evolution was initiated two centuries later in the Anglo-American world by the United States, where the first Freedom of Information Act (FOIA) was enacted in 1966. Australia, Canada and New Zealand followed suit (1982-1983).

In the United Kingdom and in Continental Europe, the principle of transparency met stronger resistance. Initially, it was implemented only by means of Administrative Procedures Acts (APAs) – thus as “procedural” transparency. However, during the last two decades, procedural transparency has been complemented with the spread, all over Europe, of Freedom of Information Acts. FOIAs have been enacted in Hungary (1992), Portugal (1993), Ireland (1997), Latvia (1998), the Czech Republic (1999), the United Kingdom (2000), Estonia (2000), Lithuania (2000), Poland (2001), Romania (2001), Slovenia (2003), Germany (2005), and at the European Union level (2001). Other EU countries – such as Austria, France, Italy and Spain – have (partially) adapted their original administrative procedure legislation to the requirements of the new procedural transparency.

There are two main factors at the origin of this development. One is the emergence of access to information as a fundamental right both at international and European Union level (*infra*, II.1.1 and II.1.2). Another relevant factor is the ripening of democratic governments in Europe. Access to public information is nowadays perceived as a crucial democracy-enhancing tool. In European countries, constitutions and legislation widely acknowledge this (*infra*, II.1.3).

#### I.1.1. International Law

The Universal Declaration of Human Rights establishes that the freedom of opinion and expression “includes freedom to (...) seek, receive and impart information and ideas through any media and regardless of frontiers” (Article 19).<sup>3</sup> The same provision appears in Article 10 of the European Convention on Human Rights (ECHR), which makes an important addition: restrictions to this right are lawful only if they are “prescribed by law”, are “necessary in a democratic society”, and pursue one of the legitimate aims (national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence, or protection of the authority and impartiality of the judiciary).

<sup>3</sup> See also Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The European Court of Human Rights (ECHR) has gradually developed an expansive reading of this norm.

Initially, it held that the freedom to receive information as guaranteed by Article 10 could not be construed as imposing on a state positive obligation to disseminate information or to disclose information to the public.<sup>4</sup> In the recent case law, however, a different approach is emerging. In 2006, the Court of Strasbourg recognises for the first time that the refusal to give access to administrative documents is to be considered as interference in the applicant's right to receive information. Therefore, Article 10 of the Convention may imply a right of access to documents held by public bodies.<sup>5</sup> In 2009, the Court itself admitted that it had "recently advanced towards a broader interpretation of the notion of 'freedom to receive information' (...) and thereby towards the recognition of a right of access to information".<sup>6</sup>

The ECHR jurisprudence reflects a more general trend.<sup>7</sup> Following sector-specific conventions<sup>8</sup> and recommendations,<sup>9</sup> the process of consecration of access to administrative documents as a fundamental right culminated in the Convention on Access to Official Documents. This Convention, adopted by the Council of Europe on 27 November 2008 and at the moment of writing (30 September 2010) signed by 12 countries,<sup>10</sup> represents the first internationally binding instrument recognising a general right of access to official documents held by public authorities.

All of these developments confirm that, in international law, the public's right to know enjoys the status of a fundamental right.

### ***1.1.2. European Union Law***

The same conclusion can be drawn from European Union law. The theme of transparency first gained relevance in 1992 with the Treaty of Maastricht. Then, in 1997, the Amsterdam Treaty introduced Article 255 EC Treaty, which established a full right of access to documents.

A Declaration attached to the Maastricht Treaty (Declaration No. 17 on "the right of access to information") was followed by the adoption of a code of conduct, adopted by the Commission and the Council. This code detailed the conditions under which access to information held by these institutions could be requested. By that time, access to documents at European level was not a self-standing right, but a mere expectation left to the discretion of the institutions. In 2001, on the basis of Article 255 EC Treaty introduced with the Amsterdam Treaty, the European institutions approved Regulation No. 1049/2001, containing an extensive discipline

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<sup>4</sup> Leander v Sweden (26 March 1987) para 74. See also Gaskin v. United Kingdom (27 July 1989) and *Sîrbu v. Moldova* (15 June 2004).

<sup>5</sup> *Sdružení Jihočeské Matky v. Czech Republic* (10 July 2006).

<sup>6</sup> *Társaság a Szabadságjogokért v. Hungary* (14 April 2009), para 35.

<sup>7</sup> For a parallel development in the jurisprudence of the Inter-American Court of Human Rights, see *Claude Reyes and others v. Chile* (19 September 2006) at [www.corteidh.or.cr/casos.cfm?idCaso=245](http://www.corteidh.or.cr/casos.cfm?idCaso=245).

<sup>8</sup> United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, on 25 June 1998 (Aarhus Convention), especially Article 4.

<sup>9</sup> The following recommendations of the Council of Europe deserve a mention: Recommendation No. R (81) 19 on the access to information held by public authorities, Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies, and Recommendation No. R (2002) 2 on access to official documents. See also OECD (2008), "Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information", [C\(2008\)36](#), OECD, Paris.

<sup>10</sup> Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia and Sweden signed the Convention on 18 June 2009.

of the matter. This regulation, still in force, has been complemented by other legal standards<sup>11</sup> and has been consistently enforced by the European Court of Justice.<sup>12</sup>

The recognition of access to information as a fundamental right is now sanctioned by the Lisbon Treaty.

On the one hand, Article 15 TEU establishes that “in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible”, and reiterates 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 of the Union’s institutions, bodies, offices and agencies, whatever their medium”.<sup>13</sup> On the other hand, the EU Charter of Fundamental Rights, now binding on all the member states, explicitly guarantees “the right of every person to have access to his or her file” (Article 41) and the right of access to documents of EU institutions (Article 42).

To sum up, in less than two decades, access to information in EU law has evolved “from a situation of a mere favor being granted to the individual by the institutions in the exercise of their discretionary power [into] one of a true subjective, fundamental right granted to the individual. (...) With the introduction of Article 255 EC by the Treaty of Amsterdam, access to documents of the institutions has become a subjective right (...). That right of access, moreover, is of the nature of a fundamental right, as confirmed by the fact that it was reproduced in Article 42 of the Charter of Fundamental Rights.”<sup>14</sup> Since the public’s right to know amounts to a fundamental right also in EU law, member states are expected to discipline administrative transparency accordingly.

### ***1.1.3. National Law***

#### *a) Constitutional Provisions*

In many European countries, the principle of transparency enjoys constitutional relevance. The highest level of protection is guaranteed in Sweden, where the right of access to information is traditionally based on three constitutional pillars: public access to official records (part of freedom of the press), freedom of speech and the right to anonymity (which also protects officials who provide confidential information to the media). In France, the principle of transparency found its first expression in Article 15 of the *Déclaration des droits de l’homme et du citoyen* of 26 August 1789, according to which “society has the right to ask any public official to account for his administration”. In Spain, Article 105.B of the Constitution guarantees the right of access to all official records and files, with three exceptions: security and defence, investigation of crimes, and privacy.<sup>15</sup> In Italy, the Constitution is silent on the matter, but the Constitutional Court has declared that transparency is a general principle that binds domestic authorities as

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<sup>11</sup> Directive 2003/4/EC of 28 January 2003 on public access to environmental information, repealing Council Directive 90/313/EEC; Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (data protection directive); Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information.

<sup>12</sup> See *ex multis*, Case T-36/04, *API v. Commission* (12 September 2007), para 96.

<sup>13</sup> See also Article 13 TEU: “The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”.

<sup>14</sup> Opinion of Advocate General Maduro in Case C-64/05 P, *Sweden v Commission* (18 July 2007), para 40.

<sup>15</sup> According to the Spanish Constitution, transparency is also a necessary requirement for promoting participation (Article 23) and is part of the right of communicating and receiving truthful information (Article 20.2).

it is part of the common European constitutional heritage.<sup>16</sup> Other relevant constitutional provisions can be found in Estonia,<sup>17</sup> Finland,<sup>18</sup> Poland,<sup>19</sup> Portugal,<sup>20</sup> Romania,<sup>21</sup> and Slovenia.<sup>22</sup>

b) *Legislative Regimes: Procedural Transparency and Freedom of Information*

At the legislative level, the affirmation of the principle of administrative transparency has given rise to two different legal regimes. One is transparency as a right of an interested party to access, in the framework of an administrative procedure, documents held by the public administration, which may affect an incoming administrative decision. The other one refers to a right of the public at large unconstrained access to official documents.

The first kind of transparency regime regulates the *right of access to documents in an administrative procedure*. In all European legal orders, a person participating in an administrative procedure has the right of access to documents on which the decision of the administration is (or will be) based. The concerned person needs to have knowledge of the documents that are relevant to the decision of the administration in order to be able to evaluate whether to challenge the administrative act before a court and/or to exercise an informed participation in the administrative proceeding. The right of access to administrative documents in an individual case is, thus, a corollary of the principle of due process (“*droit de la défense*” in France, or “fairness”/“natural justice” in the United Kingdom), which implies that in administrative procedures all information on which the decision is based has to be available to the parties.

In this form, the right of access is, thus, instrumental to the broader right of each person to defend their own interests when they can be affected by an administrative act. This explains why such a right, originally set out as a judge-made principle, is granted only to the interested parties in a procedure (even though the stretch of the notion of “interested party” may vary from one legal order to another) and is mainly incorporated in national Administrative Procedure Acts (APAs). This is the case in Austria,<sup>23</sup> the Czech Republic,<sup>24</sup> Estonia,<sup>25</sup> Germany,<sup>26</sup> Italy,<sup>27</sup> Poland,<sup>28</sup> Portugal,<sup>29</sup> Slovenia,<sup>30</sup> Spain,<sup>31</sup> and Sweden.<sup>32</sup> In few other

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<sup>16</sup> Italian Constitutional Court, Judgement No. 104 of 2006.

<sup>17</sup> Articles 13 and 44 of the Estonian Constitution.

<sup>18</sup> See Articles 12.2 and 21 of the Finnish Constitution.

<sup>19</sup> Articles 51.3 and 61 of the Polish Constitution.

<sup>20</sup> Articles 268.1 and 268.2 of the Portuguese Constitution.

<sup>21</sup> Article 31 of the Romanian Constitution.

<sup>22</sup> Articles 39 and 22 of the Slovenian Constitution.

<sup>23</sup> 1991 Austrian APA, Section 17.

<sup>24</sup> 2004 Czech Administrative Procedure Code, Article 38.

<sup>25</sup> 1993 Estonian APA, Article 37 (see also Articles 46-50, referred to as the “Open Procedure”, which provide that in some cases all of the documentation is to be disclosed in a citizen-friendly manner and public discussion is to be carried out).

<sup>26</sup> 1976 Federal APA in Germany, Section 29. See also Länder APAs, Article 29 (in each), all adopted in the 1970s.

<sup>27</sup> 1990 Italian Law on Administrative Procedure, Articles 22-28.

<sup>28</sup> 1960 Polish Administrative Procedure Code, Articles 73-74.

<sup>29</sup> 1992 Portuguese Administrative Procedure Code, Articles 61-65.

<sup>30</sup> 1999 Slovenian APA, Article 82.

<sup>31</sup> 1992 Spanish APA, Articles 35 and 37.

<sup>32</sup> 1986 Swedish APA, Section 16.

countries, the right of access to documents in individual cases is not protected by an APA, but by other means: namely, by a specific piece of legislation (as in France)<sup>33</sup> or directly by the courts (as in the United Kingdom).

The second kind of transparency regime is much wider in scope, since it regulates the *public's right of access to official documents* as part of citizens' *freedom of information*. It is important to stress that only this second type of transparency regime meets the requirement imposed by the international, European and constitutional norms mentioned above. This right, being general in character, is granted to everyone and embraces all the information officially held by public authorities, as the fundamental nature of the right requires. By contrast, APAs' provisions on procedural transparency, albeit important in guaranteeing due process in individual cases, are not adequate to the broader democracy-enhancing purpose, because they make access contingent on being party in an administrative procedure and limit it to the documents that are relevant to the specific administrative decision.

Therefore, while this "new" regime (freedom of information) partially overlaps with the "old" one (procedural transparency), its aim is different. The purpose is not to guarantee due process in a specific administrative case, as in the previous regime, but rather to promote public participation in the government and to strengthen the democratic character of institutions. This goal explains the widespread adoption of freedom of information legislation in European countries during the last two decades. All of the 15 European legal orders included in the analysis have adopted – or are in the process of adopting – a "Freedom of Information Act" or equivalent regimes.

Partial exceptions to this common trend are Austria, France, Italy, and Spain. In Austria, administrative transparency is essentially a competence of the *Länder*. At the federal level, the Act on Access to Information, adopted in 1987, only provides a rudimentary regulation of non-instrumental transparency.<sup>34</sup>

France was very precocious in recognising the rights of defence (access to documents among them), but less reactive in embracing an extended notion of transparency. The latter, in fact, is based on the idea of citizens' direct participation in and control over the government, which does not easily match the French model of representative democracy (where participation and government accountability are mediated by parliament). This may at least partially explain France's resistance to adopting FOI legislation. The same resistance is shared by Italy and Spain, countries that have been traditionally influenced by the French administrative culture.

Nonetheless, the latter exceptions – concerning France, Italy and Spain – are only partial and perhaps transient. In France, the above-mentioned provision of the 1978 Law on Access to Administrative Documents ("every person has the right to know the information contained in an administrative document the conclusions of which are invoked against him"<sup>35</sup>) is applied in a way that allows *all persons* – whether they be a party in an administrative proceeding or not – to obtain access to administrative documents held by public bodies. A similar solution has been adopted in Spain, where nominative and non-nominative documents are subject to a different regime of disclosure. In addition, an FOI proposal is currently being examined by the

<sup>33</sup> France Law No. 78-753 of 17 July 1978 on various measures to improve relations between the administration and the public, amended several times, most recently by Ordinance No. 2009-483 of 29 April 2009.

<sup>34</sup> The Fundamental Act of 15 May 1987 on the duty to grant information is a one-page regulation that does not promote a high level of transparency. It stipulates a general right of access and obliges federal authorities to answer questions regarding their areas of responsibility, but only insofar as this does not conflict with a legal obligation to maintain secrecy. In addition, it does not permit citizens to access documents but only to obtain answers from the government on the content of the information. On the basis of this law, Austrian *Länder* have enacted regulations that place similar obligations on their authorities.

<sup>35</sup> Law of 17 July 1978, Article 3 (see above, Section I.1).

Spanish government.<sup>36</sup> In Italy, by contrast, the requirement of a qualified legal interest provided for in the Law on Administrative Procedure<sup>37</sup> is now interpreted in a less restrictive way: courts have come to recognise a (limited) right of access to entities representing collective interests, such as consumer organisations and environmental groups, on behalf of those they represent. Moreover, a radical reversal of that approach is currently taking place: in 2009, the principle of “total transparency” was introduced in the legislation, which is now in the process of being implemented.<sup>38</sup>

#### ***1.1.4. Preliminary Implications***

The international, European and national legal developments so far succinctly evoked show that the right of access to official documents in Europe is now widely understood as a fundamental principle. The specific rules that determine the extension of this right in the European legal orders are detailed in FOIAs or FOIA-like regulations. These rules confirm that the notion of administrative transparency carries relevant democratic implications. Such awareness has consistently spread from Nordic countries to the rest of Europe, without any significant divergence between western and eastern countries.

If the right of access to documents and information held by public authorities has become a fundamental right in Europe, what are, then, the implications? Most of them will emerge in Part II. Yet, two of them deserve to be mentioned from the outset. First, the fundamental nature of the right requires a strict interpretation of any limitation to the exercise of that right.<sup>39</sup> Secondly, public authorities must subject any such limitation to a scrutiny of proportionality: the principle of proportionality requires that “derogations remain within the limits of what is appropriate and necessary for achieving the aim in view”.<sup>40</sup> Thirdly, and most crucially, transparency regimes should be revised so as to guarantee the widest possible access to official documents.

### **1.2. Transparency as a Result of Deliberate Policy Implementation**

Despite the general converging trend towards more transparency, openness in government is a reality only in some European countries, much less so in others. Micro-divergence stems from the interaction of three main factors: the first – the legislative framework – will be extensively addressed in Part II of this paper; the second and the third – namely, the culture of transparency/confidentiality in the administration, and the ability to implement a transparency policy – will be briefly examined here.

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<sup>36</sup> Sentence 51/1984 of 25 April 1984 of the Constitutional Court and the sentence of 19 May 1988 of the Supreme Court stated that the principle of transparency was a basic principle for democracy, but no freedom of information law was adopted to support these decisions and to regulate the principle. However, on 3 March 2010, the Coalition Pro Acceso (a platform of Spanish civil society organisations) called on the government to publish draft FOI legislation before sending it to parliament so that civil society could provide comments and suggestions. See [www.access-info.org/en/spain-coalicion-pro-acceso/93-coalicion-wpfd-2010](http://www.access-info.org/en/spain-coalicion-pro-acceso/93-coalicion-wpfd-2010).

<sup>37</sup> Article 22 of Law No. 241/1990.

<sup>38</sup> See Legislative Decree No. 150/2009 on public employment and evaluation of administrative performances, which has very few general provisions concerning transparency. These provisions embrace a different approach from that of the 1990 statute, as they provide that “transparency is intended as a possibility of complete access, even through the publication on the administrations’ websites, of information concerning every aspect of organisation” and require the greatest transparency of information concerning measures and evaluations of performance (Article 11).

<sup>39</sup> See Opinion of Advocate General Maduro in Case C-64/05 P, Sweden v Commission (18 July 2007) para 42: “Since the right of access to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively.”

<sup>40</sup> European Court of Justice, Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary (1986), para 38.

### ***1.2.1. Administrative Culture***

Despite the general recognition of transparency as a basic principle of public action, a major factor of divergence results from the culture or tradition that prevails in many specific national administrative systems. With the notable exception of the Nordic countries, until recently a strong anti-transparency tradition characterised most European legal orders, in both Western and Eastern Europe.

In France, before 1978 the freedom of access to documents of the administration was very limited. Administrative secrecy was conceived as a suitable response to the need to protect the public interest. It was only with the Act of 17 July 1978 that the French system, built by Richelieu and Napoleon as a “bastion of secrecy”, broke with “a tradition of silence and secrecy, perhaps stronger than elsewhere”.<sup>41</sup> The issue of confidentiality for the protection of the public interest was also (and in some respects still is) very relevant in Italy. Until 1990, the general rule was secrecy, which was both a principle of administrative action and a duty of civil servants. In both Portugal and Spain, long-lasting, right-wing dictatorships imposed strict secrecy regimes. In Austria, the tradition of administrative secrecy, which goes back to 1785, was reinforced in 1925 when a provision on administrative secrecy was added to the Constitution, whereas a provision on access to information was added only in 1987 (Article 20.3). The existence of a strong tradition of administrative closure and secrecy – often described as an “arcane principle” – also explains why Germany was one of the last European countries to implement a FOIA (2005).

In Eastern Europe, other factors led to similar results. In Romania, during the communist totalitarian regime (1947-1989), administrative closure was the rule. Until the early 1990s, a strong tradition of confidentiality was enshrined in the public sphere. Partially as a consequence of this factor, there is no long or solid tradition in Romania of participation in policy making or of accessing documents of public interest. In Poland, the legal tradition of secrets protecting the public interest (or the state) is very long. Some secrecy rules date back to the legislation of the partitioning states (Germany and Russia), still in force after independence (1918). The first Polish act regulating the issue of secrecy was the regulation of 16 February 1928 on penalties for espionage and some crimes against the state. Later on, the Constitution of 1952 imposed the protection of state secrets as a duty of each citizen.<sup>42</sup> This provision was only changed by the new Constitution of 1997. Similar accounts apply to most Eastern European countries.

It is thus not surprising that many officials – in both Western and Eastern Europe – still nurture a culture of secrecy, which is revealed in many ways: the generally strong civil servants’ legal obligation to maintain confidentiality, the expansive interpretation of provisions limiting access to information (for instance, privacy), the failure to use all of the envisaged procedures for making information available, and the frequent inaction (silence) or delays in processing requests for access to public information.

### ***1.2.2. Policy Implementation***

Nonetheless, the relevance of cultural tradition should not be overstated. Well-conceived processes of pro-transparency policy implementation may have a relevant impact on the attitudes of administrations (and citizens) with regard to freedom of information.

<sup>41</sup> Guy Braibant (1987), “Préface”, in Lasserre, Lenoir and Stirn (eds.) (1987), *La transparence administrative*, PUF, Paris, PUF, p. VIII.

<sup>42</sup> Article 79.1: “Watchfulness for enemies of the nation and careful guarding of state secrets is the duty of every citizen of the People’s Republic of Poland”.

Take the case of Estonia. After regaining independence in 1991, the transition from a closed (Soviet) regime to a modern open society was a broadly accepted goal. There was a common wish to restore a democratic government and to facilitate economic growth, as well as to join the EU. Transparency and anti-corruption policies were perceived as being interlinked and as a necessary pre-requisite for guaranteeing foreign investments in Estonia. Significant attention and resources were devoted to the process of implementation. Free access to administrative documents and other public information has been part of all anti-corruption strategies.<sup>43</sup> As a result, a strong culture of openness now prevails, in reaction to the secrecy culture of the occupation period.

A second case in point is Slovenia, a country with an even stronger tradition of administrative closure. Since the adoption of the Access to Public Information Act (2003), actual practice and the law have considerably changed. The result is quite an open administration, where activity is inspired by the principle whereby the information “produced” by public institutions is the “property” of the citizens. This situation represents a clear break with the past.

Another telling example can be drawn from the United Kingdom, where a composite culture of governance militated against the opening-up of central government. First of all, there were historical reasons for this tradition. Constitutional development had been notoriously bloody and violent. Secrecy protected lives – or so it was thought. Secondly, parliamentary sovereignty meant that democracy was representative. Ministers had to be accountable to parliament, not to the public. Thirdly, in the United Kingdom, the civil service is an anonymous and *politically neutral* civil service. If the civil service lost its anonymity – it was claimed – it would lose its neutrality. Fourthly, effective and efficient government was a more pressing priority than open government. Due to this profound belief in official secrecy, the United Kingdom only adopted a US-like FOIA in 2000, long after the other governmental systems built on the Westminster/Whitehall model – Australia (1982), New Zealand (1982), Canada (1983) and Ireland (1997).

Despite this tradition and the relatively late arrival of the FOIA, the British system now ranks amongst the most open in the world. The main reason for this is the careful process of implementation that was put in place. In the 1997 White Paper that prepared the reform,<sup>44</sup> the experience of other FOI regimes was examined. That experience revealed the importance of changing the administrative culture by adopting the requirement of “active” disclosure: the extensive publication of information not only ensures that public authorities will become accustomed to making information publicly available in the normal course of their activities, but also reduces the impact of the administrative workload.<sup>45</sup> This strategy was formalised with the approval of the FOIA in 2000 and gradually implemented in the following years through the elaboration of *ad hoc* “publication schemes”. The FOIA entered into force 5 years later, on 1 January 2005, once the publication schemes had come into effect across the public sector.

The importance of a proper strategy of implementation is closely linked to the cultural dimension, and yet transcends it. Transparency regulations are significantly affected by the evolution of media technologies, and their application thus also requires technical knowledge and training.

This requirement has been confirmed by the experience of Finland, a country where both the administration and the civil society are notoriously transparency-oriented. Despite that climate

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<sup>43</sup> E.g. “Fair State 2004-2007” and Anti-Corruption Strategy 2008-2012.

<sup>44</sup> UK Cabinet Office (1997), White Paper: Your Right to Know, HMSO, London.

<sup>45</sup> Ibid., paras 2.17-2.18.

of openness, the reform of the transparency legislation (1999) was accompanied by an extensive training programme. Moreover, recommendations were issued regarding the information services of the authorities, and a special set of website pages was created on the Internet site of the Ministry of Justice.<sup>46</sup>

To sum up, it is true that the cultural tradition of an administrative system has a crucial impact on the effective degree of openness of that system. However, culture may rapidly change, both inside and outside of the administration. As the comparison of several national experiences has shown, this change may be triggered and driven by an adequate implementation strategy and the emergence of a newly conceived policy on open government.

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<sup>46</sup> See [www.om.fi/en/Etusivu/Perussaannoksia/Julkisuuslaki](http://www.om.fi/en/Etusivu/Perussaannoksia/Julkisuuslaki) (also in English).

## PART II. THE RIGHT TO TRANSPARENCY: COMMON EUROPEAN LEGAL STANDARDS

### II.1. Beneficiaries

The recognition of a public's right to information implies that "everyone" is entitled to access. The administration cannot reject a request on the grounds that the request is not based on a specific interest. Disclosure can only be prevented if the administration shows the existence of a prevailing public or private interest in confidentiality. The burden of justification is on the public authority.

The analysis of the discipline adopted in the 15 legal orders considered in this report highlights the existence of more detailed common standards. Two aspects deserve a closer look: *a)* the relevance of the distinction between citizens and non-citizens; *b)* the justification of requests and the identification of the requesting party.

*a) Citizens and aliens.* What is the actual meaning of "everyone"? Should the right of access be granted not only to citizens, but also to non-citizens, whether they are residents or not? The emerging common European standard provides an affirmative answer.

In the past, access to information had been restricted to citizens. This solution, adopted by old legislation such as the Finnish Act on Openness of Government of 1951, is no longer followed. Access to documents has been gradually extended to non-citizens, thus becoming a fundamental right. In the area of transparency, the possibility for public authorities to discriminate on the basis of citizenship would not be supported by any legitimate or reasonable means.

Moreover, if access to documents has the nature of a fundamental right, then the exclusion of non-resident aliens is also questionable. Article 2 of EC Regulation 1049/2001 grants the right of access to citizens and to resident aliens: non-resident aliens seem to be excluded. However, EU institutions have never applied the existing distinction to the detriment of non-residents, implicitly acknowledging the inconsistency of the distinction, which is currently under revision.<sup>47</sup>

Therefore, as other examples show (for instance, Germany,<sup>48</sup> Portugal,<sup>49</sup> Slovenia,<sup>50</sup> and Sweden<sup>51</sup>), European legal orders are converging toward a unitary common standard: access

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<sup>47</sup> In fact, a proposal to amend EC Regulation 1049/2001 in order to eliminate the distinction and extend the right of access to any natural or legal person is currently under examination.

<sup>48</sup> According to the 2006 FOIA, the applicant neither has to be a citizen nor have his/her residence in Germany.

<sup>49</sup> Non-instrumental transparency is open to everyone, even to non-resident aliens, due to the principle of assimilation that stems from Article 15 of the Portuguese Constitution.

<sup>50</sup> Article 44 of the Slovenian Constitution explicitly states: "Anyone has the right to freely obtain information disseminated for public use. (...) Citizens of foreign states and stateless persons who are in Estonia (both resident and non-resident aliens) have the rights specified in paragraphs 2 and 3 of this section equally with Estonian citizens, unless otherwise provided by law."

<sup>51</sup> According to the Swedish Freedom of Information Act, foreign nationals are equated with Swedish citizens, all of them being "entitled to have free access to official documents" (Articles 2.1 and 14.5).

to public information is granted to “everyone”, understood as also including non-citizens, whether they are residents or not.

*b) Justification of requests.* A second question is whether the beneficiary should justify the request and identify themselves.

The Council of Europe’s Convention on access to official documents aptly summarises the relevant standards. First, the right of access to public information is a “right of everyone, without discrimination on any ground” (Article 2.1). Second, “an applicant for an official document shall not be obliged to give reasons for having access to the official document” (Article 4.1). Third, member states “may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request” (Article 4.2).

While in APAs’ procedural transparency regimes, the right is restricted to the parties in the procedure and, hence, justification and identification are needed in order for the administration to verify the interest or locus of the person, under FOIA regimes, the right of access has no subjective restriction. “Everyone” is allowed to apply, *irrespective of motive*. European FOIAs exhibit a high level of convergence in this respect. Access to public information occurs without having to show any individual interest (legal or actual). The requesting person is, of course, free to state their motives, but cannot be obliged to do so. If such an obligation is introduced, that discipline of access becomes, by definition, a regime that is other than the FOIA.

Identification is generally required, essentially for practical reasons: it helps the administration to ensure an ordinate processing of the requests. Yet, in some legal orders – as in Finland<sup>52</sup> or Sweden<sup>53</sup> – the protection of the right to anonymity may determine the adoption of the opposite rule, namely that public authorities cannot inquire into a person’s identity on account of her/his request of access. Only when there are countervailing public or private interests to confidentiality does the requester need to identify himself/herself (e.g. request of access to one’s own file containing personal data).

## II.2. Scope

To assess the scope of FOIAs in Europe, four issues need to be addressed: *a)* Do FOIA apply to all three branches of the government? *b)* Do they apply to all sectors/areas of public intervention? *c)* Do they (also) apply to regional/territorial entities? *d)* Do they (also) apply to private entities performing public functions?

*a)* As for the first issue, freedom of information should, in principle, regard all documents and information held by public authorities, regardless of their pertinence to a specific administrative procedure or to the executive power. However, it is often the case that specific regulations apply to parliamentary and judicial proceedings.

The judiciary, in particular, is often excluded from the scope of FOIAs as it is subject to specific publicity rules, the aim of which is the protection of courts’ independence. A case in point is the EC Regulation No. 1049/2001. It regulates “public access to European Parliament, Council and Commission documents”, not access to files of the European Court of Justice.<sup>54</sup>

<sup>52</sup> Finnish Openness of Government Act, Section 13.1.

<sup>53</sup> Swedish Freedom of Press Act, Article 14.3.

<sup>54</sup> Prior to the entry into force of the Lisbon Treaty (1 December 2009), the EU transparency regime applied, at least formally, only to the Council, the Commission and the Parliament, not to agencies and other secondary bodies. The Lisbon Treaty now extends the transparency obligation to all EU bodies and agencies (Article 15 of the Treaty on the Functioning of the European Union).

Nonetheless, there are legal orders where legislation on freedom of access extends to all the branches of the government. The Finnish FOIA, for instance, applies not only to state administrative authorities, but also to “courts of law” and “parliamentary agencies and institutions”.<sup>55</sup>

b) As a general rule, transparency regimes apply to all of the sectors/areas of public intervention. An exception to the rule is exemplified by the British FOIA, which does not apply to security and intelligence agencies.<sup>56</sup> However, exemptions usually refer to certain types of public interests rather than to an administrative sector *per se*.<sup>57</sup> As a consequence, any information is open to access, even when public order functions are at stake, unless a specific exemption is applicable to the case.

c) Transparency rules pertain to a fundamental right. As a consequence, they should also apply to regional/territorial entities. There are, however, two relevant exceptions, concerning federal and regional states respectively.

*Federal states.* In Germany, the federal FOIA is not binding on the *Länder*. Most of them – 11 out of 16 – have a territorial FOIA (not necessarily similar to the federal FOIA). In Austria, the Constitution does not grant competence to the Federation in the matter of transparency and confidentiality: “information provisions” follow the competence of the relevant topic. The nine *Länder* have transparency regimes for data protection, access to environmental information or access to public sector information, which are nearly the same with regard to content and wording.

*Regional states.* In Spain, the rules on administrative transparency (set out in the Administrative Procedure Act, since there is no specific FOIA) also apply to regional and local authorities: it is a basic law, which binds all administrations and functions. However, regional and local authorities have the power to issue more detailed regulations on access to documents, provided that they respect national legal principles and requirements. Therefore, territorial autonomy to regulate transparency issues is subject to a “higher standard” condition.<sup>58</sup> The same condition is established in Italy. Regions can legislate in the matter, as is clearly shown by the existence of 15 regional statutes on transparency (out of 20 regions). Yet transparency is a matter of central state legislative competence as to the definition of the “essential elements of public administration performance”.<sup>59</sup> The central state thus sets the minimum standard of transparency, while regional law can allow for more – but not less – transparency.

Where a Constitution devolves regulatory autonomy to territorial entities, the arrangement adopted in Italy and Spain may provide a balanced solution. In fact, that arrangement strikes a sound compromise between territorial regulatory autonomy and the need to preserve a common minimum level of transparency. Nowadays, this need is even more pressing, given the widespread recognition of transparency as a fundamental right.

d) A fourth issue is whether transparency regimes should apply not only to public bodies but also to private entities and, if so, under which conditions.

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<sup>55</sup> The entities to which the Openness of Government Act applies are noted in Section 4 of the Act.

<sup>56</sup> Section 23 of the FOIA exempts “information supplied by, or relating to, bodies dealing with security matters” and lists the bodies concerned.

<sup>57</sup> See Section II.4 below.

<sup>58</sup> For example, the autonomous community of Galicia issued a law whereby the principle of transparency was more demanding for the government, particularly in publishing data related to contracts and granting subsidies: see Law 4/2006 on Transparency and Best Practices in the Public Administration of Galicia.

<sup>59</sup> Legislative Decree No. 150/2009, Article 11.1. See also the Italian Constitution, Article 117.2.m.

As for the “*if private entities*” question, most European FOIAs provide an affirmative answer. The only partial exceptions are the British and Spanish regulations. The British FOIA does not apply to private bodies. The rule is that private utilities are not covered by the FOIA, but the regulators are, and thus a request of access to information can be submitted to them.<sup>60</sup> However, the British exception is partial because the Secretary of State may designate as a public authority, for the purposes of the FOIA, “any person who (...) (a) appears to the Secretary of State to exercise functions of a public nature, or (b) is providing under a contract made with a public authority any service whose provision is a function of that authority.”<sup>61</sup> Similarly, the Spanish APA does not apply to private subjects.<sup>62</sup> However, it covers all sorts of public bodies, including companies that, despite their private form, are owned by the state or another public entity.

As for the question “*under which conditions*” an FOIA includes private entities in its scope, partially overlapping with the preceding one, four main selection criteria are used. The analysis proceeds from the most to the least restrictive.

The first (more restrictive) criterion concerns the exercise of “public powers”. Accordingly, rules on freedom of information apply only to private entities entrusted with public powers, such as certification powers (e.g. notaries) or control powers (e.g. technical control bodies). This is, for instance, the case of Germany.

A second criterion makes reference to a *substantive* notion of “public companies”. What counts, for the application of FOIA, is not the legal nature of the company, but the financial contribution of the state or other public entities. Accordingly, FOIA extends to companies that are owned by the state or other public entities, even if their organisational form is governed by private law. The rationale is clear: if their activity is funded by the public, it has to be transparent and accountable to the public.

A third criterion is the performance of a public function. It overlaps with the two previous ones: when a private subject is given public powers or is financed by public funds, the usual inference is that at least some of its functions have public relevance. However, this third criterion is broader: it includes private bodies that do not have special powers or public financial support and yet perform tasks of public interest, as occurs in the case of private providers of public utilities. This criterion is best exemplified by the French transparency regulation of 1978, which applies to all private law subjects that are charged with a mission of public service, whether they are equipped with public powers or not.<sup>63</sup> This criterion is adopted in many Continental European countries, where it is often tempered by a functional sub-condition: transparency provisions only apply to private bodies concerned with regard to their specific tasks of public relevance.

A fourth criterion on the rise, adopted for instance in Portugal and Romania, is based on the notion of a “body governed by public law”. This notion is borrowed from EU public procurement law, according to which “a ‘body governed by public law’ means anybody: *a*) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; *b*) having legal personality; and *c*) financed, for the most

<sup>60</sup> Utilities are obliged to provide information, in accordance with their governing statutes (e.g. Utilities Act 2000, Communications Act 2003, etc.).

<sup>61</sup> British FOIA, Section 5.1.

<sup>62</sup> In Spain, the transparency regime can be applied to private contractors only if the public contract includes a clause obliging private subjects to respect Article 37 of the APA.

<sup>63</sup> E.g. decisions of French Conseil d’État in the cases *Ville de Melun et Association “Melun culture loisirs c/ Vivien”* (20 July 1990), *Association du personnel relevant des établissements pour inadaptés* (22 February 2007, n°264541), and *Commune d’Aix en Provence* (CE, 6 April 2007, n° 284736).

part, by the state, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law”.<sup>64</sup> Compared to the previous criteria, this one is even broader. Therefore, some further sub-criteria may apply in order to qualify the nature of the information that is exempt from disclosure. Nonetheless, its advantage is evident: it provides an anchorage to a notion that is well established in all EU member states.

### II.3. Object

According to some legislative acts on transparency, the right of access concerns “documents”, whereas, according to other regulations, the right of access concerns “information”. How relevant is this terminological distinction? Does it imply a substantive difference in the object of the right?

In abstract terms, the two notions are different. The former right allows the requester to view a *document* and extract a copy of the same. The latter right allows the requester, in addition, to ask the administration to disclose whatever *information* it has, even when it is not included in a document. Thus, the first notion is narrower than the second, even though the notion of document is usually defined in very broad terms either by domestic courts or by legislators themselves.<sup>65</sup>

Typically, the (broader) notion of *information* is upheld in FOIAs, whereas the (narrower) notion of *document* is referred to in APA rules on procedural transparency.<sup>66</sup> Most FOI regimes clearly state the right of access to *information* and impose the duty (not only to disclose an already existing document, but also) to process information and elaborate data not yet available to the public on the public authority. Under the British FOIA, for instance, any person is entitled to a presumptive right of access to information “held” by a public administration, in whatever form.<sup>67</sup> The rationale is evident: if the purpose of FOI regimes is to promote participation in decision-making processes and tighter public control on the government, the mere fact that information is included in a document or not should not make any difference.

Despite that, there are FOI regimes that define the object of the right of access by reference to the notion of “document”. Even then, some “remedies” are put in place, which tend to smooth the contradiction.

A first interesting example is the Portuguese FOIA. In defining the object of the right of access, it refers to the notion of “administrative documents”, but then it admits the right of everyone to ask for both “administrative documents” and “information as to the administrative documents’ existence and content”.<sup>68</sup>

A second case in point is provided by the EU. EC Regulation No. 1049/2001<sup>69</sup> explicitly connects the right of access to “documents”. However, the European Court of Justice soon

<sup>64</sup> Article 1.9 of Directive 2004/18/EC of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

<sup>65</sup> E.g. French Law No 78-753, Article 1, defining “administrative documents” as “files, reports, studies, minutes, records, statistics, directives, instructions, circulars, notes and ministerial responses that involve an interpretation of positive law or a description of administrative procedures, opinions, predictions and decisions”, irrespective of their date or form.

<sup>66</sup> Referral to the notion of document can be found, for instance, in older regulations mainly devoted to regulate procedural transparency, as in the case of France (Law No. 78-753, Article 1), Italy (Law No. 241/1990, Article 22.1.d) or Spain (Law No. 30/1992, Article 37.1).

<sup>67</sup> British FOIA, Section 1.1.

<sup>68</sup> Portuguese Law No. 46/2007, Article 5.

<sup>69</sup> See EC Regulation No. 1049/2001, Article 3.a.x.

adopted an expansive teleological reading of this notion: since the aim pursued by the regulation on transparency is to ensure that citizens have the widest possible access to information, it would be “wrong” to submit that the decision of the requested institution “concerns only access to ‘documents’ as such rather than to the information (...).”<sup>70</sup>

The same reasoning should, in principle, also apply to national FOIAs. If the purpose is to maximise the public’s right to know, no limitations can be admitted, other than the exemptions explicitly introduced for the protection of legitimate public and private interests. The nature of fundamental right requires that access be guaranteed to all the *information* held by a public authority, without restrictions specifically concerning the object.

## II.4. Exceptions

The right of access to documents, like other fundamental rights, meets some limitations. The discipline of exceptions represents the most crucial part of FOI regimes. Its aim is to ensure that disclosure of information held by public authorities does not harm relevant public or private interests. Yet, the obvious risk is that, if the grounds for exemption are too broadly defined and interpreted, the right to know may be excessively constrained.

Two issues must be addressed. The first concerns the grounds for exceptions: what kind of public and private interests can be protected by derogations to the principle of transparency? The second issue concerns the techniques available to limit administrative discretion in the application of the exemptions.

### II.4.1. Grounds

In all European FOIAs, the right to access is subject to a wide range of exemptions: some of them protect public interests, while others protect private interests. The Council of Europe’s Convention lists 12 grounds for exemption, whereas the EU regulation on access to documents lists 9.<sup>71</sup> Despite this quantitative difference, the only substantive difference concerns the inclusion, in the Council of Europe’s Convention, of a specific ground referring to the protection of “environment”. The EU regime, however, is converging on this point: according to one of the amendments to EC Regulation No. 1049/2001 proposed by the Commission, an additional ground for exception would regard “the environment, such as breeding sites of rare species”. This convergence on the environmental clause arises from the need to align with the provisions stemming from the Aarhus Convention.<sup>72</sup> For the rest, the two lists of exemption differ only in their wording. The same can be said about the domestic regulations included in the scope of this analysis. A high degree of harmonisation, thus, prevails. In addition to the environment, the most common grounds are the following.

#### a) *Protection of Legitimate Public Interests*

Not all the public interests justify a compression of the public’s right of access to documents. *Legitimate* public interests usually referred to in national and European regulations can be divided in two main groups.

The first includes four public interests: defense and military matters; international relations; public security (or public order or public safety); the monetary, financial and economic policy of the government. These interests are collectively identified as “sovereign functions” of the state.

<sup>70</sup> See Case C-353/99 P, Hautala (6 December 2001), para 23.

<sup>71</sup> See Convention on Access to Official Documents, Article 3.1, and EC Regulation No. 1049/2001, Article 4.

<sup>72</sup> See Article 4.1(e), Commission’s Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2008)229final, 30 April 2008.

The second group of public interest exemptions typically includes information related to court proceedings; the conduct of investigations, inspections and audits; and the formation of government decisions (i.e. internal documents). It should be noted that these grounds for refusal of access refer to particular categories of acts rather than to generic public interests.

Documents relating to a matter where a decision has not been taken and documents containing opinions for internal use as part of deliberations and preliminary consultations within the government both belong to the latter category – internal documents. Internal documents must be kept separate from files that are not yet “drawn up”: the latter are preliminary drafts that – contrary to internal documents – are not considered as official documents, and, thus, can neither be listed in the register of documents, nor be released.<sup>73</sup>

b) *Protection of Legitimate Private Interests*

There are essentially three kinds of private interests that transparency legislation usually mentions as grounds for exemptions: a) trade, business and professional secrets; b) commercial interests; c) personal data.

The notion of a trade, business or professional secret is a formal one, being dependent on an explicit legal qualification. The need to protect these secrets is, thus, self-evident. Intellectual property rights usually belong to this category. Absent it, they may also be included in the notion of “commercial interest”, which is broader: it not only includes business secrets, but also non-secret aspects of a commercial activity, such as the conclusion of a contract with a public authority.

The personal data regime is regulated in European Union countries, by Directive 95/46/EC and by national implementing measures.<sup>74</sup> This process of harmonisation also involves the notion of personal data, to be understood as “any information relating to an identified or identifiable natural person (‘data subject’)”, in turn, “an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”.<sup>75</sup> The same definition is adopted in national Data Protection Acts.

One of the main problems of access regimes concerns the conflict with norms on data protection. According to data protection regimes, the disclosure of personal data requires institutions to verify whether the data subject has given her/his consent. Moreover, the public authority should take into account the case-specific relevance of potentially conflicting interests.<sup>76</sup> Do these norms prevail over the access regime, which usually only requires the public authority to assess whether disclosure would harm privacy and other legitimate private interests?

The European Court of Justice very recently dealt with this issue. In its first judgment on the exception of “privacy and the integrity of the individual”, delivered on 29 June 2010,<sup>77</sup> the Court examined the question of whether the Commission could grant access to a document containing the names of participants at a closed-door meeting. The Court held that, “where a request based on the Access to Documents Regulation (...) seeks to obtain access to

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<sup>73</sup> E.g. Swedish FOIA, Sections 3.1 and 7.

<sup>74</sup> A specific act – EC Regulation 45/2001 – disciplines the processing of personal data by the Community institutions and bodies.

<sup>75</sup> Directive 95/46/EC, Article 2.a.

<sup>76</sup> According to Directive 95/46/EC, personal data can be processed not only when “the data subject has unambiguously given his consent”, but also, inter alia, when “processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject” (Article 7, sub a and f).

<sup>77</sup> Case C-28/08 P, *Commission v Bavarian Lager* (Bavarian Lager II) (2010).

documents including personal data, the provisions of the Data Protection Regulation become applicable in their entirety". In the absence of the consent of some participants at the meeting, the Commission complied with its duty of openness by releasing a version of the document in question with their names blanked out. The Court added that, as the applicant has not provided any express and legitimate justification in order to demonstrate the necessity for those personal data to be transferred, the Commission has not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by the Data Protection Regulation. A general principle can be inferred from this decision: the data protection regulation has to be treated as *lex specialis* to the access regime. Therefore, in case of conflicting precepts, data protection provisions prevail over the access regime.

A more general question is whether a public authority receiving an application for access to documents must carry out a concrete, individual assessment of the content of the documents referred to in the request. This issue is especially relevant in relation to classified documents (e.g. for the protection of intelligence and internal security), categorical exemptions (e.g. documents related to investigations and court proceedings) or trade, business and professional secrets (where the formal qualification depends on other pieces of legislation).

According to the European Court of Justice, in principle, access to a document cannot be restricted simply because it belongs to an exempted category, such as a court proceeding or to a secret. A concrete, individual examination of the documents in question is always necessary for two main purposes: first, to determine, in the light of the information which it contains, whether its disclosure would actually undermine a public or private interest protected by an exception; secondly, to assess whether the exemption covers the document in whole or in part (in the latter hypothesis, the principle of proportionality requires partial disclosure, making it a less onerous measure than a complete refusal of access).<sup>78</sup> By affirming that "the refusal by an institution to examine concretely and individually the documents covered by a request for access constitutes, in principle, a manifest breach of the principle of proportionality",<sup>79</sup> the European Court of Justice makes clear that, in principle, class-based exceptions should not exist. Nonetheless, an individual assessment might not be required if, due to the particular circumstances of the case, the documents requested are manifestly and integrally covered by an exception to the right of access.

#### ***II.4.2. Legislative Constraints on Administrative Discretion***

Once a law has defined the grounds for exemptions, a fundamental problem remains open: how to ensure that public authorities construe and apply the exceptions restrictively, so as not to defeat the right of access.

In this respect, the general principles of administrative law and action provide a first set of procedural and substantive constraints. On the procedural side, the principle of due process imposes several duties on the public authority: of promptly processing the request, of consulting with the applicant and with third parties whenever it is appropriate or necessary, of giving reasons, of indicating remedies (*infra*, II.5.1). On the substantive side, of primary importance is the principle of proportionality, with its sub-test of suitability, necessity and proportionality *strict sensu* (see *infra*, sub a). The responsibility to verify the compliance of decisions on access with such principles rests, of course, with the reviewing bodies, namely the competent courts and administrative authorities.

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<sup>78</sup> Opinion of Advocate General Maduro in Joined Cases C-39/05 P and C-52/05 P, Sweden and Turco v Council (2007), para 32.

<sup>79</sup> Case T-2/03, para 100.

Apart from these judge-made constraints, are there legal standards that legislators may put in place in order to ensure that public authorities properly apply the mentioned exemptions? The analysis of FOIAs in Europe (and elsewhere) supports a positive answer. FOIA rules on exemptions limit administrative discretion by establishing a hierarchy between the interests at stake, with the consequence that administrations (and judges) are required to assess the concrete relevance of those interests not only in light of the general principles (proportionality *in primis*), but also *according to legislative criteria*.

The common legislative standard is based on the distinction between “absolute” (or “mandatory” or “impairment-based”) and “relative” (or “qualified” or “discretionary”) exemptions. Since most FOI regimes uphold this distinction (including the EU regulation on the right of access), it seems necessary to explore it in some detail in order to clarify the respective role that legislators and administrators (may) play.

a) *Absolute Exemptions: The Harm Test*

The typical formula used to construe an absolute exemption runs as follows: “Public authorities shall refuse access to a document where disclosure would harm (or impair or undermine or hinder) the protection of the following interests (...)”. What is the purpose and what is the effect of a similar provision?

The purpose is to guarantee an enhanced level of protection to certain public or private interests, due to their specific relevance in a given legal order. For instance, the grounds for exemption corresponding to the “sovereign functions” of the state – defense, international relations, public order and alike – are usually included in the category of absolute exemption.

The effect is that the public authority is not entrusted with a discretionary power. No proper balancing – the typical manifestation of a discretionary power – can be exercised since the protected interests is put, on an abstract scale of interests shaped by the legislator, in a superior position *vis-à-vis* the public interest in transparency. This supra-ordinate position determines the adoption of the so-called harm test, which replaces the balancing approach and requires an assessment of the harm that disclosure may produce to a protected interest. When the public authority is satisfied that disclosure of the information requested would harm the purpose of the exemption, confidentiality prevails: the thwarting of the right of access is, by legislative judgment, of secondary concern.

More analytically, the harm test involves a single assessment that can be conceptually divided into two parts. Firstly, the public authority has to establish the *nature* of the impairment that might result from disclosure. It is necessary to identify and qualify the specific detriment that would endanger the purpose of the exemption. Secondly, the *likelihood* of the detriment to occur has to be convincingly established. A public authority needs to show that there is a causal relationship between the potential disclosure and the impairment of the public interest. The underlying rule is the following: the less significant and likely the impairment is, the more the authority is bound to disclose. However, as this rule makes clear, there is a risk is that a public authority might give the concept of impairment of the public interest an expansive reading. This problem is usually addressed in two ways.

*First way: defining the nature of the harm to the public interest.* A distinction can be drawn between the *potential* and the *actual* risk of damage. The best judicial and administrative practices tend to reject the former notion and to converge on the latter: in order to apply an exemption, the risk of impairment should be more than an abstract possibility. If exceptions to the rule of access have to be interpreted restrictively, it follows that a request can only be rejected if disclosure is capable of *actually* and *specifically* undermining the protected interest. In other words, it is not sufficient for the administration to put forward unsupported speculation or opinion. The public authority must be able to provide some evidence

supporting the conclusion that, in the given circumstances, the damage is *reasonably foreseeable and not purely hypothetical*.<sup>80</sup>

*Second way: defining the likelihood of the harm to the public interest.* Once it is ascertained that the risk of impairment is actual and specific, the degree of the risk for it to occur should be assessed. The question is how to determine the appropriate level of risk that might be deemed as sufficient to prevent disclosure. Even though this choice may well be considered as inherently political, many legislators are silent on the issue. However, two options are available. One is based on the distinction between *plausible* and *likely* impairment: a requirement of a plausible harm is more stringent than the requirement of a harm that is merely likely.<sup>81</sup> Another variant of this technique involves the distinction between the *straight* and *reverse* harm test: a straight requirement of damage favors the granting of access,<sup>82</sup> whereas a reverse requirement of damage assumes secrecy to be the main rule.<sup>83</sup>

b) *Relative Exemptions: The Balancing Test*

Relative exemptions are usually set according to such a wording: “Public authorities shall refuse access to a document where disclosure would harm (or prejudice or undermine or damage) the protection of the following interests (...) *unless there is an overriding public interest in disclosure*”. The final addition (in italics) marks the distance from absolute exemptions.

The possibility that the public interest in transparency overrides the (public or private) interest protected by the exemption implies that they are put on an equal foot. There is no ontological priority on either side: no presumption in favor of protecting the (public or private) interest is established at legislative level. It is for the administrative body to weigh the two competing interests. The result of this balancing approach is that, absent a predetermined (legislative) order of preference between the competing interests at stake, the administration is entrusted with full discretion. When applying the test, the public authority is required to decide “whether in any particular case it serves the interests of the public better to withhold or to disclose information”.<sup>84</sup> The public interest in the free circulation of information may thus prevail in the contingent case even at the price of damaging the purpose of the exemption.

More analytically, a proper application of the balancing test requires a preliminary harm test. In order to decide whether to apply the exemption, the first step is – again – to assess the relevance and the likelihood of the harm to the protected purpose. If the harm is not relevant

<sup>80</sup> Case T-211/00, *Kuijjer v. Council (Kuijjer II)* (2002), paras 55-57. The “reasonably foreseeable and not purely hypothetical” standard can be considered as equivalent to the mentioned “actual and specific” harm requirement, elaborated in Case T-194/04 *Bavarian Lager v Commission* (2007), para 117.

<sup>81</sup> When a provision (or an administrative predetermined criterion) sets a probability standard – typically requiring the administration to consider whether disclosure “would harm” or “would adversely affect” the purpose of the exemption – the prejudice must be at least more probable than not. By contrast, when a provision (or an administrative predetermined criterion) refers to a likelihood standard – typically requiring the administration to consider whether disclosure “would be likely to harm” – then disclosure may be prevented if the prospect of prejudice is less than probable. Put simply, in the latter case, the burden of evidence on a public authority is lighter.

<sup>82</sup> An example is a provision stating that the documents concerning the relationship with a foreign state are to be considered as secret “if access to such documents could damage or compromise” the international relations of the state. This is the formulation adopted by the Finnish FOIA, Section 24.1.2.

<sup>83</sup> For instance, a document prepared for the purposes of a criminal investigation is to be considered as secret “unless it is obvious that access to the documents will not compromise (...) the achievement of the objectives of the investigation” (Finnish FOIA, Section 24.1.3).

<sup>84</sup> UK Information Commissioner’s Office (ICO) (2009), “Awareness Guidance No. 3 – The Public Interest Test”, 1 July, p. 7, available at [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/fep038\\_public\\_interest\\_test\\_v3.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf).

(or not likely), there is no need for balancing: the public interest in disclosure would prevail without being “weighed”. At this stage, the administration may refer to the interpretative standards already mentioned (sub *a*). The second step, specific to the balancing test, involves weighing the potential damage against the corresponding benefits arising from the disclosure. The relevant criteria for balancing are the general ones pertaining to the exercise of administrative discretion and, thus, may vary from one legal tradition to the other.

Nonetheless, it seems appropriate to add that *the recognition of the right of access as a fundamental right in Europe imposes the adoption of a strict scrutiny* on the discretionary power of public authorities. As the jurisprudence of the European Court of Justice illustrates, a scrutiny carried out in light of the principle of proportionality may well serve this purpose. According to consistent EU case-law, this principle involves a tripartite standard: that measures adopted by the public authority do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued (*suitability*); that, when there is a choice between several appropriate measures, recourse must be had to the least onerous (*necessity*); that the disadvantages caused must not be disproportionate to the aims pursued (*proportionality stricto sensu*).<sup>85</sup> These three sub-tests may help courts preventing discretionary exemptions to become an instrument of arbitrariness in the hands of public authorities.

*c) Harm or Balancing Approach? How to Choose*

In principle, a balancing test, if correctly administered, provides a more complete assessment framework: public authorities not only ascertain whether the release may cause some harm; they also must consider whether, notwithstanding any such harm, the public interest would, on balance, be better served by release. Factors such as furthering the understanding of the public debate and participation in it, promoting the accountability of public authorities and their decisions, bringing to light information that concerns the spending of public money or affects public health and safety should be explicitly weighed against the risk of harm detected. Therefore, compared to the harm test, the balancing test involves a stronger inbuilt presumption in favor of disclosure.

Despite that, in countries like Finland and Sweden, as well as in Germany, FOI legislation shows an explicit preference in favor of absolute exemptions, rather than relative ones. Three main arguments have been advanced in support of this choice.

First, the balancing test may allow the administration more room to maneuver. The reason for this is empirical: the balancing approach is more complex than the harm test. In particular, when an administration is unwilling to release information, it may easily reverse the presumption by stating – as it often occurs – that disclosure can only be permitted where some special public interest, outweighing the harm previously identified, can be identified. When the public authority starts from this premise, it is the release – rather than the restriction – that becomes unlikely. However, such an argument is built on a “pathological” assumption, namely that officials in charge erroneously interpret the notion of “public interest in disclosure”.

In its guidelines, the British Information Commissioner’s Office (ICO) clarifies that “something ‘in the public interest’ is simply something which serves the interests of the public”; accordingly, “when applying the test, the public authority is simply deciding whether in any particular case it serves the interests of the public better to withhold or to disclose

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<sup>85</sup> Ex multis, Case C-157/96 National Farmers’ Union and Others (1998), para 60, Case T-211/02 Tideland Signal v Commission (2002), para 39. For an early application of the principle of proportionality to transparency issues, see also Case T-14/98 Hautala v Council (1999), para 85.

information.”<sup>86</sup> A careful instruction and training of the relevant officials should be sufficient to avoid the mistake.

A second argument concerns the issue of the requester’s identity and the necessity for him/her to justify the request. While the harm test “looks” only at the exemption side, evaluating the harm that disclosure may produce, the balancing test also “looks” on the side of the requester, involving an appreciation of the requester’s interest. This might induce the public authority to request the identity of the person and the grounds for his/her request, in violation of an explicit FOIA prohibition. Not even this argument seems to be decisive. Whatever norm it applies, the administration has to check the merits of the case, examine the demands and eventually identify the applicant. Transparency regulations make no exception. It is true that most FOIAs permit the applicant to exercise the right of access without having to show identity and justify the request. Yet, this merely implies that the request cannot be rejected on that ground, whereas it does not prevent the public authority from consulting with the applicant and asking him/her to qualify the request.

The third argument has to do with the concept of discretion and its impact on judicial review. Under a rigorous interpretation (especially successful in the German context),<sup>87</sup> the harm test does not involve a discretionary decision, but rather an interpretation of the meaning – or breadth – of the exemption and a judgment of the facts concerning the concrete relevance of the harm. Courts fully review these (non-discretionary) evaluations and, if necessary, may also correct them. By contrast, the balancing test involves the attribution of a discretionary power to the administration. Courts may control that the administration complies with the norms but cannot directly exercise that power, as it is reserved to the administration. In short, judges cannot interfere on the merit of the decision. This argument, however, does not hold true everywhere.

At EU level, in particular, the harm-balancing divide determines – somewhat ironically – the opposite outcome: as recently observed, “ever since an early judgment in *Hautala v. Council* [1999], both the ECJ and the CFI have systematically applied the marginal review standard to cases involving mandatory exceptions benefiting the public interest.”<sup>88</sup> According to the marginal review standard, the review is “limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or misuse of powers.”<sup>89</sup> Again recently, the Court of Justice confirmed that, even if the principle of the widest possible public access to documents implies exceptions to be interpreted and applied strictly, in respect of the absolute exceptions concerning public interest “such a principle of strict construction does not (...) preclude the Council from enjoying a *wide discretion* for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision.”<sup>90</sup> Accordingly, not only are absolute exemptions far from implying a strict judicial review, but they also seem to be reconcilable with the idea that the public authority exercises (wide) administrative discretion.

<sup>86</sup> UK Information Commissioner’s Office (ICO) (2009), “Awareness Guidance No. 3 – The Public Interest Test”, 1 July, p. 7, available at [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/fep038\\_public\\_interest\\_test\\_v3.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf).

<sup>87</sup> German courts exercise a strict scrutiny over administrative decisions based on the interpretation of “vague legal terms”, while they take a step back when proper discretion is delegated to the administration. This explains the stark opposition interpretation-discretion and the preference for the harm test.

<sup>88</sup> D. Adamski, How wide is “the widest possible”? Judicial interpretation of the exceptions to the right of access to official documents revisited, in *Common Market Law Review*, 2009, vol. 46, 521-549, at 524.

<sup>89</sup> Case T-14/98, *Hautala v. Council* (1999), para 72.

<sup>90</sup> Case C-266/05 P, *Sison v. Council* (2007), para 64 (emphasis added). See also Case T-264/04, *WWF v. Council* (2007), paras 39-40.

Also in France, Italy and Spain, transparency regimes appear to fluctuate halfway between the British model (relative or discretionary exemptions) and the Nordic/German one (absolute or prejudice-based exemptions). Where a satisfactory clarification is absent in the legislation,<sup>91</sup> the courts tend to review administrative decisions on access to information according to various criteria, ranging from proportionality to common sense. Sometimes judges resolve the issue by qualifying the decisional power of the administration as discretionary.<sup>92</sup> Other times, an implicit (and inconsistently applied) harm test seems to be the prevailing standard, especially when the state's sovereign functions are at stake.<sup>93</sup>

In conclusion, although the harm test seems to concede less room to the administration for distortion and arbitrary decisions, the balancing approach looks more promising both in theory and in practice. In theory, balancing is the only approach consistent with the status enjoyed nowadays in Europe by the right of access: as a fundamental right, it should be conceived as "*superiorem non recognoscens*"; hence, no public or private interest should be granted a superior level of protection, as it is implied in the harm test. In practice, the conferral of discretionary power to the administration does not constitute a problem *per se*, as long as it is always possible – and indeed recommended – for the reviewing bodies to adopt a strict review standard (as the ones provided by the principle of proportionality). This conclusion is consistent with the favor accorded to the balancing approach by the Council of Europe, both in its recommendations<sup>94</sup> and in the 2008 Convention on Access to Official Documents.<sup>95</sup>

d) *An Illustration: The Case of Privacy and Data Protection*

The conclusion just reached is comforted by the practice concerning decisions of access to documents containing personal data. A more or less explicit balancing approach seems to prevail even where the exception protecting privacy and other private interests is qualified by the legislator as absolute or prejudice-based.

Personal data falls within the category of absolute or relative exemptions, depending on the relevance that the legislation assigns to the right of privacy *vis-à-vis* the right to know.<sup>96</sup> Accordingly, a major division can be drawn between systems protecting privacy and personal data by means of *prejudice-based* (or absolute) derogations<sup>97</sup> and systems where the same private interests are guaranteed by means of *discretionary* (or relative) exemptions. At EU level,<sup>98</sup> the first solution prevails. This seems to testify an emerging consensus on the recognition of the enhanced legal status of the right to personal data. By contrast, in both Germany and the United Kingdom, personal data is subject to the balancing (rather than the harm) test, and the same can be said of France, Italy and Spain.

The British anomaly is less surprising, since the discretionary nature of personal data exemptions is consistent with the general preference of the British FOIA for the public interest

<sup>91</sup> See French Law of 1978, Article 6.I.2; Italian APA, Article 24.1; Spanish APA, Article 37.5.

<sup>92</sup> See, for instance, Regional Supreme Court of Castilla-León, sentence 208/2003 of 10 October 2003, holding that the legitimate public interest exception should be balanced with the right of access.

<sup>93</sup> Courts often reiterate that the administration is not asked to balance the right of access with the legitimate public interest exception. The decision as to whether or not to disclose documents must be made only in consideration of their capacity to affect the conduct of the state's sovereign functions.

<sup>94</sup> Recommendation No. R(2002)2 on access to official documents, Section IV.2.

<sup>95</sup> Convention on Access to Official Documents, Article 3.2.

<sup>96</sup> The exemption does not apply if the applicant is requesting his/her own personal data (Directive 95/46/EC, Article 12). In that event, the identification of the person requesting the information is necessary.

<sup>97</sup> See, *inter alia*, EC Regulation No. 1049/2001, Article 4.1.b, and the Swedish FOIA, Section 2.1.6.

<sup>98</sup> Article 4 of EC Regulation No 1049/2001.

test.<sup>99</sup> More evident is rather the German anomaly and for a symmetrical reason: the characterisation of the personal data exemption as discretionary (as far as “ordinary” personal data is concerned)<sup>100</sup> marks a shift from the rest of the German FOIA, which generally privileges prejudice-based exemptions.<sup>101</sup> In France<sup>102</sup> or Spain<sup>103</sup> the jurisprudence has *de facto* qualified this exemption as relative. In the Italian case, the data protection regime clarifies that sensitive information concerning a person’s health or sexual orientation can also be disclosed if the competing interest of the requesting party enjoys a comparable constitutional relevance.<sup>104</sup>

The comparison of personal data regimes confirms that opposition between impairment and balancing approaches should not be overstated. Some legal standards, in fact, have emerged, which trump the above-mentioned distinction.

First, the disclosure of personal data occurs – regardless of the kind of exemption (absolute or relative) or test (harm or balancing) – when the partial disclosure of information is possible: the principle of proportionality, in fact, requires that access be granted after deleting personal data contained in a particular document, unless this activity involves an “unreasonable burden” for the administration (see *infra*, II.5.2).

Secondly, when partial access is not feasible, the public authority should consult with the data subject in order to obtain his/her consent before rejecting the request.

Moreover, some pragmatic distinctions – implicitly assuming the balancing as standard practice – are also widespread and play a meaningful role in directing administrative practices.

A) Information that merely interests the public (e.g. the private conduct of an ordinary citizen who does not hold public office) cannot be treated as information that is in the public interest (such as information concerning the private conduct of a government minister). Even when the balancing test does not apply, the public interest to know is much stronger in the second case and this cannot be disregarded.

B) The decision on access is affected by the more or less “sensitive” nature of the personal data that is part of the information requested. When the data involved is sensitive (e.g. religious or political views) or hyper-sensitive (e.g. health or sexual orientation), the threshold for release inevitably rises, whichever test is applied.<sup>105</sup>

C) Another relevant distinction concerns the nature of the interest underlying the request: the qualified interest of a party in a procedure enjoys greater protection than the general interest of the public to have the information. This explains why in APAs or APA-like the discretionary approach prevails. And it also implies that, in case the applicant reveals to be holder of a qualified interest in disclosure, balancing is necessary (as the principle of proportionality commands) even if the exemption is construed as being absolute.

<sup>99</sup> The “personal data clause” is enshrined in Section 40 of the British FOIA.

<sup>100</sup> Sensitive data constitutes an absolute exception: it can only be disclosed with the consent of the data subject (German FOIA, Section 5.1, second sentence).

<sup>101</sup> German FOIA, Section 5.1: “Access to personal data may only be granted to the extent that the applicant’s interest in the information outweighs the third party’s interest warranting protection or the third party has consented.”

<sup>102</sup> In France, Law No. 78-753, Article 6.II.

<sup>103</sup> Spanish APA, Article 37.2.

<sup>104</sup> Legislative Decree 196/2003, Article 60.

<sup>105</sup> Conversely, the disclosure of ordinary or non-sensitive personal data (e.g. name, title, academic degree, professional and functional designation, office address, e-mail address and phone numbers) is more likely, provided that a legitimate public interest requires it. Here, the emphasis shifts from privacy to legitimate public interest.

## II.5. Processing of Requests

### II.5.1. Procedural Safeguards

In European legal orders, the processing of requests involves the application of five sets of guarantees.

First, requests of access should be processed “promptly” or “without undue delay” and, in any case, within a reasonable time “which has been specified beforehand”.<sup>106</sup> In most FOIAs, the time limit is short: 5 days in Estonia, 10 days in Portugal, 15 days in the Czech Republic, Finland and Poland and at EU level; 20 days in Slovenia and the United Kingdom.<sup>107</sup> The deadline is longer in APA-like regulations, mainly devoted to discipline procedural transparency: it is three months in Spain, eight weeks in Austria, one month in France and Italy.

Obviously, requests concerning documents that are already available and of limited length are easier to be answered than requests regarding information that requires elaboration and further processing of information, or careful examination of extensive documents. Therefore, some countries differentiate the deadline: in Estonia, for instance, it is 5 days for access to documents, but 30 days for the disclosure of more complex information.<sup>108</sup> Generally, in FOI regimes, the time limit for information provision may be extended (usually, no longer than 10-15 days) only in exceptional circumstances on the basis of serious reasons (such as difficulties in retrieving and collecting the requested information in other offices, the large volume of separate and different information requested, consultation with third private parties or other bodies – e.g. intelligence – having a substantial interest in the decision concerning the request). In these cases, the applicant should be notified of the time-limit extension and of the reasons for delay, and such notice should be provided in good time before the expiration of the time limit.<sup>109</sup>

Secondly, access should be granted by effective and appropriate means. With few exceptions, information is provided in the form requested by the applicant, unless the request would place an additional, unreasonable burden on the administration. Written forms prevails over oral means (in some countries, as in Sweden or the United Kingdom, oral access is not even mentioned). Moreover, in administrative practice, electronic means are increasingly replacing the paper/printed form: this development should be welcome, in so far as it reduces the costs of disclosure.

A third standard concerns the fee to be paid for by the applicant. While it is generally admitted that administrative authorities may charge a reasonable fee on the occasion of a request, a distinction should be made between access to documents that are already available and access to information that involves activities of research, elaboration or processing on the part of the administration.

For documents that are already available, the rule is that access is (almost) free: only the cost of reproduction (for a transcript or copy of a document) is charged. By contrast, for requests entailing a significant burden on the administration, higher fees can be charged. In this hypothesis, the main guarantee is the predetermination of fees. Where the exact amount is determined by the requested office on a case-by-case basis, complaints are more frequent than

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<sup>106</sup> Council of Europe, Convention on Access to Official Documents, Article 5.4.

<sup>107</sup> No deadline is established in the Swedish FOIA: according to Section 12.2, “applications for transcripts or copies of official documents shall be dealt with promptly”.

<sup>108</sup> See the Estonian Public Information Act (PIA), Section 18, and the Response to Memoranda and Requests for Explanations Act, Section 6.

<sup>109</sup> E.g. EC Regulation No 1049/2001, Article 7.3. A detailed provision is in the Czech FOIA, Section 14.7.c.

in systems (like Germany or the United Kingdom) where fees are predetermined in relation to the kind of request.

A fourth common standard is the duty to give reasons and indicate remedies.

No administration can deny access to a requested document without justifying its decision. Any refusal should mention the legislative exemption upon which it is grounded and clarify why the disclosure would harm the legitimate public or private interests protected by the exemption. Moreover, in giving the reasons for a total or partial rejection of a request, the public authority should take into account its obligation to undertake a concrete, individual assessment of the content of the requested documents, in so far as such an assessment is required, as a matter of principle, with regard to any kind of exceptions.<sup>110</sup> A statement of reasons must also include an indication of remedies against the rejection. Whenever possible, the requester should be informed of the remedies at the beginning of the procedure.

The requirement to give reasons entails a fifth duty on the part of the public authority, namely the obligation to issue a formal decision as a response to a request. Absent such a decision, a statement of reasons would be available to the applicant (the applicant, however, may still challenge the “silence” of the administration once the time limit expires).<sup>111</sup>

### ***II.5.2. The Concept of “Unreasonable Task”***

The real issue hidden behind the conceptual distinction between documents and information (*supra*, II.3) pertains to the different administrative workload that it implies. If the right of access concerns *information*, rather than *documents*, a series of demanding duties are imposed on the administration that is called to process the request. Due to the fundamental nature of the right at stake, a strict scrutiny of proportionality is usually adopted in the matter.

First, if access concerns information, a request of access should also be processed when it does not mention the specific document that is asked for: it suffices to clarify the kind of data that is of interest. As a consequence, the burden of concretely identifying the relevant documents(s) also falls on the administration. According to the emerging legal standard, on the one hand, the public authority has the duty to “help the applicant, as far as reasonably possible, to identify the requested official document”;<sup>112</sup> on the other hand, a request for access may only be refused “if, despite the assistance from the public authority, the request remains too vague to allow the official document to be identified.”<sup>113</sup>

Secondly, a request of access cannot be rejected *in toto* on the grounds that a part of the document is covered by an exemption and that the partial disclosure would determine a significant administrative workload. If access concerns information rather than the document as such, the public authority must consider whether, in light of the principle of proportionality, it is appropriate to grant partial access. Accordingly, only “*in exceptional cases*, a derogation from the obligation to grant partial access might be permissible where the administrative

<sup>110</sup> E.g. Case T-36/04, Association de la presse internationale (API) v Commission (2007), para 54-57. See also Case T-2/03, VKI, para 75.

<sup>111</sup> The opposite principle is established in France, where the refusal may also arise, under Article 17 of Décret 2005-1755 of 30 December 2005, from the “silence held for over a month by the competent authority that receives a request for documents”. In accordance with Article 5 of Law No. 78-753, implied decisions are exempt from the obligation to give reasons, unless a text states otherwise (CE, 14 December 2001, *Ministre de l'emploi c/ Farida Dalli*).

<sup>112</sup> Council of Europe, Convention on Access to Official Documents, Article 5.1.

<sup>113</sup> Council of Europe, Convention on Access to Official Documents, Article 5.5.a.

burden of blanking out the parts that may not be disclosed proves to be particularly heavy, *thereby exceeding the limits of what may reasonably be required.*<sup>114</sup>

As the last reference makes clear, however, the problem of the administrative burden transcends the opposition between documents and information. Partial access is admitted everywhere in Europe, regardless of the definition of the object. Moreover, access may be requested to documents that are precisely identified in the request, and yet difficult for the administration to collect; or to a single document of several thousand pages. How should such requests be processed? Is it possible for the administration to curtail the exercise of a fundamental right by invoking the excessive burden stemming from a request?

National transparency regulations often address this problem. According to some, “the right to public information covers the entitlement to obtain public information, including obtaining information processed within such a frame in which it is *particularly essential for the public interest*”.<sup>115</sup> Other ones refer to the concept of “undue burden” for the administration.<sup>116</sup> However, the prevailing criterion – accepted in most domestic regulations and case law – is that access may be refused if the request poses a manifestly unreasonable burden for the authority. This clause is also upheld in the Council of Europe’s Convention on access to official documents.<sup>117</sup> The main problem, then, is how to prevent public authorities from relying abusively on an expansive reading of the “unreasonable burden” clause.

On this issue, the jurisprudence of the European Court of Justice offers an important contribution.<sup>118</sup> As a general rule, “it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant’s right of access and its interest in order to vary the scope of that right”.<sup>119</sup> Nonetheless, the Court admits the possibility “to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard (...) the interests of good administration”, provided that this possibility is limited to exceptional cases, where the administrative burden entailed by the processing of a request exceeds “the limits of what may reasonably be required”.<sup>120</sup>

Moreover, European judges suggest that various safeguards accompany the application of the “unreasonable task” concept, in order to limit the risk of abuse of such a clause. First, the public authority bears the burden of proof of the scale of that task. Second, where the institution has adduced such proof, “it is obliged to try to consult with the applicant in order (...) to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. Third, the institution can reject the request “only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work”.<sup>121</sup>

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<sup>114</sup> Case T-211/00, *Kuijjer* (7 February 2002), para 57. This legal standard is well-established in the jurisprudence of the European Court of Justice.

<sup>115</sup> Polish FOIA, Article 3.1 (emphasis added).

<sup>116</sup> Czech FOIA, Article 4.3.

<sup>117</sup> Council of Europe, Convention on Access to Official Documents, Articles 5.5.b and 6.2.

<sup>118</sup> The leading case is Case T-2/03, *Verein für Konsumenteninformation (VKI) v Commission* (13 April 2005), concerning a request of consultation of a file of more than 47 000 pages. See also, among others, Case T-42/05, *Williams v Commission* (10 September 2008), paras 85-86, concerning a request of access to all preparatory documents relating to the EU legislation on genetically modified organisms.

<sup>119</sup> Case T-2/03, *VKI*, para 108.

<sup>120</sup> Case T-2/03, *VKI*, paras 102 and 112.

<sup>121</sup> Case T-2/03, *VKI*, paras 113-115.

The jurisprudence of the European Court of Justice (ECJ), thus, on the one hand, confirms the concept of “unreasonable task” or “burden” as the crucial criterion in the European practice on processing onerous requests; on the other hand, it shows how the application of this concept, if informed to the principles of proportionality and due process, may play a crucial role in reconciling the fundamental right to freedom of information with the functional needs of the administration.

## II.6 Publication

The general principle is that documents should be made accessible by the institutions from the outset unless an exception to the public right of access clearly applies.<sup>122</sup> In all of the European legal orders taken into consideration, there are transparency provisions that impose on the administrations a duty to publish information of public interest. However, in some cases, this duty is not conceived as general, but rather as selective (that is, limited to specific kinds of documents and information).

The comparative advantage of construing publication as a general or *default* rule is relevant, both for the administration and for the person seeking access. By making information freely available to everyone, the purpose of the access regimes is automatically achieved, with no need for the administration to process individual requests. In a cost-benefit perspective, the publication of information offers the best possible output. The administrative workload is minimised (an *una tantum* decision to publish takes the place of several iterative decisions on individual requests), while the right to know is shielded from case-specific interference of the public authority. Therefore, under the publication rule, the need to limit the administrative workload is efficiently reconciled with – and indeed satisfied by – the competing need to enhance the right to know.

The limit of the principle is evident: publication can only be provided when it is possible to assume that the release would not cause a relevant harm to a salient public or private interest. Concretely, publication is feasible when it is *prima facie* evident that none of the exceptions apply.

Some standard European practices play a meaningful role in promoting the active dissemination of information.

First of all, a precondition for the effectiveness of publication is the use of the Internet. Publication on paper in official bulletins or journals does not sufficiently fulfill the duty of the government to promote access to public information; publication on institutional websites is also necessary. In the 21<sup>st</sup> century the duty to publish can only mean publication on public authorities’ own official websites.<sup>123</sup>

Secondly, the elaboration and publication of registers is another essential prerequisite. Each public authority has to publish a register containing all of the categories of documents and information held on its website. Each register should provide a “guide to information”, giving details of *a)* the information routinely published and directly accessible by means of the register; *b)* how the remaining information can be accessed on demand; and *c)* whether a charge will be made for providing access to information.<sup>124</sup>

<sup>122</sup> This principle is the basis of the Commission’s proposed amendment to Article 12 of EC Regulation No. 1049/2001: accordingly, “Documents drawn up or received in the course of procedures for the adoption of EU legislative or non-legislative acts of general application shall, subject to Articles 4 and 9, be made directly accessible to the public” (COM(2008)229final, 30 April 2008, Article 12.1). Article 4 concerns exemption, Article 9 the treatment of sensitive documents.

<sup>123</sup> See, for instance, the “Internet clause” enshrined in the German FOIA, Section 11.3. See also, inter alia, the Estonian Public Information Act, Section 12.4.

<sup>124</sup> ICO (2009), “How to Operate a Publication Scheme”, July, p. 2, available at [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/how\\_to\\_operate\\_a\\_publication\\_scheme\\_v4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/how_to_operate_a_publication_scheme_v4.pdf). See also EC Regulation No. 1049/2001, Article 11.

Thirdly, the selection of information to be published should not be entrusted solely to the concerned administration. Rather, it involves a process of gradual specification and harmonisation, which requires a unitary supervision by an *ad hoc* competent body or government unit.

British “publication schemes” offer an important point of reference. These schemes specify the kinds of information that a public authority should routinely make available. The mechanism is simple. Each public authority adopts a publication scheme after approval by an independent supervisory body (the above-mentioned Information Commissioner’s Office – ICO). In order to promote gradual convergence between the various administrations (especially within the same sector), the Information Commissioner has prepared a “model publication scheme”, on the basis of which each public authority can develop its own scheme. This model scheme also helps “to reduce duplication and bureaucracy and to ensure consistency in the release of information.”<sup>125</sup> The model scheme detects seven broad classes of information that in principle a public authority should publish, unless the information is not held, cannot be easily accessed, or is subject to a specific exemption.<sup>126</sup>

A further good practice in this respect is the one formalised, for instance, in the Slovenian Access to Public Information Act (APIA), according to which the administration should consider the opportunity to publish “all public information requested by the applicants at least three times.”<sup>127</sup> Similar provisions should be favourably considered: if properly implemented, they would considerably reduce the impact of FOI regulations on the administrative workload.

## II.7. Review Mechanisms

In Europe there are two basic models of reviewing administrative decisions on access requests: in the first model, the crucial reviewing role is performed by the courts, while in the second it is mainly entrusted to a specialised and independent administrative authority.

The first model is typically structured as an “ordinary” review of administrative acts. In most European countries, this is the basic scheme: if the public authority denies access to information, the requesting person can challenge the decision either before a higher office of the same authority (internal administrative review) or before a judge (usually an administrative court, where a “dual” system of justice – with a jurisdictional distinction between ordinary and administrative courts – is in place).

The limitations of this model are known. Internal review is diffuse (each administrative body has its own internal hierarchy and higher offices) and is not independent (the reviewing office is part of the same administrative structure). Its primary purpose is to protect the administration from the consequences of a breach of law rather than to protect the right (of access) of the individual. In order to obtain justice, the requester must resort to the competent judge. The bulk of the review task therefore falls on the courts. As a result, this model may signify either a significant increase in the courts’ workload or a strong disincentive to challenge the administrative decision (due to the costs and time-consumption of judicial procedures), or both.

These limitations are even more evident when – as in the case of transparency – the relevant administrative activity is part of the daily routine of innumerable offices and serves a purpose

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<sup>125</sup> ICO (2009), “How to Operate a Publication Scheme”, July, p. 1, available at [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/how\\_to\\_operate\\_a\\_publication\\_scheme\\_v4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/how_to_operate_a_publication_scheme_v4.pdf)

<sup>126</sup> The seven classes are indicated in ICO (2008), “Model Publication Scheme”, April, p. 1, available at [www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/generic\\_scheme\\_v1.0.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/generic_scheme_v1.0.pdf).

<sup>127</sup> Slovenian APIA, Article 10.1.6.

that is not merely instrumental to the right of defence but is rather an end in itself, a democracy-enhancing tool. For these reasons, only a few European countries (in particular, the Czech Republic, Poland and Spain) rely on a “pure” version of the ordinary model of review.

The second review model assigns a central role to an *ad hoc* authority that is independent (or quasi-independent) from the government and accountable to parliament. Decisions on access requests may be challenged before the independent authority. Therefore, administrative review is not diffuse, but rather centralised; it is not internal to the decision-making administration, but external and independent;<sup>128</sup> it has a sector-specific mandate, rather than a general competence.

This mechanism of review by an *ad hoc* independent administrative body is in place in 7 (of the 15) European legal orders considered, namely in Estonia, France, Germany, Italy, Portugal, Slovenia and the United Kingdom. In each of these legal orders the above-mentioned features – independence, specialisation and centralisation – allow the *ad hoc* authority to perform three extremely important tasks. The authority’s independence leads to a case-by-case review that is much closer to judicial review than to internal review: as a consequence, it reduces the courts’ workload (and sometimes also the workload of the administration). Its specialisation permits the authority to elaborate and continuously update unitary standards (both general and sector-specific) that may guide and harmonise the practices of the various public administrations. Its centralisation is a precondition for the enactment of a supervisory exercise that includes the overall implementation of transparency policy in the system and allows a periodical assessment of that policy.<sup>129</sup>

Two variants of the second paradigm can be distinguished: a “French” variant (also applied in Italy and Portugal) and a “British” variant (transplanted in Estonia, Germany and Slovenia). These two variants exhibit three main differences.

First of all, in the French variant, the mandate of the independent body is strictly limited to reviewing decisions on access to documents. By contrast, in the British variant, the same body acts as both the information authority and the data protection authority.

The three “CADAs” – the French *Commission d’accès aux documents administratifs*,<sup>130</sup> the Italian *Commissione per l’accesso ai documenti amministrativi*<sup>131</sup> and the Portuguese *Comissão de Acesso aos Documentos Administrativos*<sup>132</sup> – have all been created by access regimes for the specific purpose of supervising its implementation. In the United Kingdom, with the enactment of the British FOIA in 2000, the previous Data Protection Commissioner<sup>133</sup> became the Information Commissioner (IC).<sup>134</sup> Similar developments took place in the same year in Estonia and Slovenia, and a few years later (2006) in Germany. The

<sup>128</sup> Mechanisms to protect the independence of the relevant body vary across countries, an issue where no common standard is to be found in Europe for the time being. The arrangements vary from country to country and perhaps none of them fully guarantee the independence of the institution in charge, usually an information commissioner. Likewise the reporting mechanisms also vary from country to country.

<sup>129</sup> Independent authorities usually submit annual reports on transparency to parliamentary institutions.

<sup>130</sup> Established in 1978 by Law No. 78-753, Article 20.

<sup>131</sup> Established in 1990 by Law No. 241/1990, Article 27.

<sup>132</sup> Established in 1993 by Law No. 65/93 and now regulated by Law No. 46/2007, Articles 25-32.

<sup>133</sup> Established by the Data Protection Act of 1998.

<sup>134</sup> British FOIA, Section 18.1

Spanish FOIA draft law follows the UK path by entrusting this role to the already existing Data Protection Agency.

Initially, the choice of merging transparency with data protection tasks met with some criticism. Commentators – especially in the United Kingdom, but also in Germany – argued that it was a “bad move” in terms of openness, as data protection was more oriented towards privacy. However, the scheme seems to have worked well. In particular, it makes it easier to reconcile the need for the disclosure of public information with privacy and data protection concerns, both being represented in the same institution. Ironically, the same process has been more complicated in the systems following the French variant, due to jurisdictional tensions that have often occurred between data protection and transparency authorities. Perhaps the British solution is to be preferred, especially where two separate regulations exist – one on data protection and the other on transparency – and thus a pragmatic accommodation between the two sets of norms is required.<sup>135</sup>

The second difference between the two variants of an independent review body is organisational. While French-type CADAs are collegial bodies with rather small “support services” provided by a governmental department,<sup>136</sup> British-type information commissioners are authorities equipped with autonomous apparatuses.<sup>137</sup>

Thirdly, under the British variant, information commissioners issue legally binding decisions, while French-like CADAs provide advisory opinions. Not surprisingly, the former review mechanism is more effective than the latter.

In France, procedures before the CADA are only moderately successful, as administrations follow the recommendations of the CADA in only 65% of the cases (despite the fact that, by not heeding an opinion of the CADA, an administration takes the risk of having its access refusal annulled by the administrative courts). Moreover, some CADAs (the French and the Portuguese) may also impose fines in the event of non-compliance, as do their British-like equivalents.<sup>138</sup>

Together with the attribution of binding powers to the independent authority, another crucial aspect concerns the relationship between independent administrative review and judicial scrutiny. In the United Kingdom, independent review is a necessary prerequisite for judicial review. This determines a significant reduction in the courts’ workload. The same solution is adopted in France. By contrast, in systems like Italy and Portugal, the requester may resort directly to the administrative courts. This significantly reduces the incentive to file a complaint with the CADA, and also weakens the ability of

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<sup>135</sup> In the 15 legal orders considered, the regulatory frameworks for data protection and transparency have been approved independently of each other. Sometimes working practices have been developed to make officials aware of both requirements, but there is a tendency to think and act in a “compartmentalised” manner. In particular, data protection bodies tend to over-classify and to protect information irrespective of transparency requirements, while transparency bodies may tend to downplay (or, conversely, to abuse) privacy requirements. This is a serious practical concern.

<sup>136</sup> The members of the CADA number 10 in Portugal, 11 in France and 12 in Italy.

<sup>137</sup> The degree of independence of these information commissioners varies. In Germany the Federal Commissioner is subject to the supervision of the Federal Minister of the Interior, which provides the personnel and financial resources (see Federal Data Protection Act, Section 22). The European Court of Justice (ECJ) has raised doubts about the organisational independence of the Commissioners for Data Protection of the Länder: C-518/07, *Commission v. Germany* (2010).

<sup>138</sup> See French Law No. 78-753, Article 22, and Portuguese FOIA, Article 27.1.i.

administrative review to alleviate the courts' workload.<sup>139</sup> Accordingly, the British (and, in this case, also French) solution should be preferred.

The problem of the judicial workload is also addressed in other ways. In the United Kingdom, the Information Commissioner's (IC) decision can only be challenged before a special judge, the Information Tribunal. In other countries, a fast-track judicial procedure has been established.<sup>140</sup> Moreover, a strong incentive in favour of independent administrative review is provided by the fact that CADAs and ICs do not charge fees and operate informally (legal representation is not required). The intention is to keep the process inexpensive and accessible. As a result, this arrangement may raise the opposite concern of administrative – rather than judicial – workload. The fact that internal review is not a precondition for external independent review (with the United Kingdom as the main exception) further exacerbates the problem.

Finally, in some systems (at EU level and in Austria, Finland, Romania and Sweden) an additional right of petition to the ombudsman is available. The degree of effectiveness of this additional review mechanism varies from one legal order to another, but in general it is low. The main reason for this is the lack of binding powers: ombudsman-type institutions are entrusted with only advisory competence and they thus have no power to amend or annul an administrative decision.<sup>141</sup>

At European Union level, the ombudsman intervenes more and more frequently in transparency issues, acting as a “filter” to prevent the courts' overload, but judges still play a major role in adjudicating transparency cases and in setting the relevant standards in this area. Even in Nordic countries, where the ombudsman traditionally enjoys high visibility and where public officials are “used to” (and frequently trained to) promoting transparency, the most effective way of challenging an access refusal is judicial review.

In other countries, the ombudsman is neither well known by the general public nor able to exercise relevant pressure on the public administration. This is the case in Romania, even though the visibility of the Advocate of the People (the Romanian ombudsman) has gradually increased.<sup>142</sup> This is also the case in Austria, where a weak ombudsman (*Volksanwaltschaft*), limited access to judicial review, and a lengthy process of internal (hierarchical) review leave most refusals of disclosure unchallenged and administrative discretion *de facto* unconstrained.

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<sup>139</sup> In Portugal, the only incentive for parties to resort to the CADA prior to judicial review is that it interrupts the time period for judicial submission of the same type of request (FOIA, Article 15.2). There is no such incentive in Italy, where the time period is the same for both complaints before the CADA and judicial submission (Law No. 241/1990, Article 25.4).

<sup>140</sup> In Portugal, an urgent judicial procedure is in place. Deadlines are short: the deadline to submit the request is 20 days, the deadline for the administrative authority to reply is 10 days, and the maximum deadline for the administrative authorities to comply with the judicial decision that orders the disclosure of the information is 10 days. No court fees are due.

<sup>141</sup> Ombudsman-type institutions, in fact, are independent supervisory bodies that report to parliaments on administrative action and typically enjoy a merely advisory power that is non-binding on administrations.

<sup>142</sup> The Advocate of the People was created in Romania in 1997. During 2008, 8 030 complaints were received by the ombudsman, of which 1 031 concerned violations of the right to information. See Advocate of the People (2009), Report of Activity 2008, Ombudsman Minister Office, Bucharest, available at [www.avp.ro/](http://www.avp.ro/) (Statistics).

### PART III. POLICY RECOMMENDATIONS

In 1981 the Council of Europe (CoE) provided European legislators and policy makers with eight basic recommendations with regard to the access to documents and information.<sup>143</sup> Twenty years later, in 2002, the same recommendations were revised and developed.<sup>144</sup> Their direct and indirect impacts have been remarkable. The recommendations have been widely applied all over Europe. As mentioned (*supra*, I.1.1), this process of gradual convergence has culminated both in the recognition of access to information as a fundamental right at EU level (Article 42 of the EU Charter of Fundamental Rights) and through the adoption of the Convention on Access to Official Documents on 27 November 2008. This Convention, signed by 12 countries at the moment of writing (30 September 2010),<sup>145</sup> represents the first internationally binding instrument recognising a general right of access to official documents held by public authorities. Against this background, the comparative analysis carried out in this paper has detected a conspicuous series of European-wide legal standards, which are recapitulated in the following policy recommendations.

#### ***Administrative Transparency and Reform***

1. *The Right of Access as a Fundamental Right.* Administrative transparency is increasingly acknowledged as a crucial value in enhancing the democratic quality of a liberal state ruled by law. In today's Europe, free access to information held by public authorities is recognised as a fundamental right. Transparency regimes should be revised to promote the widest possible access to public information. In this regard it should be considered as being part of the 1993 Copenhagen criteria for EU membership.

2. *Tradition and Reform.* The cultural tradition of an administrative system has a crucial impact on the effective degree of openness of that system. National experiences show that culture may change both inside and outside the administration with resolute political willingness. An adequate implementation strategy is required, however. Legislative reforms should be accompanied by extensive training projects, dissemination of information to the public, adequate institutionalisation by for example setting up Information Commissioners, and a dedicated website with recommendations from the authority supervising the process.

#### ***Beneficiaries***

3. *Right of Access to Everyone.* The right of access to public information is a right of everyone, without discrimination on any ground. "Everyone" means both citizens and non-citizens, whether they are residents or not. No subjective restrictions are consistent with the recognition of access to official documents as a fundamental right.

4. *Request for Access.* A person requesting access to a document should not be obliged to justify his/her request. Formalities for requests should be kept to a minimum.

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<sup>143</sup> Council of Europe Recommendation No. R(81)19 on the Access to Information held by Public Authorities, 25 November 1981 (CoE 1981).

<sup>144</sup> Council of Europe Recommendation No. R(2002)2 on Access to Official Documents, 21 February 2002 (CoE 2002).

<sup>145</sup> Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia and Sweden signed the Convention on 18 June 2009.

**Scope**

5. *Branches of Government.* In principle, access regulations concern information held by public authorities in all of the sectors of public action. However, special regimes are often in place for parliamentary, and council of ministers' decision-making and judicial procedures. Accordingly, "member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities." (CoE 2002, Rec. II.1).

6. *Regional/Territorial Entities.* Transparency norms apply to public authorities at national, regional or local levels. Sub-national governments should also feel bound by international treaties such as the TEU, even if sub-national governments cannot be brought before the European Court of Justice through an infringement procedure, as the only ones formally bound by treaty obligations are the central governments. Where a constitution devolves competence to territorial entities, the regulatory autonomy of regional and local authorities should be exercised in due respect of internal, European and national law, thus subject to a "higher standard" condition. This would accommodate the principle of territorial regulatory autonomy with the need to preserve a common minimum level of transparency, as the fundamental nature of the right of access requires.

7. *Private Entities Performing Public Functions.* In all European systems, the access regime is also applied to private entities (natural and legal persons) performing public functions or exercising administrative authority. Private companies are subject to different transparency requirements, depending on the country where they operate. To redress the difficulties arising from these regulatory asymmetries, member states should examine whether a common standard could be applied to access regulation. Some countries have adopted the EU notion of "body governed by the public law" – which originated in public procurement legislation – as a selective criterion. This option would provide an anchorage to a notion that is well established in all member states and facilitate harmonisation.

**Object**

8. *Access to "Document" or to "Information"?* The nature of fundamental right requires that access be guaranteed to all *information* held by a public authority, without restrictions specifically concerning the object. Whenever access regimes make reference to the notion of "document", this notion should be construed broadly. If the purpose of freedom of information acts is to maximise the public's right to know, no limitations can be admitted, other than the exemptions explicitly introduced for the protection of legitimate public and private interests.

**Exemptions**

9. *Grounds.* The right of access to information, like other fundamental rights, may suffer derogations. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting legitimate public and private interest.

10. *Legislative Constraints on Administrative Discretion.* Most FOIAs explicitly qualify the grounds of derogation, distinguishing between absolute (or oriented to preventing impairment) and relative (or discretionary) exceptions. The distinction may provide a framework of evaluation to the public authority and, under certain conditions (specified below), may contribute to ensure that public authorities construe and apply the exceptions restrictively.

- a) *Absolute (impairment prevention oriented) exceptions.* The exemptions serve the purpose of guaranteeing an enhanced level of protection to certain interests (e.g. defence, international relations, public order, and so forth) by removing them from the area of administrative discretion. The harm test applies, which requires the public authority to assess whether disclosure would damage the interest protected. In order to ensure a restrictive application of an exception, the harm test needs to be accompanied by further specifications as to the nature and the likelihood of the harm:

- i. the public authority must be able to provide some evidence supporting the conclusion that, in the given circumstances, the damage is *reasonably foreseeable and not purely hypothetical*;
  - ii. a differentiation may be introduced between a *straight* and a *reverse* harm test: a straight requirement of damage favors the granting of access, whereas a reverse requirement of damage assumes confidentiality to be the main rule.
- b) *Relative (discretionary) exemptions*. It is for the administrative body to weigh the interest protected by the exemption with the public interest in disclosure. This balancing approach entrusts the administration with proper administrative discretion, in the absence of a predetermined (legislative) order of preference between the competing interests at stake. In order to ensure that the public authority makes appropriate use of the discretionary power thereby delegated to it, the standard judicial review principles apply (e.g. due process, proportionality).
- c) *Absolute and Relative Exceptions: How to Choose*. The harm test, if properly applied, may concede less room to the administration for distortion and arbitrary decisions. Nonetheless, balancing is the only approach consistent with the status nowadays enjoyed in Europe by the right of access. No public or private interest should be granted a superior level of protection (as it is implied in the harm test) in so far as the right of access is conceived as a fundamental right. In practice, the conferral of discretionary power to the administration does not constitute a problem *per se*, as long as it is always possible – and indeed recommended – for the reviewing bodies to adopt a strict review standard. This conclusion is consistent with the favour accorded to the balancing approach by the Council of Europe, both in its recommendations and in the Convention on Access to Official Documents of 2008.

### ***Processing of Requests***

11. *Time Limit*. A request of access should be processed *promptly* and, in any case, within a reasonable time which has to be specified in advance and should not exceed 30 days.

12. *Duty to Give Reasons*. A public authority refusing access to an official document wholly or in part should give the reasons for the refusal. In giving the reasons for a total or partial dismissal of a request, the public authority should take into account its obligation to undertake a concrete, individual assessment of the content of the requested documents. A statement of reasons must also include an indication of remedies.

13. *Fees*. When access involves a complex processing of “information”, a fee may be charged, provided that it is proportional and determined in advance.

14. *Administrative Workload*. It is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant’s right of access and its interest in order to vary the scope of that right. Nonetheless, access may be refused in exceptional cases, when the request poses a *manifestly unreasonable burden* for the authority. When such is the case, the following rules should apply:

- a) the public authority bears the burden of proof of the unreasonable scale of that task;
- b) where it has adduced such proof, the public authority is obliged to consult with the applicant in order to consider whether and how it may adopt a less onerous measure;
- c) the public authority may reject the request only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

### **Publication**

15. *Publication as the "Default Rule"*. Documents should be made accessible by the institutions from the outset unless an exception to the public right of access clearly applies. All public information that has been requested and disclosed more than three times should be published.

16. *Internet Clause*. Publication of information on paper in official bulletins or journals does not suffice in terms of the government's duty to facilitate access to public information; publication on the pertinent institutional websites is also necessary.

17. *Register of Documents*. To ensure the effectiveness of the right of access, each institution should provide public access to a register of documents in electronic form. Each register should include a "guide to information", giving details of:

- a) the information routinely published and directly accessible through the register;
- b) how the remaining information can be accessed on demand;
- c) whether or not a fee will be charged for this access.

18. *Publication Schemes*. Each authority should adopt a publication scheme on the basis of a "model publication scheme". This scheme should be subject to periodical revision. It should indicate the broad classes of information that a public authority is obliged to publish, unless the information is not held, cannot be easily accessed or is subject to a specific exemption.

### **Review Mechanisms**

19. *First Instance Administrative Review*. An applicant should also have access before an independent administrative body operating as a first instance reviewing authority.

- a) *Features*. Administrative review should be:
  - i. independent from the government (e.g. appointed by the parliament by qualified majority for no less than a five-year term and reporting to it);
  - ii. centralised (i.e. unitary supervision and harmonisation of practices);
  - iii. specialised (expertise is crucial in performing both adjudicatory and standard-setting tasks);
  - iv. entrusted with enforceable adjudicatory powers, *reviewable by a court*.
- b) This mechanism of independent administrative review has various merits:
  - i. it prevents an increase in the workload of courts (which intervene only in second instance: see below);
  - ii. it provides specialised supervision and promotes the harmonisation of administrative practices;
  - iii. it significantly reduces the costs and time-consumption of the review process.

20. *Second Instance Judicial Review*. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit, should always have a right of appeal to a court against the decisions of the administrative reviewing authority. An *ad hoc* judicial procedure should also be established in order to speed up the processing of appeals before the courts.